

Submissions to the Standing Committee on Finances and Economic Affairs

Re Schedule 7 of Bill 106, *Supporting Retention In Public Services Act, 2022*

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Prepared by:

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Overview

These submissions address the following three issues:

- (1) Lack of transparency and undemocratic character of Schedule 7 of Bill 106 ("the Bill");**
- (2) The Bill's undermining of fundamental human rights, including labour and pay equity rights; and**
- (3) Recommended amendments.**

(1) LACK OF TRANSPARENCY AND UNDEMOCRATIC CHARACTER OF SCHEDULE 7

- From a transparency and good governance perspective, it is concerning that Schedule 7 of Bill 106 does not contain any details of what the government is purportedly promising to workers.
- The substance of the promise is to be determined unilaterally by regulation (s. 11).
- The Bill does not define key terms such as "compensation enhancement program".
- The Bill is silent with respect to crucial details such as:
 - *who* will be eligible for the wage enhancement?
 - *when* will they receive the wage enhancement?
 - *how* much will the wage enhancement be?
 - will it be *temporary or permanent*?
 - *who* will participate in the *negotiation* of the terms of the wage enhancement?
- All of these crucial details are left to cabinet to unilaterally determine by regulation (s. 11).

- In short, the substance of the promise will be written and adopted – and potentially amended and revoked – at cabinet's sole discretion without legislative oversight and with no guarantee that workers' representatives will be meaningfully engaged.
- The few details the Bill does provide are deeply concerning. The Bill purports to:
 - *Insulate* from legal challenge the substance of the wage enhancement program (ss. 5, 6(2), & 8) – the terms of which may be unilaterally dictated by government.
 - *Override* workers' fundamental human rights, including their labour and pay equity rights (ss. 5 & 6(2)).
- Thus, not only is the Bill anti-democratic from a transparency and good governance perspective, it is also anti-union and, ironically, anti-worker.

(2) SCHEDULE 7 UNDERMINES FUNDAMENTAL HUMAN RIGHTS

- The Bill represents a Faustian bargain for women workers.
- On the one hand the Bill offers an elusive promise of a wage enhancement for some (but not all) workers (with the details left to cabinet to unilaterally dictate), while on the other hand it purports to circumvent important human rights protections set out in legislation such as the Pay Equity Act and Labour Relations Act, 1995.
- In short, under the Bill, women workers are legislatively forced to give up their fundamental pay equity and labour rights in exchange for a wage enhancement program, the details of which are unknown.
- Women workers should be entitled to the wage enhancement program *without having to give up their fundamental human rights*.

Pay Equity Rights

- Section 6(2) of the Bill **deems** permanent wage enhancements to be for the purposes of pay equity, without requiring the employer to adhere to the requirements of the *Pay Equity Act*.
- This deeming provision circumvents important protections in the *Pay Equity Act* with respect to which wage increases are (or are not) appropriately characterized as pay equity adjustments.
 - Under the *Pay Equity Act*, wage enhancements are generally treated as general wage increases, not pay equity adjustments. They are added to the pay of women workers *on top of* the pay equity adjustments.

- Furthermore, by singling out some workers for wage enhancements, and not others, the Bill will exacerbate wage inequities within the workplace, and in the context of the proxy sector (which includes private, for-profit nursing homes), among workplaces within the sector.
 - For example, it is not just PSWs and DSWs who are deserving of wage enhancements; it's *all* of the predominantly female workers in the healthcare sector, including RPNs, Activity Aides, Dietary Aides, Cooks, Housekeeping Aides, and others. All of the women workers have put their lives at risk and have had their working conditions severely impacted by the pandemic.
 - All of them deserve a fair wage and compensation free of systemic gender discrimination.
- Yet, s. 5 of the Bill purports to prevent a tribunal, such as the Pay Equity Hearings Tribunal, Ontario Human Rights Tribunal, or a labour arbitrator, from requiring the employer to extend the wage enhancement to other employees as a matter of equity.
- The fundamental precept of pay equity is equal pay for work of equal value. This fundamental human right necessarily entails pay equity compliant relationships (i.e. equitable pay relativities) among the different job classes within the workplace, and in the proxy sector, among workplaces within the specific sector.
- Yet, the wage enhancement program has the potential to severely disrupt pay equity within the health sector – to exacerbate wage inequities among different job classes, while at the same time insulating the program from challenge (s. 5, s. 8).
- Moreover, there are important mechanisms under the *Pay Equity Act* for identifying and redressing systemic gender discrimination in compensation of women workers, including in the nursing homes and hospitals.
- If the government wants to help these vulnerable women workers – *do not override* these important pay equity and human rights protections.
- Instead focus on removing the barriers that these workers face in *enforcing* their pay equity rights, including:
 - Lengthy systemic delays before the Pay Equity Hearings Tribunal and Ontario Human Rights Tribunal (both of which are severely under resourced).
 - Rules of procedure and legislative provisions which allow employers to evade their pay equity duties for years – even decades – on end, and make it difficult and costly to enforce tribunal rulings.
 - Streamline and expedite pay equity maintenance processes under the *Pay Equity Act*.

- Provide funding to women workers and their workplace representatives to support their enforcement of their pay equity rights.
- Where necessary, provide funding to employers to enable them to satisfy their pay equity obligations.

Labour Rights

- The Bill similarly undermines labour rights, which are protected under s. 2(d) of the *Canadian Charter of Rights and Freedoms*.
- S. 5 of the Act purports to unilaterally override collective agreements on a matter of fundamental importance to workers (compensation) – something the Supreme Court of Canada has previously found violates s. 2(d) of the *Charter of Rights and Freedoms*.¹
- The Bill also excludes workers' representatives – unions – from a meaningful role in negotiating the wage enhancement program (s. 5(1) para 1).
- The Bill also prohibits workers and their representatives from making complaints to an expert labour relations board or labour arbitrator regarding the terms of the wage enhancement program.
- Finally, the Bill fails to repeal Bill 124 in its entirety, despite the corrosive effective it has had on labour relations, including the suppression of the compensation of vulnerable women workers during the pandemic (s. 7).

Conclusions

- In light of all of the foregoing, if there was truly a desire on the part of this government to ensure fair and equitable pay to the women workers in lower paid, precarious positions in nursing homes and other sectors of the economy, why is the government trying to take away their hard fought labour, pay equity, and human rights protections?
- Many of the solutions to the problem of women's discriminatorily low pay are in the *Pay Equity Act*. The problem is one of enforcement.
- There is no good public policy rationale for letting employers off the hook with respect to their pay equity obligations, and their broader labour and human rights duties, which this Bill purports to do.

¹ *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, para 72.

- The Bill, and the regulations adopted thereunder, are very likely unconstitutional both from the perspective of s. 15 equality rights and s. 2(d) freedom of association and collective bargaining rights under the *Canadian Charter of Rights and Freedoms*.
- The Bill will sadly result in protracted legal challenges that will be a costly distraction for all those involved, including the government, employers, and unions, and will result in uncertainty and delay in getting the money in the pockets of the workers who deserve it.

(3) RECOMMENDED AMENDMENTS

- In light of the constitutional infirmities of the Bill, it is recommended that this Committee and the Legislature request a legal analysis of the constitutionality of Schedule 7 from the Constitutional Law Branch of the Ministry of the Attorney General, prior to passing it.
- It is further recommended that at a minimum:

- Sections 5, 6 and 8 be removed from Schedule 7;
- Section 7 be amended to repeal Bill 124 in its entirety; and
- The following non-derogation clause be added to the Schedule:

Non derogation

For greater certainty, nothing in this Act shall be construed as abrogating or derogating from the rights and requirements under the Human Rights Code, Pay Equity Act, Labour Relations Act, 1995, Hospital Labour Disputes Arbitration Act, Crown Employees Collective Bargaining Act, 1993, and the Canadian Charter of Rights and Freedoms.