

#MeToo: Legal Responses to Sexual Harassment at Work



A Kingsford Legal Centre, Redfern Legal Centre, Women's Legal Service NSW and National Association of Community Legal Centres joint report



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Acknowledgements

We acknowledge the traditional owners of the land on which we work.

Thank you to Imogen Eckersley, Cameron Scenna, Muhammad Jarri Haider Syed and Sean Stimson for editing assistance. Thank you to Gilbert + Tobin for their assistance with this report.

A note about case studies used in this report:

Names and other identifying features of clients assisted by community legal centres have been changed for the purposes of this submission however, the broad set of facts and outcomes are the true experiences of our clients.

A note about language used in this report:

Some people who experience sexual harassment prefer the term 'victim' and others prefer to use the term 'survivor.' In this report, we use the term 'victim' which is intended to be inclusive of victims and survivors.

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About us

Kingsford Legal Centre (KLC)

KLC is a community legal centre providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas since 1981. KLC provides general advice on a wide range of legal issues, including discrimination and other human rights issues.

KLC has a specialist discrimination law service (NSW wide), a specialist employment law service, and an Aboriginal Access Program. In addition to this work, KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

Redfern Legal Centre (RLC)

RLC is an independent, non-profit, community-based legal centre with a particular focus on human rights and social justice. Our specialist areas of legal practice include domestic violence, tenancy, credit and consumer, employment and discrimination and complaints about police and other governmental agencies. RLC runs the International Students Service NSW.

By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education, prepare publications and submissions and advocate for law reform. RLC works towards reforming our legal system for the benefit of the community.

Women's Legal Service NSW (WLS NSW)

WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. WLS NSW seeks to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. WLS NSW prioritises women who are disadvantaged by their cultural, social and economic circumstances and provides specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.

As part of its services, WLSNSW provides an unfunded Working Women's Legal Service which specialises in providing advice and representation to women who have experienced sexual harassment at work or discrimination because of gender, pregnancy or carer responsibilities in their employment.

National Association of Community Legal Centres (NACLC)

The National Association of Community Legal Centres (NACLC) is the peak body for all community legal centres in Australia. Community legal centres are independent, non-profit, community-based organisations that provide free and accessible legal and related services to everyday people, including people experiencing discrimination and disadvantage. Its members are the eight State and Territory Community Legal Centre Associations.

1 Executive summary

While there are numerous laws prohibiting sexual harassment in Australian workplaces, sexual harassment remains endemic in Australia. Data from the Australian Bureau of Statistics indicates that 1 in 2 women and 1 in 4 men experience sexual harassment in their lifetime.¹ It is reported that in the last 12 months, 23% of women and 16% of men in the Australian workforce have experienced some form of workplace sexual harassment.² Barriers to reporting sexual harassment remain, with fewer than 1 in 5 people making a formal report or complaint after experiencing sexual harassment.³ Diverse groups of people, including women with disability, LGBTQ+ people, young people and women of colour are more likely to experience sexual harassment.⁴ Sexual harassment can take many forms, from unwelcome touching and sexual comments, to conduct that may be criminal such as assault and sexual assault.

The prevalence of sexual harassment is a form of sex discrimination and acts as a barrier to women fully participating in the workforce. As shown in the statistics above, sexual harassment disproportionately affects women, and is thus a gendered issue. The broader context of gender inequality in the workplace is a driver of sexual harassment, and provides underlying conditions where a culture of sexual harassment is permitted to continue. We recognise that men can also be victims of sexual harassment. The legislative, regulatory and policy reforms outlined in this report will result in fairer workplaces for everybody.

As community legal centres with specialist employment and discrimination practices, we regularly provide advice and representation to women who have experienced sexual harassment in the workplace. In our frontline work, we have identified that the law, complaints processes and responses to reports of sexual harassment are broken and further,

¹ Australian Bureau of Statistics, *Personal Safety, Australia, 2016* (Web Page, 8 November 2017) <<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4906.0main+features12016>>.

² Australian Human Rights Commission, *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces* (Report, August 2018) 25 ("*Everyone's Business*").

³ Australian Human Rights Commission, *Working Without Fear: Results of the Sexual Harassment National Telephone Survey* (Publication, October 2012).

⁴ Ibid, 9.

that reporting sexual harassment or lodging a formal complaint often leads to our clients being further victimised.

The endemic nature of sexual harassment and barriers to reporting indicate that the current law is not responding adequately to prevent sexual harassment. With the failure of the existing legal framework to sufficiently prevent and address sexual harassment, it is clear that immediate and systemic change is required. This includes holistic legal and cultural change in order to reduce sexual harassment, improve responses to reports of sexual harassment and increase access to remedies for victims of sexual harassment. Such reform will require duty-holders, including state, territory and federal governments, regulatory agencies, and employers to meet their responsibilities and effectively legislate and regulate to ensure sexual harassment is not permitted in practice. The burden on individual complainants to address sexual harassment needs to be shifted to workplaces. We need work health and safety agencies, other regulators, individual workplaces and education programs to promote a culture where sexual harassment is not permitted and contraventions of sexual harassment law are treated seriously, with appropriate civil penalties.

This report makes 46 recommendations to build a culture where women can access and enjoy their right to work, in safe workplaces free from sexual harassment. This report was endorsed by the 11 organisations listed at **Appendix C**.

Chapter 2 of this report details the differences in coverage between the *Anti-Discrimination Act 1977* (NSW) (**'ADA'**), the *Sex Discrimination Act 1984* (Cth) (**'SDA'**), and the *Fair Work Act 2009* (Cth) (**'FW Act'**), the key laws that prohibit sexual harassment at the NSW and federal levels.

Chapters 3 and 4 of this report examines the inadequacies and inconsistencies between the ADA, SDA and FW Act. Issues that complicate choice of jurisdiction for sexual harassment complainants, such as differences in time limits, coverage of volunteers, costs risks, and onus of proof are discussed. Key recommendations for reform are made in order to shift the onus from the individual complainant to regulatory agencies and the workplace to prevent and investigate sexual harassment, including the power for own-motion investigations for the complaints bodies, the ability to make group and representative complaints, and a positive duty on employers to take all reasonable steps to prevent sexual harassment.

Chapter 5 explores vital structural changes to increase consistency across discrimination law, and institute broader coverage to complainants, through third party protection and recognition of intersectionality. Additionally, we recommend funding for legal assistance services and improvements to conciliation processes at the Anti-Discrimination Board, Australian Human Rights Commission and Fair Work Commission to facilitate greater access to justice for complainants.

Chapter 6 covers confidentiality and settlement agreements, and recommends the introduction of a law to regulate the use of confidentiality clauses in sexual harassment matters in order to ensure flexibility for complainants while holding employers and serial perpetrators accountable for sexual harassment.

Chapter 7 discusses the need to treat sexual harassment as a work health and safety issue, recommends regulatory reform in this area, and highlights the difficulty of advising complainants about the overlapping worker's compensation jurisdiction.

Chapter 8 details the specific difficulties faced by international students experiencing sexual harassment and makes recommendations to offer increased protection to international students from exploitation and sexual harassment.

Finally, **Chapter 9** explores the cultural change that is required to address the prevalence of sexual harassment in Australian workplaces. In this chapter, we cover key initiatives such as community legal education, workplace sexual harassment policies and training, and effective workplace reporting and investigating procedures as integral levers to create attitudinal change in the community and workplaces and reduce sexual harassment.

Recommendations

Sexual harassment claims under the Anti-Discrimination Act 1977 (NSW) and Sex Discrimination Act 1984 (Cth)

Time limits

- 1) The time limit to lodge a complaint of sexual harassment to the Australian Human Rights Commission should be extended to 12 months and the onus of establishing why an application should not be accepted out of time should be reversed.
- 2) The Australian Human Rights Commission and the Anti-Discrimination Board NSW should allow a series of events to be considered even if some are out of time, if these events are linked to the last event that is within time.

Coverage of volunteers

- 3) The federal government should amend the *Sex Discrimination Act 1984* (Cth) and the *Fair Work Act 2009* (Cth) to make sexual harassment unlawful for all volunteers and unpaid workers.
- 4) The NSW government should amend the *Anti-Discrimination Act 1977* (NSW) to make sexual harassment unlawful for all volunteers and unpaid workers.

Coverage in all circumstances/all areas of public life

- 5) The federal government should amend the *Sex Discrimination Act 1984* (Cth) to make it unlawful for one person to sexually harass another person in all circumstances.

- 6) The NSW government should amend the *Anti-Discrimination Act 1977* (NSW) to make it unlawful for one person to sexually harass another person in all circumstances.

Adverse costs risk

- 7) The federal government should amend Part IIB Division 2 of the *Australian Human Rights Commission Act 1986* (Cth) so that applicants and respondents in sexual harassment matters must bear their own costs unless an exception applies. Parties should only be ordered to pay the costs of the other sides if one of the following exceptions applies:
 - The party instituted the proceedings vexatiously or without reasonable cause; or
 - The party caused the other party to incur costs by an unreasonable act or omission.

Onus of proof

- 8) The federal government should amend the *Sex Discrimination Act 1984* (Cth) to introduce a shifting onus of proof for sexual harassment claims.
- 9) The NSW government should amend the *Anti-Discrimination Act 1977* (NSW) to introduce a shifting onus of proof for sexual harassment claims.
- 10) The *Sex Discrimination Act 1984* (Cth), the *Anti-Discrimination Act 1977* (NSW), and the *Fair Work Act 2009* (Cth) should make clear that the standard of proof to be applied in claims of discrimination and sexual harassment is the civil standard of the balance of probabilities and that the *Briginshaw standard* should not be applied.

Own-motion investigations

- 11) To address systemic sexual harassment, the Anti-Discrimination Board NSW and the Australian Human Rights Commission should be given the power to conduct own-motion investigations of what appears to be unlawful sexual harassment, and the power to commence court proceedings without receiving an individual complaint. Victims would not be compelled to take part in investigations.

Group and representative complaints

- 12) The federal government should amend the *Australian Human Rights Commission Act 1986* (Cth) and the *Sex Discrimination Act 1984* (Cth) to provide for group and representative complaints.
- 13) The NSW government should amend the *Anti-Discrimination Act 1977* (NSW) to provide for group and representative complaints.

Funding for the AHRC and ADB

- 14) The federal government should increase funding to the Australian Human Rights Commission to enable it to efficiently and effectively fulfil its complaint-handling and educative functions.
- 15) The NSW government should increase funding to the Anti-Discrimination Board NSW to enable it to efficiently and effectively fulfil its complaint-handling and educative functions.

Positive obligation on employers and introduction of civil penalties

- 16) The federal government should amend the *Sex Discrimination Act 1984* (Cth) to impose a positive obligation on employers to take all reasonable steps to prevent sexual harassment in their workplace. An accompanying civil penalty provision should be introduced for breaches of this duty.
- 17) The NSW government should amend the *Anti-Discrimination Act 1977* (NSW) to impose a positive obligation on employers to take all reasonable steps to prevent sexual harassment in their workplace. An accompanying civil penalty provision should be introduced for breaches of this duty.

Sexual harassment claims under the Fair Work Act

Inadequate protection against sexual harassment in the Fair Work Act

- 18) The federal government should amend the *Fair Work Act 2009* (Cth) to expressly prohibit sexual harassment. Adverse action should be defined to include sexual harassment as a form of discrimination against a person by reason of the person's sex.

The time limit is too short

- 19) The federal government should amend the *Fair Work Act 2009* (Cth) to increase the time limit to lodge a general protections claim involving dismissal to the Fair Work Commission from 21 days to 12 months.

Serious misconduct under the FW Act

- 20) The federal government should amend sub-regulation 1.07(3) of the *Fair Work Regulations 2009* (Cth) to include sexual harassment as an example of serious misconduct.

Other areas for reform

Third party protection

- 21) The federal government should amend the *Sex Discrimination Act 1984* (Cth) to make it unlawful for one person to sexually harass another person in all circumstances.
- 22) The NSW government should amend the *Anti-Discrimination Act 1977* (NSW) to make it unlawful for one person to sexually harass another person in all circumstances.
- 23) The federal government should amend the *Fair Work Act 2009* (Cth) to make it unlawful for one person to sexually harass another person in the course of their employment in all circumstances.
- 24) The *Sex Discrimination Act 1984* (Cth), *Anti-Discrimination Act 1977* (NSW), and *Fair Work Act 2009* (Cth) should be amended to:
 - a) introduce a duty on employers to act where an employee is being sexually harassed by a third party; and
 - b) to hold employers vicariously liable if they fail to take all reasonable steps to protect their employees in the course of their work from sexual harassment by third parties.

Civil penalties

- 25) The *Sex Discrimination Act 1984* (Cth), *Anti-Discrimination Act 1977* (NSW), and *Fair Work Act 2009* (Cth) should be amended to allow the courts to order civil penalties for sexual harassment. The quantum of civil penalties should reflect the seriousness of the conduct.

Intersectionality

- 26) The *Sex Discrimination Act 1984* (Cth) and the *Anti-Discrimination Act 1977* (NSW) should be amended to protect against intersectional discrimination. The definition of discrimination under these acts should specifically include discrimination on the basis of the intersection of two or more attributes.

Consolidation of anti-discrimination laws

- 27) The federal government should consolidate existing anti-discrimination legislation and enact a comprehensive Equality Act that:
- a) addresses all prohibited grounds of discrimination, promotes substantive equality and provides effective remedies, including against sexual harassment, systemic and intersectional discrimination;
 - b) The harmonisation of this legislation should reflect at least the highest level of protection currently provided across the relevant States, Territories or Commonwealth.

Access to justice and funding for legal assistance services

- 28) The federal and NSW governments should immediately provide increased funding to Community Legal Centres to enable them to provide increased advice and representation in sexual harassment matters.

Conciliator capacity and training

- 29) Conciliators at the Anti-Discrimination Board NSW, Australian Human Rights Commission and Fair Work Commission should receive extensive training on the relevant sexual harassment legislation, alternative dispute resolution theory and techniques, the nature and dynamics of sexual violence and trauma informed practice.
- 30) The Anti-Discrimination Board NSW, Australian Human Rights Commission and Fair Work Commission should make early referrals to free legal assistance in sexual harassment matters.
- 31) To improve consistency in conciliation, the Anti-Discrimination Board NSW, Australian Human Rights Commission and Fair Work Commission should have appropriate and publicly-available policies in place to empower parties in conciliations. This should include:
- a) providing a basic framework for conciliation procedures to the parties and any representatives prior to conciliation;

- b) having consistent and transparent practices for legal representation in conciliation conferences, including a presumption that legal assistance lawyers be granted leave to represent complainants in sexual harassment matters; and
- c) notifying the applicant and respondent about who will be present at the conciliation for both sides.

Confidentiality and settlement agreements

- 32) The federal and NSW governments should introduce a law to regulate the use of confidentiality agreements in sexual harassment matters. The law should:
- a) Prohibit confidentiality in settlement agreements in sexual harassment matters, with the exception of allowing a confidentiality provision should the applicant request it. Any confidentiality clause that is included at the request of the applicant should be drafted in plain English and have a clear explanation of what information cannot be disclosed;
 - b) Prohibit the use of a confidentiality clause to suppress factual information in sexual harassment claims; and
 - c) Allow both parties to request that the settlement amount remain confidential.

Workplace health and safety obligations

- 33) The NSW government should amend the *Work Health and Safety Act 2011* (NSW) to explicitly include sexual harassment as a health risk to workers, requiring SafeWork NSW to investigate, address and manage sexual harassment.

International student visa holders

- 34) The federal government should remove visa condition 8105 from student visas.
- 35) If condition 8105 is not removed, the federal government should issue a new decision-making protocol so that international students can be issued with a warning instead of having their visas cancelled if they breach their work conditions.
- 36) The NSW and federal governments should increase their funding for community-based employment services and create a community-based 'one-stop-shop' hub to assist vulnerable migrant workers to navigate the system and enforce their rights.

Cultural change

Community Legal Education

- 37) The federal and state governments should provide increased funding for community legal centres to develop and deliver sexual harassment community legal education programs in schools, workplaces and the community in general.

Education and awareness raising by the specialist complaints-handling bodies

- 38) The federal and state governments should increase resourcing to the Australian Human Rights Commission and Anti-Discrimination Board NSW to enable them to fulfil their education functions.

Cultural change in workplaces

- 39) The highest level of management in an organisation should be involved in the policy making to reinforce that the company values do not condone sexual harassment. This will help to create a culture of respect in which harassment is not tolerated.
- 40) Workplaces should make regular sexual harassment training compulsory.
- 41) Workplaces should define the type of conduct that constitutes sexual harassment, set out the complaint process (including the complainant/respondent's rights), the investigation process (stressing it is transparent, confidential and fair), and the disciplinary action that will be taken against sexual harassment.
- 42) Workplaces should regularly publish their sexual harassment policy via various workplace channels including on website and social media to encourage transparency, and giving it to each employee at induction.

Training on sexual harassment

- 43) Workplaces should tailor sexual harassment training to the specific workplace in question, with relevant examples, scenarios, and addressing workplace specific risk factors. Such training should also address the drivers of gender-based violence and respectful workplace conduct and provide training on responding appropriately and sensitively to victim disclosures.

Reporting and investigating

- 44) Workplaces should allow for multifaceted reporting systems, for those who have observed and those who have experienced sexual harassment. There should be with a choice of procedures (hotlines, web-based) and complaint handlers (such as managers and human resource departments).
- 45) Workplaces should handle reports of sexual harassment sensitively, confidentially and transparently. This includes responding to and investigating reports promptly, thoroughly and fairly, and keeping the complainant informed.
- 46) Workplaces should take proportional corrective action in response to sexual harassment complaints. Those who engage in sexual harassment must be held responsible in a meaningful, appropriate, and proportional manner through sanctions proportionate to behaviour, irrespective of a person's rank.

2 Sexual harassment under Commonwealth and NSW law

The Sex Discrimination Act 1984 (Cth)

The definition of sexual harassment

The *Sex Discrimination Act 1984* (Cth) prohibits sexual harassment in the workplace. Under section 28A of the SDA, sexual harassment is defined as 'an unwelcome sexual advance' or

‘unwelcome request for sexual favours’ or ‘unwelcome conduct of a sexual nature’ where ‘a reasonable person having regards to all of the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated’.⁵ Section 28A (1A) provides a non-exhaustive list of circumstances to be taken into account, including ‘the age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour or national or ethnic origin’ or ‘any disability of the person harassed’, and ‘the relationship between the person harassed and the alleged harasser’.⁶ The test for sexual harassment under section 28A thus includes objective and subjective elements.

Coverage

The SDA makes sexual harassment unlawful in all areas of public life where sex discrimination is also unlawful under the SDA: employment, partnerships, members of bodies with the power to grant occupational qualifications, registered organisations, employment agencies, education, goods, services and facilities, land, clubs, accommodation and Commonwealth laws and programs.⁷

However, coverage remains inadequate, as groups such as volunteers and unpaid workers are not protected from sexual harassment under the SDA. Additionally, the SDA, by only prohibiting sexual harassment in specified areas of public life does not cover situations such as street harassment.

This report discusses the inadequacies and gaps in the SDA and makes recommendations for change.

The Anti-Discrimination Act 1977 (NSW)

The definition of sexual harassment

The *Anti-Discrimination Act 1977* (NSW) prohibits sexual harassment in the workplace. Under section 22A of the ADA, sexual harassment is defined as ‘an unwelcome sexual advance’ or ‘unwelcome request for sexual favours’ where ‘a reasonable person having regards to all of the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated’.⁸ Unlike the SDA, the ADA does not provide a list of circumstances to take into account.

⁵ *Sex Discrimination Act 1984* (Cth)(**SDA**) s 28A(1A).

⁶ SDA s 28A(1A).

⁷ SDA div 3.

⁸ *Anti-Discrimination Act 1977* (NSW)(**ADA**) s 22A.

Coverage

The ADA makes sexual harassment unlawful in employment (interestingly also specifically covering members of parliament), qualifying bodies, employment agencies, educational institutions, provision of goods and services, accommodation, land, sport and state laws and programs.⁹

Under the ADA, it is unlawful for a workplace participant to sexually harass another workplace participant in the same workplace. While 'workplace participant' is defined to cover volunteers and unpaid trainees, it does not cover other unpaid workers.

This report discusses the inadequacies and gaps in the ADA and makes recommendations for change.

The Fair Work Act 2009 (Cth)

Sexual harassment under the Fair Work Act

The *Fair Work Act 2009* (Cth) is the key legislation that governs the employer/employee relationship in most Australian workplaces. The FW Act does not contain explicit prohibition on sexual harassment, however, the protections under section 351 of the FW Act have been interpreted to cover sexual harassment. The lack of clear legislative guidance creates difficulties for complainants attempting to make a sexual harassment claim under the general protections provisions of the FW Act, as discussed further below at chapter 4.

This report discusses the inadequacies and gaps in the FW Act and makes recommendations for change.

Sexual harassment under international law

Sexual harassment in the workplace breaches women's right to full participation in work; breaches the right to just and favourable working conditions; and breaches the right to equality and non-discrimination. Sexual harassment is a form of sex discrimination, as it is disproportionately experienced by women. Australia needs to take concrete steps to promote, protect and fulfil these rights to ensure women are protected from sexual harassment. For further discussion of Australia's obligations under international human rights law, see **Appendix A**.

⁹ ADA pt 2A.

3 Sexual harassment claims under the *Anti-Discrimination Act 1977 (NSW)* and *Sex Discrimination Act 1984 (Cth)*

Issues under the *Anti-Discrimination Act 1977 (NSW)* and *Sex Discrimination Act 1984 (Cth)*

Time limits

Under section 46PH(1)(b) of the *Australian Human Rights Commission Act 1986 (Cth)* (**'AHRC Act'**), the President of the Australian Human Rights Commission (**'AHRC'**) may terminate a complaint on the ground that it was lodged more than 6 months after the alleged conduct took place. This effectively acts as a 6-month time limit for applicants to bring a sexual harassment complaint to the AHRC. Prior to the passage of the *Human Rights Legislation Amendment Act 2017 (Cth)* in April 2017, applicants had a 12-month time limit to bring complaints of sexual harassment to the AHRC. The reduction in time limit has the potential to act as a barrier to access to justice.

In our experience, applicants may experience severe sexual harassment of differing forms over an extended period of time. In accepting complaints of sexual harassment, both the ADB and AHRC may disallow certain conduct if it did not occur within the time limit. This fails to recognise the legitimate reasons that an applicant may not make a sexual harassment complaint immediately following the alleged conduct, including: the impact the sexual harassment may have on the applicant's mental state, fear of victimisation, lack of knowledge of how and where to complain, and that they were awaiting the outcome of an internal investigation.

Additionally, due to the high incidence of victimisation following reporting, many victims of sexual harassment may not feel comfortable lodging a complaint until they have secured alternative employment and left the workplace where the sexual harassment occurred.

Recommendations:

- 1) The time limit to lodge a complaint of sexual harassment to the Australian Human Rights Commission should be extended to 12 months and the onus of establishing why an application should not be accepted out of time should be reversed.
- 2) The Australian Human Rights Commission and the Anti-Discrimination Board NSW should allow a series of events to be considered even if some are out of time, if these events are linked to the last event that is within time.

Coverage of volunteers

Volunteers make a vital contribution to Australian society, however they are currently not explicitly protected from sexual harassment. This gap arises as a result of the different definitions in the SDA, ADA and FW Act about who is an "employee" or a "workplace

participant” in the respective Acts. This gap in legal protection is particularly concerning given the vulnerability of volunteers in the workplace due to the power differential between paid workers and volunteers.

The ADA, SDA and FW Act do not provide clear protection against sexual harassment for volunteers and unpaid workers. Under the SDA, volunteers and unpaid workers cannot make a claim of sexual harassment. The ADA has broader coverage, as it provides that it is unlawful for a workplace participant to sexually harass another workplace participant in the same workplace. However, the coverage under the ADA is still inadequate as while ‘workplace participant’ is defined to cover volunteers and unpaid trainees, it does not cover other unpaid workers. The FW Act does not cover volunteers as they do not fall within the ordinary meaning of employee in section 335 of the FW Act.

Recommendation:

- 3) The federal government should amend the *Sex Discrimination Act 1984* (Cth) and the *Fair Work Act 2009* (Cth) to make sexual harassment unlawful for all volunteers and unpaid workers.
- 4) The NSW government should amend the *Anti-Discrimination Act 1977* (NSW) to make sexual harassment unlawful for all volunteers and unpaid workers.

Coverage in all circumstances/all areas of public life

Case study - Rebecca

Rebecca’s current employer, Starfish, placed her in a customer service call centre run by Seahorse. Rebecca reported to a CLC that calendars with sexually explicit photos were displayed in the workplace. Rebecca had made internal complaints to Starfish and Seahorse but felt the complaint was not adequately addressed as the calendars were not removed. Rebecca reported that following her internal complaint that she was not rostered on shifts in the following week and she was pressured to move her day shifts to night shifts. When Rebecca took down some calendars at work she was verbally abused by her colleagues. Both Starfish and Seahorse attempted to deny that they were responsible for the unlawful behaviour due to a labour hire arrangement, and both failed to deal with the sexual harassment in an appropriate manner.

As discussed above, the SDA and ADA prohibit sexual harassment only in certain areas of public life. It can be difficult to demonstrate that a person being sexually harassed is covered under the law, particularly in circumstances that may involve labour hire or other employment relationships and when sexual harassment arises between an employee and a client or customer or patient.

The endemic nature of sexual harassment in the community means that it is imperative that all persons are protected under sexual harassment legislation regardless of the type of

workplace, the nature of their employment or volunteer status, the nature of their relationship to the harasser and the other circumstances of where or how the sexual harassment is taking place. In Queensland and Tasmania, it is unlawful to sexually harass another person in 'all circumstances'¹⁰ and it is our recommendation that the SDA and the ADA be amended to provide such protection.

The inclusion of a general prohibition on sexual harassment in all areas of public life will increase the effectiveness of the SDA and ADA and will simplify the operation of both Acts. It will also send a clear message to the community that sexual harassment is not acceptable under any circumstances. We note that the Senate Legal and Constitutional Affairs Committee has previously made a similar recommendation that the SDA be amended to prohibit sexual harassment in any area of public life similar to section 9 of the *Racial Discrimination Act 1975* (Cth).¹¹

Recommendation:

- | |
|--|
| <p>5) The federal government should amend the <i>Sex Discrimination Act 1984</i> (Cth) to make it unlawful for one person to sexually harass another person in all circumstances.</p> <p>6) The NSW government should amend the <i>Anti-Discrimination Act 1977</i> (NSW) to make it unlawful for one person to sexually harass another person in all circumstances.</p> |
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Adverse costs risk

The costs jurisdiction of the Federal Circuit Court of Australia and Federal Court of Australia for sexual harassment matters under the SDA has created a significant barrier for clients pursuing discrimination claims even if they can get free legal assistance. This is complicated by the fact that the benefits of a no-costs jurisdiction at the NSW level must be balanced against the benefits of uncapped damages at the federal level. For many victims of sexual harassment who pursue a formal complaint with either the ADB or AHRC, the need for adequate compensation and the risk of an adverse costs order are live and conflicting issues.

New South Wales

Lodging a formal complaint and undertaking a conciliation conference at the Anti-Discrimination Board is free.¹² Should the applicant pursue their complaint in the NSW Civil and Administrative Tribunal, the applicant will be required to pay their own legal costs

10 *Anti-Discrimination Act 1991* (QLD) s 118 ; *Anti-Discrimination Act 1998* (TAS) s 17(2).

11 Senate Standing Committee on Legal and Constitutional Affairs, *The effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (Report, 12 December 2008), Recommendation 9.

¹² Anti-Discrimination Board of NSW, *Conciliation conference* (Web page, 23 June 2016)<http://www.antidiscrimination.justice.nsw.gov.au/Pages/adb1_makingacomplaint/conciliation-conference.aspx>.

unless special circumstances apply.¹³ NCAT has the capacity to award damages of up to \$100,000 for breaches of the *Anti-Discrimination Act 1977* (NSW).¹⁴

Commonwealth

Lodging a formal complaint and undertaking conciliation through the Australian Human Rights Commission is free.¹⁵ Unlike at the NSW level, there is no cap on damages which can be awarded should the complaint be pursued in the Federal Circuit Court or Federal Court. However, costs orders can be awarded against unsuccessful litigants, which is a significant barrier to commencing litigation, even where matters have strong merit. In our experience, clients avoid lodging complaints with the AHRC due to the risk of an adverse costs order at the Federal Circuit Court or Federal Court.

We submit that the current costs regime for sexual harassment claims under the SDA should be reformed to increase access to justice for sexual harassment complainants. We submit that the general rule that parties bear their own costs unless an exception applies, such as under section 570 of the FW Act, is a sensible approach to costs in workplace disputes, and should be implemented for sexual harassment matters under the SDA.

Recommendation:

- 7) The federal government should amend Part IIB Division 2 of the *Australian Human Rights Commission Act 1986* (Cth) so that applicants and respondents in sexual harassment matters must bear their own costs unless an exception applies. Parties should only be ordered to pay the costs of the other sides if one of the following exceptions applies:
- The party instituted the proceedings vexatiously or without reasonable cause; or
 - The party caused the other party to incur costs by an unreasonable act or omission.

Onus of proof

The balance of power in the employee-employer relationship is unequal. This inequality should be addressed by shifting the burden of proof from the applicant onto the respondent to ensure a more equitable resolution of workplace disputes, such as the reverse onus in section 361 of the FW Act (see chapter 4 below).

Under the SDA and the ADA, the onus of proof in sexual harassment matters rests with the complainant. This places too great an evidentiary burden on the individual complainant, and

¹³ *Civil and Administrative Tribunal Act 2013* (NSW), s 60.

¹⁴ Legal Aid New South Wales, *Discrimination toolkit* (Web Page)

<<https://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/discrimination-toolkit/courts-and-tribunals/the-administrative-decisions-tribunal>>.

¹⁵ Australian Human Rights Commission, *The Complaint Process* (Web Page)

<<https://www.humanrights.gov.au/complaints/complaint-guides/complaint-process>>.

it is often impossible for complainants to satisfy, given the evidence is usually held by an employer respondent, and that in sexual harassment matters, the conduct often occurs in private and without witnesses or other forms of evidence. A shifting onus, similar to that of section 361 of the FW Act would assist in addressing this power imbalance. This would mean that an applicant would have to raise a prima facie case of sexual harassment, and the onus would then shift to the respondent to show that either the conduct complained of does not fall within the definition of sexual harassment, or that the conduct did not occur. If the respondent was unable to discharge this onus, the applicant's case would be made out.

Further, consideration should be given to the adverse effect by the application of the *Briginshaw standard*¹⁶ to discrimination cases. The strength of the evidence necessary to meet that standard will vary according to the seriousness of the allegations being made. This effectively makes the standard applied more onerous than the civil standard, requiring the complainant to adduce evidence that is considered to be stronger or more probative to meet the *Briginshaw standard*. The underlying premise for applying the *Briginshaw standard* is that being accused of something such as sexual harassment is so serious and heinous for the alleged perpetrator's reputation that it is necessary to apply a higher standard of proof to such matters. In practice, this not only increases the standard of proof applied in such cases, but also prioritises the reputation of an alleged perpetrator over that of the complainant victim and fails to acknowledge the very serious potential consequences for a complainant in terms of their own reputation in making a claim of discrimination.

Recommendations:

- 8) The federal government should amend the *Sex Discrimination Act 1984* (Cth) to introduce a shifting onus of proof for sexual harassment claims.
- 9) The NSW government should amend the *Anti-Discrimination Act 1977* (NSW) to introduce a shifting onus of proof for sexual harassment claims.
- 10) The *Sex Discrimination Act 1984* (Cth), the *Anti-Discrimination Act 1977* (NSW), and the *Fair Work Act 2009* (Cth) should make clear that the standard of proof to be applied in claims of discrimination and sexual harassment is the civil standard of the balance of probabilities and that the *Briginshaw standard* should not be applied.

Own-motion investigations

The individual nature of the sexual harassment complaints process, and the confidential nature of settlements reached in sexual harassment claims means that systemic sexual harassment often remains unaddressed. The onus on individuals who have experienced sexual harassment is often too great - in our experience, many clients who have suffered sexual harassment and have claims with merit do not pursue a complaint due to the stress, effort and time involved.

¹⁶ *Briginshaw v Briginshaw* [1938] HCA 34; codified in section 140 of the *Evidence Act 1995* (Cth).

The ADB and AHRC, as bodies handling sexual harassment complaints at first instance, are in a unique position to identify systemic sexual harassment and ‘frequent flyer’ respondents. The ACT Human Rights Commission has the power to begin an ‘own motion complaint’ without an individual complainant, which is often used where there is a pattern of individual complaints against a particular respondent, or in response to media attention to a particular issue.¹⁷ While several overseas jurisdictions enable their discrimination agencies to investigate, intervene in matters and support test cases, the ADB and AHRC do not have this power.¹⁸

Recommendation:

11) To address systemic sexual harassment, the Anti-Discrimination Board NSW and the Australian Human Rights Commission should be given the power to conduct own-motion investigations of what appears to be unlawful sexual harassment under the law, and the power to commence court proceedings without receiving an individual complaint. Victims would not be compelled to take part in investigations.

Group and representative complaints

Case study – Nadia, Mary, Sarah and Thi

Nadia, Mary, Sarah and Thi are young women all aged under 19 years. They were employed across different shops owned by the same employer. The shops were all in close proximity to each other and from time to time, the employees were required to work in another business for a short period. The owner of the business sexually harassed each of the women and the conduct included inappropriate sexual comments and questioning and sexual touching.

Nadia contacted a CLC for advice about her options and asked could she send Mary, Sarah and Thi to the CLC for advice as well. All of the women remained in their employment. Each of the complainants had to lodge a separate complaint at the AHRC and their complaints travelled as individual complaints through the investigation and conciliation process. Each of the clients expressed that they felt very vulnerable in making their complaints and would have appreciated the opportunity to complain as a group. The process became so stressful for each that they left their employment and withdrew their complaints prior to the conciliation conferences.

The ADA, SDA and the AHRC Act do not provide for group and representative complaints. The capacity for complainants to make a group complaint of discrimination would mean that

¹⁷ACT Human Rights Commission, *Commission-initiated Discrimination Complaints Policy* (Web page, 11 June 2013) <<http://hrc.act.gov.au/discrimination/make-discrimination-complaint/332-2/>>.

¹⁸ The UK, US and Canada have discrimination agencies that have the power to intervene in proceedings and support test cases.

in circumstances such as the above case, where there is alleged systemic unlawful conduct in a workplace, complainants have the capacity to make a group or representative complaint. This would, in turn have the effect of streamlining the functions of the complaint body in investigating and conciliating the matter. Complainants should then have the option of adapting settlement outcomes for each individual.

Given the endemic nature of sexual harassment, we submit that organisations with a sufficient interest in sexual harassment complaints, such as women's organisations, community legal centres, and trade unions, should have standing to bring a complaint to address systemic sexual harassment in their own right.

Recommendations:

- 12) The federal government should amend the Australian Human Rights Commission Act 1986 (Cth) and the Sex Discrimination Act 1984 (Cth) to provide for group and representative complaints.
- 13) The NSW government should amend the *Anti-Discrimination Act 1977* (NSW) to provide for group and representative complaints.

Funding for the AHRC and ADB

The AHRC and ADB remain significantly under-resourced, hampering their ability to fulfil their statutory complaint-handling and educative functions¹⁹ in an efficient and effective manner.

The AHRC, as Australia's national human rights institution, has key functions including resolving complaints of sexual harassment, developing human rights education programs and resources, and providing advice to government on laws, policies and programs. Similarly, the ADB handles complaints of sexual harassment, informs the NSW community about their rights and responsibilities under the ADA, and advises the NSW government on discrimination matters. The AHRC and ADB both have a vital role to play in educating the community and employers about their rights and obligations under sexual harassment law. The educative and awareness-raising functions of the ADB and AHRC have significant potential to lead to cultural change for sexual harassment (see chapter 9 for further discussion on this topic).

However, the financial resources allocated to the AHRC remain inadequate and there has been a substantial reduction in funding,²⁰ including further cuts of half a million dollars over

¹⁹ *Australian Human Rights Commission Act 1986* (Cth) s 11; *ADA* s 119.

²⁰ The funding cuts to the AHRC announced on 15 December 2014 amounted to \$5 million over three years, or more than \$1.6 million per year: see Commonwealth Government, 'Mid-Year Economic and Fiscal Outlook: Appendix A – Policy Decisions Taken since the 2014-2015 Budget: Expense Measures' (December 2014) 120.

the next five years.²¹ In our experience, there are significant delays in getting to a conciliation conference at AHRC, with waiting times of up to 6 months. Clients have decided to utilise the faster conciliation processing times of the Fair Work Commission (**FWC**) and make general protections applications instead of complaining to the AHRC or the ADB, even though the FW Act offers them inadequate protection against sexual harassment (see chapter 4 below).

Recommendations:

- 14) The federal government should increase funding to the Australian Human Rights Commission to enable it to efficiently and effectively fulfil its complaint-handling and educative functions.
- 15) The NSW government should increase funding to the Anti-Discrimination Board NSW to enable it to efficiently and effectively fulfil its complaint-handling and educative functions.

Positive obligation on employers and introduction of civil penalties

Case study – Jo and Ning

Jo worked in a commercial kitchen. The chef in the kitchen constantly made sexist and sexual comments about Jo and her colleague Ning, including jokes about their bodies and their sex lives. Ning was at the beginning of her work career at the time of this conduct and the chef was her direct supervisor. Jo complained to the manager, both about conduct towards her, and about being present as her young colleague Ning was sexually harassed in front of other staff. Ning also complained. Both women found that their complaints were not taken seriously by the manager.

Jo's shifts were changed to her disadvantage after she complained about the chef. She eventually resigned from her job. Ning continued in the job, but after the chef learned of her complaints, he started to undermine her at work.

Jo and Ning suffered a decline in their mental health due to the sexual harassment and the lack of support from their employer. A CLC represented both Jo and Ning in complaints to the ADB and were able to settle both matters. The company agreed to pay Jo and Ning financial compensation, issued a statement of regret and committed to holding sexual harassment training for the staff involved.

See also: Australian Human Rights Commission 'Corporate Plan 2016-17' (Report, July 2016) <<https://www.humanrights.gov.au/sites/default/files/document/publication/Corporate-Plan-2016-AHRC.pdf>>, 5.

21 Commonwealth Government, 'Budget 2018-19 - Budget Paper No. 2' (8 May 2018) 48, 75.

The sexual harassment complaints process is highly individualised, placing the onus on the victim of sexual harassment to make an internal or external complaint. Given the high incidence of victimisation following reporting sexual harassment, this acts as a disincentive to reporting and places a large burden and risk on the individual. The framing of sexual harassment as an individual issue that requires an individual complaint of sexual harassment to prompt employer action means that employers have traditionally not been held to account for failing to introduce transparent complaint policies and procedures, sexual harassment training and cultural change to prevent sexual harassment from occurring in the first place.

Currently, employers can only be held accountable for failing to take all reasonable steps to prevent sexual harassment through the vicarious liability provisions of the SDA²² which require an individual complaint of sexual harassment to be made – this means the test only becomes relevant where an employer is defending a claim of sexual harassment. Under the ADA, the vicarious liability provisions are even narrower, where employers are only vicariously liable if they expressly or impliedly authorise the act of sexual harassment.²³ There is currently no statutory positive duty in discrimination law on employers to take all reasonable steps to prevent sexual harassment of or by their employees.

In our experience, many employers do not have any policies, training or complaints procedures at all. In cases where they do exist, they are generally inadequate and exist only as a measure to circumvent liability, rather than representing a true commitment on the part of an employer to institute active steps to prevent and respond to sexual harassment. Implementing a positive obligation on employers to take all reasonable steps to prevent sexual harassment would require employers to take genuine, active steps to reduce the incidence of sexual harassment and in turn, would likely lead to cultural change.

A positive obligation would mean that a complaint could be brought by anyone in the relevant workplace in the event that the employer fails to take reasonable steps. This would relieve the burden on individual victims of sexual harassment to hold employers to account for their unlawful behaviour. It would also mean that anyone could bring a complaint on account of a failure by an employer to take the necessary preventative steps to protect employees from unlawful conduct, even in the absence of any alleged unlawful conduct.

We submit that any breach of the positive duty should attract substantial civil penalties. Relevant bodies such as the AHRC and ADB could develop a code of practice for employers so they are aware of the content and their obligations under such a duty.

Recommendations:

²² SDA s 106.

²³ ADA s 53.

- 16) The federal government should amend the *Sex Discrimination Act 1984* (Cth) to impose a positive obligation on employers to take all reasonable steps to prevent sexual harassment in their workplace. An accompanying civil penalty provision should be introduced for breaches of this duty.
- 17) The NSW government should amend the *Anti-Discrimination Act 1977* (NSW) to impose a positive obligation on employers to take all reasonable steps to prevent sexual harassment in their workplace. An accompanying civil penalty provision should be introduced for breaches of this duty.

4 Sexual harassment claims under the Fair Work Act

Issues under the *Fair Work Act 2009* (Cth)

Inadequate protection against sexual harassment in the FW Act

Case Study – Belinda

Belinda was employed to work in an administration role by a car dealership. From very early on in her employment, Belinda was sexually harassed by her manager. Her manager made comments of a sexual nature which included “*You look so sexy today in that dress, I’d love to have my way with you,*” and carried out acts of a sexual nature that included dragging her into a bathroom and grabbing her breasts, sending her lewd text messages and grabbing himself in the groin as she walked past. Belinda was so scared that she left one day and didn’t return.

Belinda lodged a general protection complaint in the Fair Work Commission complaining of sexual harassment. During the conciliation conference, the employer and the conciliator challenged Belinda about the jurisdiction of the FWC to hear complaints of sexual harassment. Belinda ended up withdrawing her complaint and filed a complaint of sexual harassment at the AHRC.

The FW Act does not explicitly prohibit sexual harassment in the workplace. Bringing legal action against an employer using the FW Act offers complainants an imperfect remedy as there is no stand-alone cause of action for sexual harassment. An employee can bring a general protections claim under the FW Act against their employer if they have been dismissed, for example, because they *complained* about being sexually harassed.²⁴ Using the FW Act, it is much harder for a complainant to establish that the sexual harassment itself was adverse action on the basis of the person’s sex, such as by making a ‘discrimination’ claim in accordance with section 351 of the FW Act.²⁵

²⁴ *Fair Work Act 2009* (Cth)(FW Act) s 340.

²⁵ *Kassis v Republic of Lebanon* [2014] FCCA 155.

As such, few complainants have used the FW Act to bring sexual harassment claims against their employers. Applicants in this jurisdiction do not have the benefit of drawing guidance from an established line of legal authority, as with discrimination law. Without precedents, there are challenges to providing a client with any certainty about whether their case has merit and the possible quantum of a FW Act claim.²⁶ If the FW Act were amended to expressly prohibit sexual harassment, it would simplify the process for complainants who experience complex forms of discrimination or multiple breaches of their workplace rights by enabling them to bring a single claim addressing all unlawful conduct in the one jurisdiction.

Recommendation:

18) The federal government should amend the *Fair Work Act 2009* (Cth) to expressly prohibit sexual harassment. Adverse action should be defined to include sexual harassment as a form of discrimination against a person by reason of the person's sex.

The time limit is too short

Case Study - Samantha

Samantha's employer engaged in highly sexualised language around her and directed sexualised comments towards her at work, such as: *"I'd rethink wearing that bikini, Samantha!", "Put on a bit of weight there, love?!"* and *"Oh my god, look at Samantha's camel toe in those tights! Everyone, come and look!"*. Samantha felt forced to resign when her boss told her *"I don't know Samantha...continuing with your role and IVF may be too much for you. I don't want you to have another miscarriage"*.

A CLC assisted Samantha to draft a general protections application for her to file at the FWC herself. Due to her anxiety about the situation, Samantha could not bring herself to file within the 21-day limitation period and became disentitled to claim. Samantha wanted to move on with her life and her IVF treatment and did not want to wait for months for a conciliation date through the AHRC or the ADB. If Samantha had more time to file a claim at the FWC, Samantha may still have been able to pursue a general protections complaint.

If a complainant wishes to bring a sexual harassment general protections claim involving dismissal, they only have 21 days to lodge such a claim at the FWC. Many victims of sexual harassment are not in a position to lodge a complaint within this time frame. The stress of being sexually harassed and dismissed in that context means that complainants may not be in a position to seek legal advice and make an application within 21 days. Clients may have more pressing concerns to deal with following a dismissal, including finding new employment, financial strain and breakdown of relationships due to job loss and the impact of the sexual harassment.

²⁶ Ibid.

In our experience, it is the most disadvantaged clients, including women, young people, Aboriginal and Torres Strait Islander people, people with a disability and people from a culturally and linguistically diverse background that experience sexual harassment at higher rates. These groups also tend to have less knowledge about their employment law rights, and where and how to seek assistance. These factors, combined with the limited availability of free legal assistance in employment and discrimination law means that many clients will be unable to secure an appointment for legal advice within the 21-day time limit or lodge their claim in the absence of such advice.

We note that in other similar jurisdictions, including to lodge a discrimination claim to the Anti-Discrimination Board NSW, the time limit to make a claim is 12 months, which more accurately reflects the time needed by an applicant to seek legal advice and make a workplace claim.

Currently, opportunities to extend the time limit for making an application are extremely limited, and fail to reflect the reality of the difficulties faced by dismissed employees in becoming aware of the FWC general protections application process and accessing legal advice. The Fair Work Commission has consistently interpreted section 366 of the FW Act which provides for an extension of time in exceptional circumstances narrowly, meaning that out of time applications are rarely accepted.

Recommendation:

19) The federal government should amend the <i>Fair Work Act 2009</i> (Cth) to increase the time limit to lodge a general protections claim involving dismissal to the Fair Work Commission from 21 days to 12 months.
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Serious misconduct under the FW Act

Under the FW Act, summary dismissal is permitted where serious misconduct has occurred. Serious misconduct is defined in Reg 1.07 of the *Fair Work Regulations 2009* (Cth) to cover an employee deliberately behaving in a way that is inconsistent with their continuing employment. Examples include:

- causing serious and imminent risk to the health and safety of another person or to the reputation or profits of their employer's business;
- theft, fraud, assault, being intoxicated at work; or
- refusing to carry out a lawful and reasonable instruction that is part of the job.

We submit that sexual harassment should be specifically included in the definition of serious misconduct in the FW regulations. This would enable employers to take strong disciplinary action against the perpetrators of sexual harassment in the workplace, and would have the potential to stop serial offenders from remaining employed and continuing to engage in unlawful conduct.

Recommendation:

20) The federal government should amend sub-regulation 1.07(3) of the *Fair Work Regulations 2009* (Cth) to include sexual harassment as an example of serious misconduct.

Benefits under the FW Act

Despite the above issues with bringing sexual harassment claims under the FW Act, there are practical benefits to applicants making general protections applications instead of traditional discrimination law claims.

Costs

General protection applicants enjoy a 'cost free' jurisdiction in accordance with section 570 of the FW Act. For those complainants who are considering taking their sexual harassment claim beyond conciliation, the risk of adverse costs orders is an important factor to consider. Unlike claims brought under the SDA, the FW Act provides that generally, parties must bear the costs of bringing proceedings on their own, even if successful. Under the FW Act, a party will only be ordered to pay the costs of the other side if they instituted the proceedings vexatiously or without reasonable cause or if their unreasonable act or omission caused the other party to incur costs.²⁷ This is a significant benefit to bringing a claim under the FW Act as the costs of discrimination proceedings can be prohibitive,²⁸ (as discussed at above at chapter 3).

Time/certainty

A complainant will generally be allocated a conciliation date with the FWC within 4 to 6 weeks of filing a complaint. This is of significant benefit to clients who wish to deal with the sexual harassment complaint quickly and move on with their lives. CLC clients have reported waiting 6 to 12 months after filing to get a conciliation date at the AHRC and ADB. The nature of sexual harassment is highly intimate and distressing, and where a complainant is still working with a respondent, it is not practicable, safe or best trauma-informed practice to have a delay of over 6 months for a conciliation.

Accessorial liability

After commencing proceedings against an employer, many CLC clients report having issues with their ex-employer winding up their company and restarting, or 'phoenixing', the business under another name. When an applicant has brought a claim under the FW Act, complainants are able to rely on section 550 of the FW Act. This accessorial liability provision

²⁷ FW Act s 570(2).

²⁸ Public Interest Advocacy Centre Ltd, *Disability case costs RailCorp \$420,000* (Web Page, 1 April 2013) <<https://www.piac.asn.au/2013/04/01/disability-case-costs-railcorp-420000/>>.

means that directors, human resources professionals and potentially even lawyers and payroll providers may be found personally liable if a complainant can prove that they were “knowingly concerned” in a contravention. If a complainant takes action under the SDA, and their employer winds up the company, there are much more limited opportunities for a complainant to take action against a director in their personal capacity using directors’ liabilities under the *Corporations Act 2001* (Cth). In this way, complainants have better chances of enforcing a judgment debt against a wealthy director under the FW Act.

Shifting onus of proof

Section 361 of the FW Act creates a shifting or reverse onus of proof whereby the onus is on the employer rather than the employee to establish why a person was not adversely affected, in the workplace. If this onus is not discharged, it is to be assumed that the action in question was taken for a prohibited purpose.

A reverse onus goes some way toward reversing the inherent power imbalance that exists between employers and employees and the fact that it is generally the employer who holds the information relevant to the grounds of a complaint made by a complainant employee. In cases of sexual harassment, and assuming greater clarification in the FW Act that sexual harassment is explicitly prohibited, it would be assumed that a complainant was sexually harassed unless the respondent can establish that the conduct did not occur or that the conduct falls outside of the definition of sexual harassment.

5 Other areas for reform

Third party protection

Case study – Amanda and Jill

Amanda is employed as a casual cleaner by a small business. One of the contracts held by the business is to provide cleaning services in a nursing home. Amanda, her colleague Jill, and the cleaning business owner were cleaning the room of a patient when he pulled his penis out and started to masturbate. When Amanda and Jill complained to the business owner about being subjected to the patient’s conduct, he told them “*Just ignore it. Keep working: the patient is harmless.*” The following day when they complained again, the business owner stopped giving each of them shifts.

In our experience many people experience harassment through third parties. In scenarios such as the one above, despite these events clearly falling within the course of the clients’ employment, there are no clear protections under the ADA or the SDA.

The patient is not a workplace participant and it is likely that it was the nursing home rather than the individual patient to whom “goods and services” were being provided. In order to

bring employees with circumstances such as that outlined above within the protections of the Acts, it becomes necessary to argue that the business owner, who was for these purposes also a co-worker, sexually harassed them by exposing them to the patient's behaviour when he told them to keep working. In turn, the business can be held vicariously liable for the business owner's actions, including the victimisation.

A more expansive definition of "workplace participant" and the inclusion of a provision that provides for protection from sexual harassment in all areas of public life would resolve the issues faced in scenarios such as these.

The AHRC 2018 survey into sexual harassment in the workplace²⁹ highlights the prevalence of third-party sexual harassment and found that:

- after a co-worker on the same level as the victim (27%), the second most common relationship of a sexual harassment perpetrator to victim in Australian workplaces was a client or customer (18%). This relationship type was more common than a co-worker more senior than the victim (15%) or the victim's direct manager/supervisor (11%).
- Where multiple harassers perpetrated sexual harassment, a client or customer was involved 17% of the time.
- 30% of those who experienced workplace sexual harassment in the retail trade and accommodation and food services respectively reported that the perpetrator was a client or customer, compared with 18% of people who were sexual harassment in the workplace overall.³⁰

The FW Act does not specifically mention 'clients', however the adverse action provisions in the FW Act would likely prohibit an employer taking adverse action against an employee because of a client's sexual harassment of that employee (e.g. dismissal, discrimination, injury, altered position) **and** it offers protection to all persons, including clients.³¹

Under the SDA, third party clients or customers are not liable for sexually harassing an employee or contract worker. However, depending on the circumstances, an employer may be found liable for sex discrimination if they treated an employee or contract worker less favourably than they would have treated someone of the opposite sex by failing to protect them from harassment from a client or customer.

²⁹ Australian Human Rights Commission above n 2.

³⁰ Australian Human Rights Commission above n 2: The survey notes employees are more likely to interact with external clients and customers in some industries (e.g. retail, accommodation, and food services) than others.

³¹ FW Act s.340.

For example, in the case of *Smith v Sandalwood Motel* (1994)³² a motel owner was found to have discriminated against two women he engaged to perform as singers in his motel. The Tribunal found that the motel owner did nothing to prevent the women being subjected to sexualised and offensive behaviour by bar patrons "*in an atmosphere close to violence.*" The Tribunal found that the motel owner's neglect meant that the women were subjected to less favourable treatment than a male contractor would have received.³³

Section 22F of the ADA provides that it is unlawful to sexually harass another person in the course of receiving, or seeking to receive, goods or services from that other person, or in providing, or offering to provide, goods or services to that other person.³⁴

We submit there should be an increase in and harmonisation of protections for complainants sexually harassed by third parties. This is a problematic area and occurs across sectors where customers can be harassers but are seen by an employer as too important to alienate, such as in the hospitality industry and in professional services such as law and accounting firms. This could be achieved through making sexual harassment unlawful in all areas of public life as discussed above at chapter 3.

Recommendations:

- 21) The federal government should amend the *Sex Discrimination Act 1984* (Cth) to make it unlawful for one person to sexually harass another person in all circumstances.
- 22) The NSW government should amend the *Anti-Discrimination Act 1977* (NSW) to make it unlawful for one person to sexually harass another person in all circumstances.
- 23) The federal government should amend the *Fair Work Act 2009* (Cth) to make it unlawful for one person to sexually harass another person in the course of their employment in all circumstances.
- 24) The *Sex Discrimination Act 1984* (Cth), *Anti-Discrimination Act 1977* (NSW), and *Fair Work Act 2009* (Cth) should be amended to:
 - a) introduce a duty on employers to act where an employee is being sexually harassed by a third party; and
 - b) to hold employers vicariously liable if they fail to take all reasonable steps to protect their employees in the course of their work from sexual harassment by third parties.

Civil penalties

Currently, under the ADA, FW Act and SDA, there are no civil penalties for individual employees or employers for engaging in sexual harassment or for failing to prevent sexual harassment from occurring. The lack of civil penalties for sexual harassment acts as a

³² *Smith v Sandalwood Motel* (1994) EOC 92-577

³³ AHRC, 'Sexual Harassment (A Code in Practice) - When is sexual harassment prohibited?', <https://www.humanrights.gov.au/publications/sexual-harassment-code-practice-when-sexual-harassment-prohibited>

³⁴ ADA s 22F.

disincentive for employers to take meaningful action to prevent sexual harassment in the future.

The general protections scheme under the FW Act includes civil penalties that are payable by both individuals and employers for unlawful conduct that breaches the general protections provisions of the FW Act. A civil penalty framework for sexual harassment would act as an incentive for employers to actively prevent sexual harassment, and to individuals from engaging in such conduct.

Recommendation:

25) The *Sex Discrimination Act 1984* (Cth), *Anti-Discrimination Act 1977* (NSW), and *Fair Work Act 2009* (Cth) should be amended to allow the courts to order civil penalties for sexual harassment. The quantum of civil penalties should reflect the seriousness of the conduct.

Intersectionality

Case study - Stacy

Stacy is a young Chinese woman who was sexually harassed by a colleague when working in a kitchen. Stacy was on a working holiday visa. The colleague made a number of inappropriate sexual comments to Stacy, and frequently followed her into the cool room at work where he would grope her breasts and bottom. When Stacy complained to the manager, he said, *"I thought you Chinese girls liked being treated like this"*.

Stacy came to a CLC for advice. We advised her that as intersectional discrimination is not expressly recognised in Australian law, she would have to claim sexual harassment and race discrimination as two separate grounds.

Current Australian discrimination law fails to adequately recognise and deal with the way in which individuals may experience complex forms of discrimination. The failure of anti-discrimination law to address this type of discrimination has meant that the law has not been utilised by the most disadvantaged people in our community – that is, people experiencing complex forms of discrimination.

As discussed above, minority groups, including women, LGBTQ+ persons, women of colour, women with disability and young people experience higher rates of sexual harassment than the general population. Where a complainant seeks to claim more than one form of discrimination, they must take action where each ground and each form of discrimination is examined in isolation with a comparator without that characteristic. This acts as a further barrier to minority groups who experience sexual harassment along with discrimination based on other protected attributes from pursuing a claim.

While section 28A(1A) of the SDA, as discussed at chapter 2 above, does provide for the consideration of relevant circumstances, including other protected attributes, we submit the current framework does not adequately recognise the ways in which individuals experience intersectional forms of discrimination. Coverage under the ADA is even narrower as it does not explicitly require consideration of these circumstances.

Recommendation:

26) The SDA and ADA should be amended to protect against intersectional discrimination. The definition of discrimination under these acts should specifically include discrimination on the basis of the intersection of two or more attributes.

Consolidation of anti-discrimination laws

As discussed above, the intersection of sexual harassment laws is both complex and confusing to individual complainants. Variations in coverage, definitions and process make an already intimidating formal complaints process even more complex and inaccessible. Anti-discrimination laws remain inconsistent and fail to comprehensively protect the rights to equality and non-discrimination.

Recommendation:

27) The Federal government should consolidate existing anti-discrimination legislation and enact a comprehensive Equality Act that:

- a) addresses all prohibited grounds of discrimination, promotes substantive equality and provides effective remedies, including against sexual harassment, systemic and intersectional discrimination;
- b) The harmonisation of this legislation should reflect at least the highest level of protection currently provided across the relevant States, Territories or Commonwealth.

Access to justice and funding for legal assistance services

As detailed above, bringing a sexual harassment complaint is an often stressful, re-traumatising, time-consuming and complex exercise for individuals. Access to justice for victims of sexual harassment necessitates access to expert free legal advice and representation, delivered within a trauma-informed approach and framework.

Community legal centres have been providing specialist advice and representation to victims of sexual harassment for many years. In particular, CLCs are often the first port of call for vulnerable workers experiencing intersectional forms of discrimination, such as Aboriginal and Torres Strait Islander women, women of colour, women with disabilities and young women.

CLCs do vital work in early intervention and prevention, through community legal education and resolving problems before they escalate. Through our frontline services, we are in a unique position to identify where the law is not working well for our clients, and advocate for systemic change to improve the law and its impact on disadvantaged communities. Additionally, we keep matters out of court through facilitating early resolution of complaints.

However, our resource constraints mean there are often long waits for advice appointments, or after providing initial advice, we are unable to represent clients in matters even where there is strong merit.

Recommendation:

28) The federal and NSW governments should immediately provide increased funding to Community Legal Centres to enable them to provide increased advice and representation in sexual harassment matters.

Conciliator capacity and training

Case Study – Maxine and Mara

Maxine and Mara were employed as customer service assistants in a retail store. Maxine and Mara were both in Australia on working holiday visas. Maxine and Mara's boss began sexually harassing them when they commenced employment. Maxine and Mara lodged sexual harassment complaints with the ADB, who referred them to a CLC for advice.

The CLC agreed to represent Maxine and Mara at conciliation. Both Maxine and Mara were due to return to their home countries shortly after lodging the complaint. The CLC contacted the ADB requesting an expedited conciliation conference. The ADB conciliator was extremely helpful and proactive, contacting both sides to propose conciliation dates and organising an interpreter. The conciliator provided flexibility in holding a joint conciliation conference for Maxine and Mara as this was their preferred option. The conciliation conference was held within two weeks of the request for an expedited conference being made. Settlement was reached at the conference.

A professional, sympathetic and timely response is integral to the experience of a complainant and respondent. For victims of workplace sexual harassment, making a formal complaint to the AHRC, ADB or FWC can be a challenging and intimidating step. Often the complaint process will involve a conciliation conference between the complainant and the respondent, with the assistance of a conciliator. As a result, it is essential that complaint-handlers and conciliators at the AHRC, ADB and FWC are trained appropriately to ensure that victims of sexual harassment are treated with respect and empathy, that the power

imbalance between applicants and respondents is acknowledged and addressed and that conciliators are aware of the difference between questions of fact and law.

Often, appearing at a conciliation means that the victim of sexual harassment will be required to face the perpetrator of the sexual harassment, or management that failed to act and / or respond appropriately when the sexual harassment was reported. As most matters do not proceed past the conciliation stage at the ADB, AHRC and FWC, it is vital that the conciliation process is conducted in a best practice manner which operates within a trauma and sexual violence informed framework, and which provides a safe avenue for victims of sexual harassment to bring their complaint.

We recognise the value of alternative dispute resolution practices, as providing a less formal avenue than court for resolving disputes and options for systemic remedies that are not available at court. Alternative dispute resolution has greater scope to consider the specific needs of participants and can empower participants by allowing them to tell their story and the impacts of the conduct they are complaining about, have a direct role in determining the outcome of a dispute, and taking into account the needs and interests of the participants. This flexibility is integral for victims of sexual harassment to feel they have had an opportunity to have their voice heard and hold a respondent to account for unlawful behaviour.

Kingsford Legal Centre recently conducted a research study, of the experience of vulnerable clients in discrimination conciliations at the ADB, AHRC and FWC.³⁵ In the report of that study, *Having My Voice Heard: Fair Practices in Discrimination Conciliation*, Kingsford Legal Centre found that the conduct of conciliations in sexual harassment matters can vary significantly, both between and within jurisdictions. A conciliation that is not run well can have a re-traumatising effect on the victim of sexual harassment. Conciliation processes that do not adapt reflective practices, particularly where vulnerable clients are involved, can compound the already damaging effects of discrimination.

The Commonwealth Ombudsman has identified key elements of effective complaint-handling, emphasising the need for a culture which values complaints and staff who are skilled and professional.³⁶ The Commonwealth Ombudsman has also acknowledged that closer oversight may be needed for vulnerable complainants,³⁷ and that specialised skills can be required for handling sexual harassment cases.³⁸

³⁵ Maria Nawaz, Anna Cody and Emma Golledge, 'Having My Voice Heard - Fair Practices in Discrimination Conciliation', Kingsford Legal Centre UNSW, 2018.

³⁶ Commonwealth Ombudsman, 'Better Practice Guide to Complaint Handling', Commonwealth Ombudsman, April 2009, 2.

³⁷ Ibid 19.

³⁸ Ibid 18.

The *Having My Voice Heard: Fair Practices in Discrimination Conciliation* report makes key recommendations for improving conciliation processes at the ADB, AHRC and FWC that would benefit applicants in sexual harassment matters:

- Conciliators should receive extensive training on the Acts they operate under; on what is a question of fact and what is a question of law; ADR theory and techniques; and how to mitigate power imbalances in conciliations and employ these techniques when conducting conciliations;
- The complaints bodies should make early referrals to free legal assistance; and
- To improve consistency in conciliation, a basic framework for conciliation procedures should be provided to the parties and any representatives prior to conciliation.

Recommendations:

- 29) Conciliators at the Anti-Discrimination Board NSW, Australian Human Rights Commission and Fair Work Commission should receive extensive training on the relevant sexual harassment legislation and alternative dispute resolution theory and techniques, the nature and dynamics of sexual violence and trauma informed practice.
- 30) The Anti-Discrimination Board NSW, Australian Human Rights Commission and Fair Work Commission should make early referrals to free legal assistance in sexual harassment matters;
- 31) To improve consistency in conciliation, the Anti-Discrimination Board NSW, Australian Human Rights Commission and Fair Work Commission should have appropriate and publicly-available policies in place to empower parties in conciliations. This should include:
- a) providing a basic framework for conciliation procedures to the parties and any representatives prior to conciliation;
 - b) having consistent and transparent practices for legal representation in conciliation conferences, including a presumption that legal assistance lawyers be granted leave to represent complainants in sexual harassment matters; and
 - c) notifying the applicant and respondent about who will be present at the conciliation for both sides.

6 Confidentiality and settlement agreements

Currently conciliation conferences for discrimination matters start with the conciliator explaining the outcome will be confidential. While anything said in the conciliation itself is confidential, whether or not the outcome is confidential is an issue to be negotiated just like the other terms of any settlement. Commencing a conciliation conference with a presumption that the outcome will be confidential can make it difficult for complainants who do not wish for the outcome to be confidential to negotiate this term as a part of settlement discussions.

We recognise that confidentiality of the conciliation process itself is often integral to allowing parties to discuss the complaint in full on a without prejudice basis. However, the confidentiality of settlements reached at conciliations are often unnecessarily broad, and can lead to systemic sexual harassment remaining unaddressed.

It is standard in sexual harassment matters for applicants and respondents to sign a deed upon settling the matter. Such deeds traditionally include a confidentiality or non-disclosure clause. Often, these clauses are extremely broad, and impose confidentiality on the conduct alleged, the negotiations leading to settlement, and the settlement reached.

We recognise there are some benefits to confidentiality clauses:

1. Many of our clients, particularly in rural, regional and remote areas or in small industries with limited employment opportunities do not wish their sexual harassment complaint to be made public, due to fear about an adverse impact on future employment opportunities; and
2. Respondents often settle sexual harassment matters due to a desire to avoid reputational damage - if confidentiality clauses were not available, it is likely that some matters would not be settled due to a lack of incentive for the employer, or that settlement amounts would be even lower.

However, we submit that the standard use of confidentiality clauses in settlement deeds in sexual harassment matters effectively has a silencing effect on complainants, and allows endemic sexual harassment to occur. In our experience, we see numerous sexual harassment complaints against the same employers and individual employees, indicating that the confidentiality associated with settling sexual harassment complaints can allow employers and perpetrators to continue to engage in unlawful conduct and avoid repercussions.

An option to address the unfair effects of confidentiality agreements in sexual harassment matters is to introduce a law to regulate the type of confidentiality agreements available in sexual harassment matters. For example, California recently passed a law that restricts the use of non-disclosure agreements in settlements involving sexual harassment.³⁹ The law prohibits confidentiality in settlement agreements in sexual harassment matters, with the exception of allowing a confidentiality provision should the applicant request it. The law also prohibits the use of a confidentiality clause to suppress factual information in sexual harassment claims. Under the law, both parties can request that the settlement amount remain confidential. We submit that the federal and state governments should introduce similar legislative provisions based on the California law to empower victims of sexual harassment to bring claims, and deter repeat conduct on the part of respondents.

³⁹ Senate Bill No. 820, Chapter 953, An act to add Section 1001 to the Code of Civil Procedure, relating to civil procedure. http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB820

Recommendations:

- 32) The federal and NSW governments should introduce a law to regulate the use of confidentiality agreements in sexual harassment matters. The law should:
- (a) Prohibit confidentiality in settlement agreements in sexual harassment matters, with the exception of allowing a confidentiality provision should the applicant request it. Any confidentiality clause that is included at the request of the applicant should be drafted in plain English and have a clear explanation of what information cannot be disclosed;
 - (b) Prohibit the use of a confidentiality clause to suppress factual information in sexual harassment claims; and
 - (c) Allow both parties to request that the settlement amount remain confidential.

7 Workplace health and safety obligations

Sexual harassment is not treated as a WHS issue

SafeWork NSW can assess and regulate workplace compliance with the *Work Health and Safety Act 2011* (NSW) (**WHS Act**), by investigating unsafe workplaces, issuing penalty notices, enforceable undertakings and prosecuting breaches of WHS law. Despite the fact that sexual harassment is so prevalent in the workplace, with one in three workers in Australia reporting that they had been sexually harassed at work over the last five years,⁴⁰ there is no current work health and safety obligation on employers to prevent their workers from being harassed. Sexual harassment is not treated as a health concern in the same way as bullying.

The short and long-term health effects of sexual harassment include psychological distress, stress, depression, anxiety, and post-traumatic stress disorder. In turn, these conditions are risk factors for various chronic diseases, blood pressure issues, cortisol concentrations, heart rate variability, obesity, hypertension, smoking, harmful use of alcohol, cardiovascular disease, and some cancers.⁴¹ Despite these significant health impacts, sexual harassment is generally not treated as a work health and safety issue.

Recommendation:

- 33) The NSW government should amend the *Work Health and Safety Act 2011* (NSW) to explicitly include sexual harassment as a health risk to workers, requiring SafeWork NSW to investigate, address and manage sexual harassment.

⁴⁰ Australian Human Rights Commission, above n 2, 8.

⁴¹ Adrienne O'Neil et al, 'The #MeToo movement: an opportunity in public health?' (2018) 391(10140) *The Lancet* 2185, 2587.

Workers compensation

Case study: Jonathan

Jonathan had been working at his office job for about a year when one of his colleagues started acting inappropriately towards him. The colleague made inappropriate comments of a sexual nature, touched Jonathan frequently and used social media to contact him outside of work.

After trying to tell his colleague that the conduct was unwelcome, Jonathan started trying to avoid him in the office as much as possible. The situation did not improve, and Jonathan became very stressed and anxious about going to work. He took sick leave and lodged a complaint about the sexual harassment.

A CLC assisted Jonathan in the discrimination conciliation process. After a long and stressful conciliation, Jonathan was able to reach a settlement with his colleague and his employer for financial compensation and an agreement that the employer would undertake sexual harassment training for all staff.

Because Jonathan suffered psychological injuries as a result of the sexual harassment which made it difficult for him to work, the CLC advised him to get workers compensation advice about his situation. We had to advise him that his ability to get workers compensation may be negatively affected by any ADB settlement he reached. This area of the law is confusing and was difficult to deal with at the same time as the ADB complaint process.

Clients have a choice of jurisdiction in which to make a claim for sexual harassment: the ADB, the AHRC, the FWC, or making a worker's compensation claim to their employer's insurer. Depending on the circumstances, a client may also be eligible to make a claim for Victims Support. A client is unable to 'double dip' or claim the same remedy through a sexual harassment claim and through workers compensation.⁴²

In order to determine whether a claim has merit, 2 sets of issues need to be determined:

1. Did a person (for instance) engage the client in unwelcome conduct of a sexual nature in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that client would be offended, humiliated or intimidated; and

⁴² *Workers Compensation Act 1987* (NSW) s 151A.

2. Has the client notified their employer and insurer of the injury caused by sexual harassment? Has the client provided a worker's compensation certificate of capacity? Is the client suffering from a diagnosable psychiatric injury that impairs at least 15% of the client's whole person? Was the injury wholly or predominantly caused by reasonable action taken by the employer.

To make a worker's compensation claim, the client may be able to obtain a grant from the Workers Compensation Independent Review Office (**WIRO**) that will cover the client's legal costs and medical reports. Apart from receiving support from their Union, CLC or Legal Aid, the client does not otherwise have the same option to receive free legal services to support an application to the AHRC, ADB or FWC. These access to justice issues are persuasive considerations for a client in choosing a legal pathway.

Lawyers need to advise a complainant about the range of potential causes of action, the pros and cons of each option and the consequences of each choice. Based on this advice, lawyers then need their clients to instruct them on what option they want to pursue. A complainant may not be interested in monetary outcomes, and may be interested in 'justice' in the form of an acknowledgment of wrong doing by the respondent and an assurance that their employer will take steps to protect workers, such as implementing policies and training. The no-fault statutory workers compensation scheme does not extend to such remedies, and this may be unsatisfactory for complainants. Conversely, the client may be interested in having their medical costs and loss of earnings covered, and be paid a lump sum for their injury. Such payments may exceed estimated damages of bringing a discrimination claim.

To ensure that a client's claim is not barred by incorrectly characterising the injury or remedy claimed, solicitors need to have expertise across employment law, discrimination law and also workers compensation. The short time limits to bring a sexual harassment complaint (see Chapter 3) are further complicated by waiting for worker's compensation options to be resolved.

As many CLCs do not provide advice on worker's compensation, there is a systemic issue in CLC lawyers providing holistic advice to a sexual harassment complainant with multiple jurisdictional options. Having to refer clients elsewhere for worker's compensation advice makes it difficult to holistically assess claims and provide advice.

Case study - Lee

Lee was sexual harassed at work. Lee had asked for a meeting with her manager to talk about her unreasonable workload and unrealistic deadlines. During this meeting, Lee's manager told her *"Your face is beautiful. If I could bend you over the table, I would go for it."* Lee did not respond to these advances. Soon after, she was dismissed.

A CLC advised her on a number of options, including making claims for a general protection breach, sexual harassment and workers' compensation. The CLC talked Lee through the risks

of 'double dipping' in making a claim for sexual harassment and then making a claim for worker's compensation for the same issue. The CLC helped Lee characterise workplace injury relating to depression and anxiety diagnosed consequent to her sexual harassment at work. Lee was well prepared going into her conciliation at the Fair Work Commission, and knew how to tailor a deed of release that would limit the risk in making a later, more beneficial, worker's compensation claim.

8 International student visa holders

Case study -Claire

Claire is an international student at an Australian university. After arriving to begin her studies, Claire started working as a waitress to assist with the cost of studying. On her first shift, Claire's boss brushed past her and touched her breasts and buttocks. His behaviour became bolder, and by her third shift he openly touched her multiple time on the breasts and buttocks. Claire witnessed him behave similarly with other female staff members. This boss offered to pay her money if she would perform sexual acts on him. He showed Claire a room at the back of the restaurant where he took female staff members to perform his requests. Claire refused all of her manager's advances, but this did not stop her manager's behaviour. Claire needed the money and so tolerated this behaviour for some time, but she became increasingly scared for her safety and resigned from the restaurant.

Specific issues for international students that experience sexual harassment:

Vulnerabilities

Clients on international student visas are particularly vulnerable to sexual harassment in the workplace for a number of reasons.⁴³ The temporary nature of students' visas creates a significant power disparity between these students and their employer. International students are often young and from culturally and linguistically diverse backgrounds. Many international students may not know whether harassing behaviour is acceptable social conduct in Australia. They may not have a working knowledge of their legal rights at work, or the Australian legal system, or an understanding of where they can go for support if they have a legal issue at work or otherwise. Many students are isolated, and do not know who to ask for help. Many are under considerable financial stress. They can have trouble getting

⁴³ Factors that stopped migrant workers from trying to recover unpaid wages was surveyed in the National Temporary Migrant Work Survey (NTMWS). These factors also apply generally to international students who have been sexually harassed at work. The NTMWS was reported on in: Farbenblum, B, & Berg, L 2018 *Wage Theft in silence: Why Migrant Workers Do Not Recover Their Unpaid Wages In Australia* viewed 14 March 2019 <<https://static1.squarespace.com/static/593f6d9fe4fcb5c458624206/t/5bd26f620d9297e70989b27a/1540517748798/Wage+theft+in+Silence+Report.pdf>>

work, and are at risk of losing their jobs if they complain about sexual harassment. Further, international students are concerned that complaining about sexual harassment at work can create a risk to their reputations in their communities, and limit their future job prospects. They are effectively dispensable in the saturated labour market of their low wage industries.⁴⁴

Visa conditions

International students on a subclass 500 student visa⁴⁵ are subject to visa condition 8105⁴⁶ which prohibits them from working more than 40 hours per fortnight when their course is in session. If an international student is found to have breached this condition, the Department of Home Affairs (**'the Department'**) may cancel their visa.⁴⁷ Visa cancellation can not only remove a student's right to study in Australia, but can restrict the type of visa they can use to stay in or re-enter Australia,⁴⁸ ban a student from re-entering Australia,⁴⁹ result in a student being taken into immigration detention,⁵⁰ or removed from Australia.⁵¹

For students, visa cancellation can take place automatically through serving them with a cancellation notice.⁵² This cancellation can only be revoked if the student can establish that there was no breach, or that the breach was due to 'exceptional circumstances' beyond their control.⁵³ There is a high evidentiary bar to establish exceptional circumstances.

If a student breaches conditions of their visas, the Department does not have the discretion to impose an alternate penalty, such as a warning or the imposition of a civil penalty. Even a minor visa condition breach could require an international student to leave Australia without finishing an expensive degree or course. The Senate Report, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, released in March 2016, addressed this issue at [8.45]:

⁴⁴ Ibid 15.

⁴⁵ We have only considered subclass 500 (student) visa in this report, for visa applications made after 1 July 2016.

⁴⁶ *Migrations Regulations 1994* (Cth) (**Migration Regulations**) sch 8 cl 8105.

⁴⁷ *Migration Act 1958* (Cth) (**Migration Act**) s.116.

⁴⁸ *Migration Regulations* sch 4-5.

⁴⁹ *Migration Act* ss.48, 501E and *Migrations Regulations* sch 4 cl 4013-4014, sch 5 cl 5001-5002, 5010.

⁵⁰ *Migration Act* s.189.

⁵¹ Ibid s.198.

⁵² Ibid s.137J and *Education Services for Overseas Student Act 2000* (Cth) (**ESOS Act**) s.20.

⁵³ *Migration Act* ss.137K-137L and *ESOS Act* s.20.

“The severity of the consequences was seen as a structural incentive for an employer to entice or coerce a temporary visa worker into breaching a condition of their visa in order to gain leverage over the worker”.⁵⁴

CLCs regularly deal with international students who face serious exploitation at work but are constrained from taking legal action due to the risk of visa cancellation. Clients tell us that unscrupulous employers have threatened to report actual or fabricated breaches of condition 8105 to the Department to silence their complaints about workplace conditions and stop them from taking legal action to enforce their legal rights.

If the employment visa condition is removed, international students will be able to work in the same way as local students. These students will not need to risk breaching their visas in order to support themselves financially. Students will still be required to focus on the object of their visa: their studies. The operation of other visa conditions requires students to attend 80% of their classes, and they must achieve a satisfactory course results.⁵⁵

The elimination of condition 8105 will remove an obstacle to international students taking legal action against sexual harassment in the workplace. Employers will no longer be able to use the threat of visa cancellation over international students who complain of such conduct at work.

Strict liability for breaches of visa conditions

International students currently risk visa cancellation if they breach condition 8105. More students would take action against sexual harassment if they were assured that they would not have their visas cancelled for a first-time breach of condition 8105.

In 2017, RLC made a proposal to remove strict liability for student visa breaches, and for the adoption of a decision-making protocol by the Department to follow a more nuanced approach to visa breaches and cancellation (see Appendix B). In most situations where a student has breached 8105, this protocol would provide for a first and final warning to the visa holder. Students would then be better placed to access Australian legal protections against workplace exploitation while continuing with their studies.⁵⁶

⁵⁴ Senate Standing Committees on Education and Employment, Parliament of Australia, *A National Disgrace: the Exploitation of Temporary Work Visa Holders* (Final Report, March 2016).

⁵⁵ Migration Regulations, sch 8 cl 8202.

⁵⁶ In 2017, RLC made recommendations on this issue in submissions to the Migrant Workers Taskforce. It was proposed that this decision making protocol be issued in the form of a Ministerial Direction as made under section 499 of the Migration Act. These are provided at appendix B.

Limited protection of international students

Employers hold considerable power over international student employees. There are very few mechanisms that give international students any protection against employers that exploit international students and violate their employment rights.

The Fair Work Ombudsman and Department of Home Affairs ‘amnesty’

The Fair Work Ombudsman (**‘FWO’**) offers migrant workers an ‘assurance protocol’ or ‘amnesty’ to support workers come forward to request assistance from the FWO and provide evidence or information about exploitation.⁵⁷ The FWO has an arrangement with the Department that a person’s temporary visa will not be cancelled if they were entitled to work, believe they have been exploited at work, have reported their circumstances to FWO, and actively assist FWO in an investigation. The migrant worker must commit to abide by visa conditions in the future and there must be no other basis to cancel the worker’s visa.

Further details of the agreement between FWO and the Department are unknown. The amnesty requires the FWO to share information about a client’s breach of visa conditions with the Department in order for the Department to give the client an exemption from cancelling their visa. Some CLC clients have indicated that they are uncomfortable with the FWO sharing information with the Department about them breaching visa conditions.⁵⁸ Other clients have concerns that they will not be protected against visa cancellation where they report workplace exploitation to the FWO, but are then involved in FWO mediation or dispute resolution (rather than FWO investigation), or no action is taken by the FWO.⁵⁹ While, to our knowledge, no CLC clients’ visas have been cancelled due to making a report of exploitation to the FWO, many clients have expressed reluctance to report to the FWO without a guarantee that they will not have their visa cancelled.

Further, the wording of the amnesty offers migrant workers protection from exploitation, however this does not appear to include sexual harassment: the FWO does not assist complainants of sexual harassment, and directs complainants to state anti-discrimination bodies and the AHRC.

⁵⁷ Australian Government: Fair Work Ombudsman, *Visa Holders and Migrants* (Web Page) <<https://www.fairwork.gov.au/find-help-for/visa-holders-and-migrants>>.

⁵⁸ Recommendations were made to the Migrant Workers’ Taskforce that an information ‘firewall’ be created between the Department and FWO to address the reluctance of migrant workers to report exploitation: The Migrant Workers’ Taskforce (7 March 2019) *Report of the Migrant Workers’ Taskforce*. Available at: <https://docs.jobs.gov.au/documents/report-migrant-workers-taskforce> (Accessed: 20 March 2019).

⁵⁹ Ibid: The Migrant Workers’ Taskforce has indicated that FWO and the Department are conducting further analysis to consider whether visa holders participating in a broader range of FWO services can access the amnesty.

Limited enforcement of employer obligations

All Australian employers have obligations under the *Migration Act 1958* (Cth). Employers must not employ a worker in breach of a work-related visa condition.⁶⁰ In response to breaches, the Australian Border Force ('ABF') applies a tiered framework of compliance and enforcement tools according to the frequency and seriousness of the breaches.⁶¹ These tools include issuing administrative penalties, infringement notices, civil penalties and criminal penalties. As strict liability offences, it does not matter if an employer is not aware of their obligations or whether or not an individual is not allowed to work in Australia. Unless employers have taken reasonable steps to verify that the person is allowed to work, they are in breach of these laws.

In 2017- 2018, the Migrant Workers' Taskforce encouraged the ABF to increase its focus on non-compliant employer and sponsors. In that period, the ABF issued 19 infringement notices to employers and 2 briefs of evidence were accepted by the Commonwealth Director of Public Prosecution ('CDPP').⁶² The CDPP conducted no prosecutions against employers for breaches of offences in relation to work by migrant workers in the period.⁶³ While we welcome this increase in upholding and enforcing employer obligations by the ABF and CDPP, there are still limited legal consequences for exploiting employers.

Limited legal support for international students

Studies have indicated that international students are interested in enforcing their employment rights but fail to do so because they do not know how, and/or were scared about possible immigration consequences.⁶⁴

There are limited services available to help international students with their legal problems at work, or more generally. Students may go to their local CLC, their universities' legal service, RLC's International Students Service NSW, their union or go to FWO. The capacity of the CLC sector to advise and represent international students in taking sexual harassment action is stretched. Reports indicate that international students do not join their union, and that despite FWO's significant efforts to engage migrant workers, relatively few contact the agency through its Infoline or otherwise.⁶⁵

Due to their vulnerability to visa cancellation because of condition 8105, many international students do not complain about sexual harassment at work and require legal assistance to

⁶⁰ Migration Act div 12 sub-div C.

⁶¹ The Migrant Workers' Taskforce, above n 58, 69

⁶² Ibid 71

⁶³ CDPP, *Prosecution Statistics* (Web Page, 2018) <<https://www.cdpp.gov.au/statistics/prosecution-statistics>>.

⁶⁴ In the context of taking action on wage theft. Farbenblum, B, & Berg, L Wage Theft in Silence, above n **Error! Bookmark not defined.**, 7-8.

⁶⁵ Ibid

take any action against such conduct. Existing legal services need to be better resourced to advise and represent international students in sexual harassment proceedings. Students need targeted resources and legal education to learn about their rights at work and sexual harassment. They need legal representation and other assistance to help identify and substantiate all potential claims. International students need assistance in liaising with government agencies, regulators and policy-makers on their behalf. All legal services that help migrant workers must be accessible and independent of government.

Recommendations:

- 34) The federal government should remove visa condition 8105 from student visas.
- 35) If condition 8105 is not removed, the federal government should issue a decision-making protocol so that international students can be issued with a warning instead of having their visas cancelled if they breach their work conditions.
- 36) The NSW and federal governments should increase their funding to community-based employment services and create a community-based 'one-stop-shop' hub to assist vulnerable migrant workers to navigate the system and enforce their rights.

9 Cultural change

Community Legal Education

Case study: 'Me Too, It's About You' community legal education program

In 2018, when the #MeToo movement was gaining momentum Kingsford Legal Centre staff had a conversation about how KLC could be a part of that and encourage cultural change in young people. KLC has a strong focus on community legal education and wanted to help, so developed a community legal presentation on sexual harassment to give to local high schools. The presentation is aimed at year 9 and 10 students of all genders and predicated on the fact that at that age range the young people are old enough to be having that conversation and they may also be about to enter the workforce with many of them getting part-time jobs. The aim is to start a conversation about sexual harassment and to educate young people around their rights and responsibilities in relation to sexual harassment. By the end of the workshop KLC hopes that the students will understand what sexual harassment is, be able to identify it in day-to-day life, and know what they can do to help put a stop to it.

In September 2018 KLC presented the workshop to around 50 Year 9 students at Matraville Sports High School and in October 2018, to around 60 Year 10 students at JJ Cahill. There are plans to present to Randwick Boys High School in April this year.

The students have been very receptive to learning about sexual harassment and adapting their ideas. The teachers were really impressed by the program. Students were asked to

complete surveys and the feedback was positive, with students saying they had walked away and learnt something new including how jokes or sexual propositioning could be sexual harassment and that they did not have to put up with this kind of behaviour. KLC is now developing a CLE pack with instructions and resources so that the program can be picked up by other CLCs and delivered in their area.

While the law has a very important role to play in setting standards about what conduct is and is not acceptable in line with society's standards and human rights norms, cultural change is equally important in order to prevent sexual harassment from occurring in the first place.

CLCs have a well-established community development approach to promoting early intervention in legal matters and preventing legal problems from occurring in the first place. CLCs conduct community legal education programs for members of the community, community workers and other professionals to help them learn about their rights and obligations under the law. It is integral that those entering the workforce, and employers are aware of what sexual harassment is, how to intervene as a bystander, how to complain and where to get legal advice and for employers, their obligations.

Recommendation:

37) The federal and state governments should provide increased funding for community legal centres to develop and deliver sexual harassment community legal education programs in schools, workplaces and the community in general.

Education and awareness raising by the specialist complaints-handling bodies

The ADB and AHRC are both statutorily empowered to undertake information and education programs to promote human rights/anti-discrimination. There is significant potential for the ADB and AHRC to take a leading role in educating the community and employers about their rights and obligations under sexual harassment law through education programs and other awareness-raising activities.

For example, the ADB and AHRC could be resourced to develop best practice policies to prevent sexual harassment in the workplace, and make these available to help employers meet their obligations. The ADB and AHRC could also develop sexual harassment training for employers and employees to be delivered to support employers to comply with sexual harassment laws.

Recommendation:

38) The federal and state governments should increase resourcing to the Australian Human Rights Commission and Anti-Discrimination Board NSW to enable them to fulfil their education functions.

Cultural change in workplaces

Case study - Lisa

Lisa's manager sexually harassed her. He forced her to hug him for prolonged periods. Lisa once asked him how she could help with a work task and he said, "*You can help me with a ménage à trois*". He pulled Lisa onto his lap and called it foreplay. He took Lisa into a dark cupboard to offer her a permanent job. Lisa was then moved to a desk near her manager's desk where he would frequently strip down to his underwear and work at his desk. After the cupboard incident, Lisa made an official complaint to human resources. They questioned some witnesses and were able to substantiate some of the claims. Lisa was told by HR that the manager was meeting all his targets. No action was taken against the manager.

The company offered Lisa work from home and to move her desk away from her manager's which she found to be inadequate solutions. At an internal mediation, the company offered Lisa either a pay rise or a permanent contract with a confidentiality clause which she declined. During the meeting, the company owner joked about the matter and HR lectured her on manners. Lisa resigned from her job and was under financial stress subsequently. She accessed her superannuation early to access counselling following the sexual harassment because she developed poor sleep, nightmares, loss of confidence and anxiety.

Our clients report experiencing trauma as a result of how their employers respond to and handle their complaints of sexual harassment. In most cases an inadequate reporting and investigation process can worsen the impact of any harassment and in some circumstances could even amount to victimisation.

As the AHRC's 2018 survey outcomes highlight,⁶⁶ employers need to continue taking steps both to prevent workplace sexual harassment from occurring and to ensure that they respond appropriately when a report is made. Workplace culture is often cited as having a significant impact on either preventing or encouraging sexual harassment.⁶⁷ Instead of responding to incidents as they arise, workplaces must adopt holistic, systemic approaches that include systems to prevent sexual harassment, in order to improve the reporting and investigation aspects.

⁶⁶ Australian Human Rights Commission, above n 2.

⁶⁷ United States Equal Employment Opportunity Commission (EEOC Report), *Report of the Co-Chairs of the Select Task Force on the Study* (June 2016).

Sexual harassment policies

In order to implement effective training, reporting and investigating, an employer's sexual harassment policy is a key component in grounding organisational dedication to the issue, and ensuring holistic sexual harassment prevention.

Recommendations:

- 39) The highest level of management in a workplace should be involved in the policy making to reinforce that the company values do not condone sexual harassment. This will help to create a culture of respect in which harassment is not tolerated.⁶⁸
- 40) Workplaces should make regular sexual harassment training compulsory.⁶⁹
- 41) Workplaces should define the type of conduct that constitutes sexual harassment, set out the complaint process (including the complainant/respondent's rights), the investigation process (stressing it is transparent, confidential and fair), and the disciplinary action that will be taken against sexual harassment.⁷⁰
- 42) Workplaces should regularly publish their sexual harassment policy via various workplace channels including on website and social media to encourage transparency, and giving it to each employee at induction.⁷¹

Training on sexual harassment

Research suggests that training employees about an employer's policy, reporting systems and investigations is an effective way to prevent sexual harassment, and increase reporting of sexual harassment. However, studies have shown that only 58% of organisations in Australia provide sexual harassment training.⁷²

Recommendations:

- 43) Workplaces should tailor sexual harassment training to the specific workplace in question, with relevant examples, scenarios, and addressing workplace-specific risk factors.⁷³ Such training should also address the drivers of gender-based violence and respectful workplace conduct and provide training on responding appropriately and sensitively to victim disclosures.

⁶⁸ Center for Talent Innovation, *What #Metoo means for Corporate America Key findings*: (Survey Report, 2018) and Centre for Talent Innovation, 'The Pervasiveness of Sexual Harassment in Today's White-Collar Workplace' (Media Release, 11 July 2017).

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ United States Equal Employment Opportunity Commission, above n 67.

⁷² Hugh TJ Bainbridge, Elissa L Perry and Carol T Kulik, 'Sexual Harassment Training: Explaining Differences in Australian and US Approaches' (2018) 56 *Asia Pacific Journal of Human Resources* 124.

⁷³ United States Equal Employment Opportunity Commission, above n 67.

Reporting and investigating

Effective reporting and investigating policies and procedures are integral to increasing the reporting of sexual harassment, ensuring high quality, responsive and timely investigations that are sexual violence and trauma informed and decreasing the incidence of sexual harassment in the workplace. All employers should be required to introduce a reporting system that allows employees to file a report of harassment they have experienced or observed, and a clear and transparent process for undertaking investigations.

Recommendations:

- 44) Workplaces should allow for multifaceted reporting systems, by those who have observed and those who have experienced sexual harassment. There should be with a choice of procedures (hotlines, web-based) and complaint handlers (such as managers and human resource departments).⁷⁴
- 45) Workplaces should handle reports of sexual harassment sensitively, confidentially and transparently. This includes responding to and investigating reports promptly, thoroughly and fairly, and keeping the complainant informed.⁷⁵
- 46) Workplaces should take proportional corrective action in response to sexual harassment complaints. Those who engage in sexual harassment must be held responsible in a meaningful, appropriate, and proportional manner through sanctions proportionate to behaviour, irrespective of a person's rank.⁷⁶

⁷⁴United States Equal Employment Opportunity Commission, above n 67.

⁷⁵Ibid, Center for Talent Innovation, above n 68.

⁷⁶United States Equal Employment Opportunity Commission (EEOC Report), above n 67.

Appendix A: Sexual harassment under international human rights law

Australia's obligations under international human rights law

Australia is a signatory to a number of international treaties prohibiting discrimination in the workplace, and guaranteeing the right to work and just and favourable conditions of work. These include:

- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
- The International Covenant on Civil and Political rights (ICCPR);
- The International Covenant on Economic, Social and Cultural Rights (ICESCR); and
- International Labour Organisation (ILO) Discrimination (Employment and Occupation) Convention (C111).

As a signatory to these treaties, Australia has committed to promoting policies, laws, structures and attitudes that ensure women enjoy the same protections from discrimination in the workplace as men.

CEDAW

The Convention on the Elimination of All Forms of Discrimination against Women requires states parties to take all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 11 of CEDAW requires states to take all appropriate measures to eliminate discrimination against women in the workplace.

The Committee on the Elimination of the Discrimination Against Women has interpreted article 11 to require protections against sexual harassment in the workplace:

“Equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace. Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.”⁷⁷

⁷⁷ Committee on the Elimination of Discrimination Against Women, General Recommendation No 19 (1992) On Violence Against Women, 11th Sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I).

ICCPR

Article 2 of the ICCPR requires states party to respect and ensure the protection of rights enshrined within the ICCPR. This includes ensuring that states party respect and ensure all individuals enjoy the rights contained within the treaty, irrespective of any distinctions based on sex, race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status.

On 29 March 2000 the Human Rights Committee adopted *General Comment 28* (GC 28), which replaced *General Comment 4*. This reflected the experience of the Human Rights Committee over the 20 years since the ICCPR's inception and provides recommendations as to how best implement the ICCPR, such as:

“The Committee has also often observed in reviewing States parties’ reports that a large proportion of women are employed in areas which are not protected by labour laws and that prevailing customs and traditions discriminate against women, particularly with regard to access to better paid employment and to equal pay for work of equal value. States parties should review their legislation and practices and take the lead in implementing all measures necessary to eliminate discrimination against women in all fields, for example by prohibiting discrimination by private actors in areas such as employment, education, political activities and the provision of accommodation, goods and services. States parties should report on all these measures and provide information on the remedies available to victims of such discrimination.”⁷⁸

ICESCR

Article 6 of ICESCR requires states party to recognise the right to work and safeguard this right.

Article 7 of ICESCR requires states party to recognise the right of all individuals to enjoyment of just and favourable conditions of work, including safe and healthy working conditions.

The United Nations Economic, Social and Cultural Rights Committee has interpreted article 6 and article 7 to require that:

“All workers should be free from physical and mental harassment, including sexual harassment. Legislation, such as anti-discrimination laws, the penal code and labour legislation, should define harassment broadly, with explicit reference to sexual and other forms of harassment, such as on the basis of sex, disability, race, sexual orientation, gender identity and intersex status. A specific definition of sexual

⁷⁸ Human Rights Committee, *General Comment No 28 (2000) on The Equality of Rights between Men and Women*, 68th Sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I).

harassment in the workplace is appropriate, and legislation should criminalize and punish sexual harassment as appropriate.”⁷⁹

ILO’s Discrimination (Employment and Occupation) Convention 1958 – C111

Article 2 of the ILO Convention C111 stipulates that each member to this convention should pursue a national policy designed to promote, by appropriate methods, equality of employment and occupation with a view to eliminating any form of discrimination in the workplace.

⁷⁹ United Nations Economic and Social Council, *General Comment No 23 (2016) On the right to just and favourable conditions of work (Article 7 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/23.

Appendix B



Redfern Legal Centre

Exploitation of International Students in the Workforce Proposal for a new Ministerial Direction under s499 of the *Migration Act 1958*

Redfern Legal Centre

1. Redfern Legal Centre (RLC) is an independent, non-profit, community-based legal organisation with a prominent profile in the Redfern area.
2. RLC has a particular focus on human rights and social justice. Our specialist areas of work are domestic violence, tenancy, credit and debt, employment, discrimination and complaints about police and a dedicated international student legal service. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free legal advice, conduct case work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

RLC's work with International Students

3. RLC has been providing advice to international students through its international student advice service since October 2011.
4. We launched this service following an increase in the number of international students seeking advice over the previous few years. International students appear to be particularly targeted and vulnerable to exploitation in a number of areas including housing, employment, consumer scams and issues with their education providers.
5. A key feature of the service is access to both legal and migration advice. In our experience international students frequently have a visa issue associated with their legal problem and fears about their visa status can prevent international students from seeking advice or asserting their rights.

Combatting Exploitation of International Students in the Workforce

6. Redfern Legal Centre (RLC) wants to ensure the workplace rights of international students are implemented, complied with and enforced by facilitating safe and secure reporting of breaches of Australian law.

7. The RLC International Students and Employment Law practices regularly deal with international students who face serious exploitation at work but are constrained from taking action if they have worked over their 40 hour per fortnight visa condition, the breach of which is a clear threat to their visa status.
8. The focus of our proposal is to address unscrupulous employment practices and exploitation of vulnerable employees who are very unlikely to report breaches of workplace laws as they risk their visa status.
9. The Senate Report, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* ('the Senate Report'), released in March 2016, addressed this issue in detail at Chapter 8. The Report noted, at [8.45]:

... one of the key points emphasised by several submitters and witnesses were the draconian consequences under the Migration Act that flowed from a temporary visa worker breaching a condition of their visa. The severity of the consequences was seen as a structural incentive for an employer to entice or coerce a temporary visa worker into breaching a condition of their visa in order to gain leverage over the worker.
10. See also the Productivity Commission 2015 report *Workplace Relations Framework* regarding threats by employers to report migrants who have breached visa conditions, even where there has been coercion, as deterring complaints of exploitative work conditions. (Productivity Commission Inquiry Report No. 76, 30 November 2015, at 921.
11. We propose a decision-making protocol which, in most cases, provides for a first and final warning so, if no further breach, a visa holder can continue with their studies and the integrity of workplace laws and conditions are maintained. This will also allow relevant agencies, including the DIBP, FWO and AFP, to be apprised of unscrupulous employers and labour hire companies and so buttress current and ongoing workplace investigations. We propose that this decision-making protocol be in the form of a Ministerial Direction as made under s499 of the Act.
12. We have drawn on the submission of Associate Professor Joo-Cheong Tham to the Senate Inquiry, in which he proposed an amendment to the *Migration Act 1958* (the Act) at section 116 and 235 (see the Senate Report at [8.56]ff). We propose that such provisions could be incorporated into a Ministerial Direction.
13. Section 499(1) of the Act empowers the Minister for Immigration and Border Protection (the Minister) to give written directions to a person or body having functions or powers under the Act, if the directions are about the performance of those functions or the exercise of those powers. These directions must be consistent with the Act and the Migration Regulations 1994, and they must be

tabled in Parliament after they are given by the Minister. A Ministerial direction made under s499 is binding on a DIBP delegate as:

- a. s499(2A) provides that a person or body having functions or powers under the Act must comply with directions made under s499(1); and
- b. s496(1A) provides that persons to whom the Minister's powers under the Act have been delegated (under s496(1)) are subject to the directions of the Minister.

14. Given their nature, section 499 Directions are generally used where the performance of a function (or the exercise of a power) under the Act is of critical importance to the integrity of Government policy to ensure that all ministerial delegates consistently weigh or take into account relevant matters and/or that specified procedures are followed consistently by ministerial delegates.
15. While there are current DIBP instructions (referred to as PAM3 instructions) which delegates may use in visa decision making (including specific visa cancellation instructions) these PAM3 instructions do not hold the same weight as a Ministerial Direction, nor are they as transparent as a Direction, which is required to be tabled in Parliament. For this reason, we propose that a new Ministerial Direction be issued to provide guidance as to appropriate matters to be taken into consideration in the exercise of the discretion whether to cancel a student visas for non-compliance with conditions 8104 or 8105. We would see great benefit in such a Direction on the basis that it:
 - a. Would provide greater transparency as to the visa cancellation process and the factors that a delegate will take into account within the context of exercising the legislative discretion whether to cancel the student's visa under s116(1)(b) of the Act; and
 - b. Would be binding at both primary decision and merits review decision level.

Basis of direction

16. Where the DIBP is apprised of a student's details in which there has been a breach of visa condition 8105, this will not trigger cancellation of the visa unless there has been serious non-compliance. In determining whether this is the case, the decision maker could have regard to factors such as:
 - whether the non-compliance/contravention occurred with knowledge of its unlawfulness on the part of the visa-holder;
 - the frequency of the non-compliance/contravention;
 - the gravity of the non-compliance/contravention;
 - whether the non-compliance/contravention was brought about by conduct of others, including employers; and/or

- whether visa-holder previously warned by the Immigration Department in relation to the non-compliance/contravention. (Senate Report at [8.57])
17. Further, we propose the reference to ‘conduct of others’ would take into account the relative bargaining position of the parties, including importing accepted contractual considerations such as duress, legality, consent. This would allow for relevant considerations to incorporate socio-economic, cultural, educational and other factors influencing the capacity of the visa holder to have consented to the employment contract.
 18. To effect this decision-making process, we also refer to Associate Professor Tham’s proposal for a warning system whereby a system of civil penalties modelled upon section 140Q(1) of the *Migration Act* is introduced. This provides for civil penalties when there is a failure to satisfy a sponsorship obligation by sponsoring employers. As the Senate Report notes, given a maximum of 60 penalty units applies to section 140Q(1), Associate Professor suggested a proportionate penalty for a breach by a visa-holder would be 5 penalty units.

Proposed decision-making protocol structure

19. a. Decision at first instance: presumption is in favour of the visa holder maintaining visa status and a warning will be issued.
 - (i) The presumption will be rebutted at first instance only in cases of extreme non-compliance
 - (ii) A single breach does not amount to serious noncompliance.
 - (iii) Multiple breaches occurring in a continuing course of conduct will be deemed as a single breach.
- b. If a subsequent breach: cancellation where there has been serious noncompliance. The first warning is a relevant consideration – as per conditions set out above. See Senate Rec 23, ref [8.263], Senate Rec 22, ref [8.253], Senate Rec 24 [8.269]

Opening the Floodgates?

20. We have discussed this proposal with many individuals and organisations working in this field and have had unanimous support. In addition, we have submitted the proposal to the Federal Government’s Migration Review Taskforce and discussed the proposal with the Taskforce chair, Allan Fels.
21. We understand that there may be concerns on the part of government because of a perceived loosening up of the regime’s objective to ensure students attend the requisite hours at their education institutions.

22. In our view, this proposal should not open the floodgates for international students to throw in the studies in favour of unconstrained employment. Contraventions will still be subject to regulatory action, including warnings and penalties and still a possibility of visa cancellation where there is a subsequent breach.
23. Further, non-attendance by students is strictly regulated by the *Education Services For Overseas Students Act 2000* and the *National Code of Practice for Providers of Education and Training to Overseas Students* (National Code). Student visa condition 8202 requires satisfactory course attendance and progress in the registered course.
24. The National Code requires education providers to have documented policies and procedures for recording the attendance and course progression of each international student. The students are expected to achieve a minimum of 70%-80% of the scheduled course contact attendance, with an additional early warning system in place, which notifies the education provider if the student has been absent for more than five consecutive days without approval.
25. Where there is a breach and the student cannot satisfy internal review processes, the education provider must report to the Secretary of the Department of Education the cancellation of the student's enrolment. Students are given an opportunity to explain their situation to the Department of Immigration, as well as an opportunity to enrol in an alternative course or return to their home country. A breach of student visa condition 8202 may result in cancellation of the student's visa.
26. We consider that our proposal in fact will discourage current extensive breaches of the visa regime by providing a safer framework for exploited workers to go on the record about their circumstances. It is more likely to ensure the workplace rights of international students are implemented, complied with and enforced, by facilitating safe and secure reporting of breaches of Australian law.

Appendix C: List of Endorsements

This report is endorsed by the following organisations:

Arts Law Centre of Australia
Australian Centre for Disability Law
Community Legal Centres NSW
Elizabeth Evatt Community Legal Centre
Human Rights Law Centre
Hunter Community Legal Centre
Marrickville Legal Centre
Public Interest Advocacy Centre
Shoalcoast Community Legal Centre
South West Sydney Legal Centre
Western NSW Community Legal Centre

