

13 July 2021

Kingsford Legal Centre

Submission to the Inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021

We welcome the opportunity to make a submission to the inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (**the Bill**).

This submission outlines our response to the Bill and makes recommendations for how gaps in the Bill can be improved. It draws on our significant work in this area. We have 40 years of experience working for people who have experienced harassment.

Kingsford Legal Centre (**KLC**) runs the specialist, NSW state-wide Sexual Harassment Legal Service. The Sexual Harassment Legal Service works across a range of areas, including:

- x Legal advice, assistance and representation to people who have experienced sexual harassment;
- x Community legal education aimed at preventing sexual harassment and empowering people to speak up when it happens. This education is focused on a wide range of audiences, from high school and university students to community legal centres, pro bono lawyers and community workers;
- x Law reform work to advocate for better legal protections for people who experience sexual harassment. This work aims to improve how the law and institutions deal with sexual harassment and draws on the direct experience of our clients;
- x Leading cultural and institutional change. KLC is a leader in the conversation within legal institutions and with the next generation of lawyers about sexual harassment in the profession.

In 2020, we provided 65 advices on sex discrimination matters, including 19 advices on sexual harassment. This submission also draws on our previous submission to the Respect@Work Inquiry which we reference throughout this submission (**#MeToo Report**).

within the Fair Work system.⁵ The Government cannot claim to be taking sexual harassment seriously while neglecting these key reforms.

In some areas, the Bill's proposals are in line with the recommendations from the Respect@Work Report • and as a result does more harm than good • for example, in legislating for protection against sex-based harassment, the Bill weakens the existing protection. Our submission provides further detail below.

The Respect@Work Report clearly highlights that there must be cultural change. Any response in the form of modest amendments to existing legislation is limited by the narrow scope of the Bill. The Bill's proposals are in line with the recommendations from the Respect@Work Report • and as a result does more harm than good • for example, in legislating for protection against sex-based harassment, the Bill weakens the existing protection. Our submission provides further detail below.

Some small positive first steps in the Bill include:

- x Broadening the coverage of the SDA to include volunteers, interns, contractors, judicial staff, parliamentary staff and state public servants;
- x Extending the time limit for making an SDA complaint to the AHRC from 6 months to 24 months;
- x Introducing stop sexual harassment orders alongside stop bullying orders in the FWA;
- x Clarifying that sexual harassment can be a valid reason for dismissal; and
- x Including miscarriage as a ground for compassionate leave.

These are very small first steps and they fall significantly short of implementing the Respect@Work Report. As a result, the Bill represents more piecemeal reform in this regard, when the Respect@Work Report clearly outlines the need for comprehensive change.

We also are concerned that the short timeframe for consultation on the Bill will mean there is insufficient community input into these changes.

Key areas requiring reform not addressed by this Bill include:

- x The need for a clear positive duty on employers in the SDA;
- x The need to regulate and re0 g00p601 re07t 841.92 reW*nBT/F2 9.96 Tf1 0 0 1 446.74 444.91 Tm0 g0 G(())

Instead, the Bill proposes to rely on work health and safety (WHS) law and vicarious liability provisions.⁷ In our view this is a significant problem with the Bill.

A positive duty on employers is proposed in the Bill.

sexual harassment in workplaces where the power gaps are particularly great. While we
power gap will remain between judges and court workers. The broadened coverage of the
SDA will be of limited effect if not accompanied by other measures, including a positive
duty on the employer. We also favour the restricted use of confidentiality agreements,
especially in these settings (further detail below).

Current WHS law and vicarious liability provisions contained in discrimination law have
failed to protect workers from sexual harassment. If these provisions were adequate,
harassment.¹⁶

As the Sex Discrimination Commissioner found, sexual harassment is a form of gender-
based violence and discrimination.¹⁷ The SDA, being the expression of international
human rights against such violence and discrimination in Australia, is the appropriate
mechanism for the Australian Government to specifically address such behaviour.

The Respect@Work Report closely analysed the ways that anti-discrimination laws, the
FWA and WHS laws can operate in tandem to prevent and address sexual harassment in
the workplace, noting:

The right of workers to be free from sexual harassment is a human right, a
schemes, while recognising their distinct jurisdictions, have an important and
mutually reinforcing role to play.¹⁸

WHS law is designed to manage work health and safety risks which are many and varied
and are distinct from gendered violence and discrimination. Many cases of sexual
harassment and sex discrimination are not an easy fit for the WHS framework. WHS
legislation is state and territory based and relying on WHS legislation does not address
Elimination of All Forms of Discrimination against Women (CEDAW). In also not naming
the gendered nature of the issue, WHS law risks overlooking keys to prevention and
culture change which are central to the Respect@Work Report.

While WHS processes may in some cases run parallel to complaints of discrimination

complaints impacting on human rights and reflects a complainant-centred process.¹⁹ WHS law does not approach injuries in such a way.

Case study: WHS systems and sexual harassment

Alex was sexually harassed in their job waiting tables at a local restaurant. They called the relevant state WHS regulator to report this issue. When they called up, they were told sexual harassment was not dealt with by the regulator as they were more focused on industrial accidents. Alex was told to try elsewhere for their complaint.

Vicarious liability provisions are no substitute for a positive duty

The vicarious liability provisions of the SDA require a complaint after the discrimination or sexual harassment has already occurred.²⁰ As a matter of practicality, many businesses take positive steps now because of vicarious liability provisions so that these can operate as an effective defence if a claim is brought against an employer. However, this is not widespread and is not a clear positive duty. It is clear that some employers and leaders are moving beyond the current legislative requirements to develop stronger workplace responses to sexual harassment and discrimination, however, this type of cultural change is not widespread and across all industries.

A positive duty would be more effective than vicarious liability provisions because it would apply across all employers and have a mechanism of enforcement without a complaint through the AHRC. While vicarious liability provisions sometimes are used by employers to proactively improve their practices and response, they are only enlivened after a complaint of harassment or discrimination is made. The evidence suggests these are not an effective prevention measure.

Vicarious liability provisions are not a positive obligation of the sort contemplated by the Respect@Work Report. They also require that an act is done by an employee in connection with their employment or an agent in connection with their agency duties. This is a complex requirement. For example, it means that an employer cannot be held accountable for failing to take reasonable and proportionate measures to eliminate sexual harassment perpetrated by a customer, client or patient. There is significant evidence that this type of third-party harassment is a problem and a clear gap in the law.²¹

Case study: Vicarious liability in a labour hire context

Thao came to Australia on a temporary visa and was sexually harassed while working in the agricultural industry. Thao's employer placed her on a farm in a regional area

¹⁹ Maria Nawaz, Anna Cody and Emma Golledge (Report, Kingsford Legal Centre, 27 August 2018) 18 <https://www.klc.unsw.edu.au/sites/default/files/documents/2870%20having%20my%20voice%20heard%20report_WEB.pdf> (Having My Voice Heard Report).

²⁰ Sex Discrimination Act 1984 (Cth) s 106.

where she was sexually harassed by another person on the farm. Thao's employer was not interested in engaging with her about her complaint. As the person who harassed Thao was not an employee, she would need to demonstrate that the person was an agent of her employer before she could hold her employer liable for what happened to her. This is almost impossible to do in circumstances where a person who has

than the threshold for disability harassment, which only requires that the harassment occur

Recommendation 3: Amend the SDA to clearly recognise the ability of bystanders to bring victimisation complaints and include the use of XLI XIVQ ^F]WXERHI legislation.

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Recommendation 13: The Government should introduce a law to regulate the use of confidentiality agreements in sexual harassment matters. The law should:

- a) **Prohibit confidentiality in sexual harassment matters, with the exception of allowing a confidentiality provision if the applicant requests 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.**

Costs risks to pursue complaints in Court

This Bill fails to implement Recommendation 25 of the Respect@Work Report, to 'Amend the Australian Human Rights Commission Act to insert a cost protection provision consistent with section 570 of the Fair Work Act 2009 (Cth) %'

This recommendation is significant as it aims to ensure that workers who have experienced sexual harassment have genuine access to justice. The costs risk associated with applications to the federal courts in discrimination matters is daunting for most of our clients, and means that court proceedings are on the whole an unrealistic option, even for meritorious complaints. The Explanatory Memorandum to the Bill opens with a commitment to ensure that more workers, particularly vulnerable workers, are protected and empowered to address unlawful conduct.⁴¹ The Bill fails to implement this commitment by perpetuating an unfair costs jurisdiction that will continue to deter low- and middle-income workers from asserting their rights in court.

Recommendation 14: The AHRC Act should be amended to insert a cost protection provision consistent with section 570 of the FWA.

Short timeframe for consultation

The Senate has allowed the public only 2 weeks and 1 day to make submissions, and has allowed the Committees only a further month to report. The short period of submissions has overlapped with the end of financial year, when many organisations are stretching to meet reporting requirements. It has also overlapped with an outbreak of COVID-19 and the implementation of a stay-at-home order in NSW.

Authors

4 Sexual harassment claims under the Fair Work Act

5 Other areas for reform

6 Confidentiality and settlement agreements

7 Workplace health and safety obligations

8 International student visa holders

Appendix A: Sexual harassment under international human rights law

Appendix B: Exploitation of International Students in the Workforce Proposal for a new Ministerial Direction under section 499 of the Migration Act 1958

Appendix C: List of Endorsements

About us

Kingsford Legal Centre (KLC)

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† O'Connell Service NSW

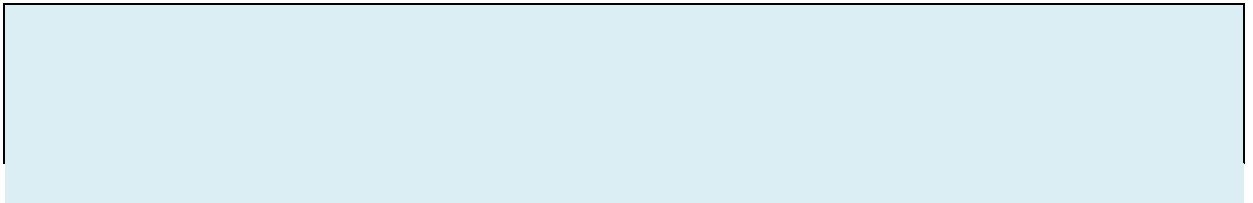
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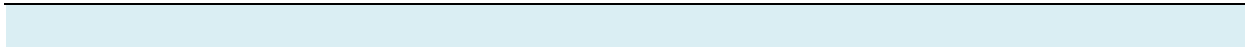
Sexual harassment claims under the Fair Work Act

Other areas for reform

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

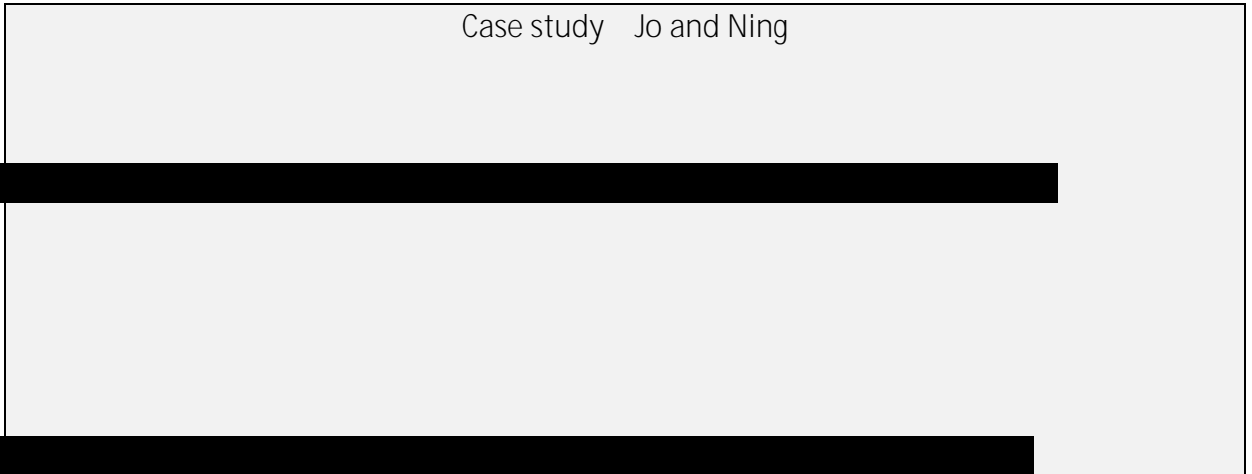
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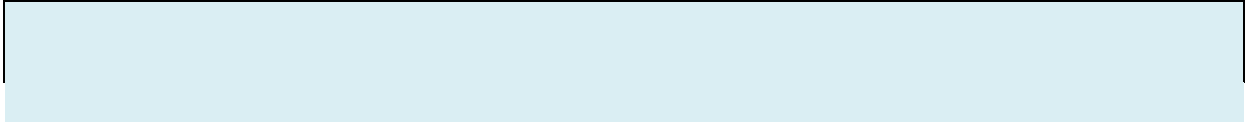






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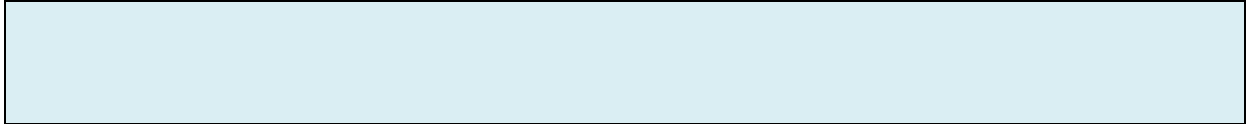


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5 Other areas for reform

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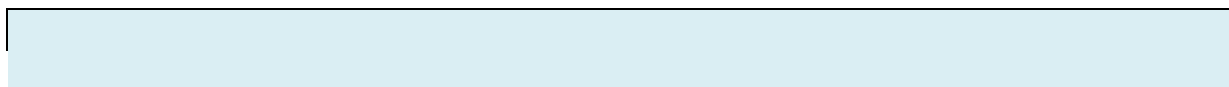




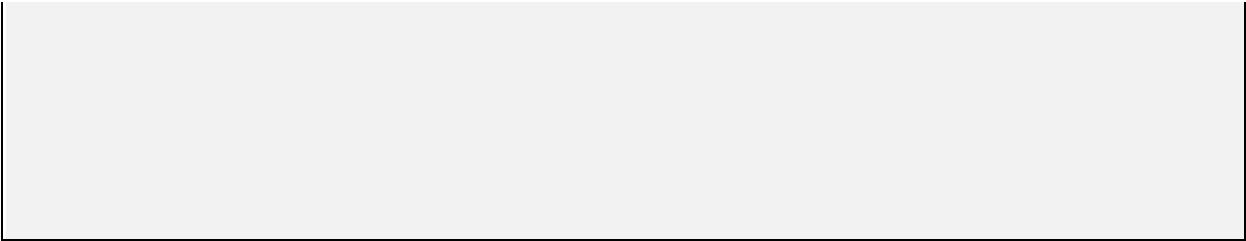
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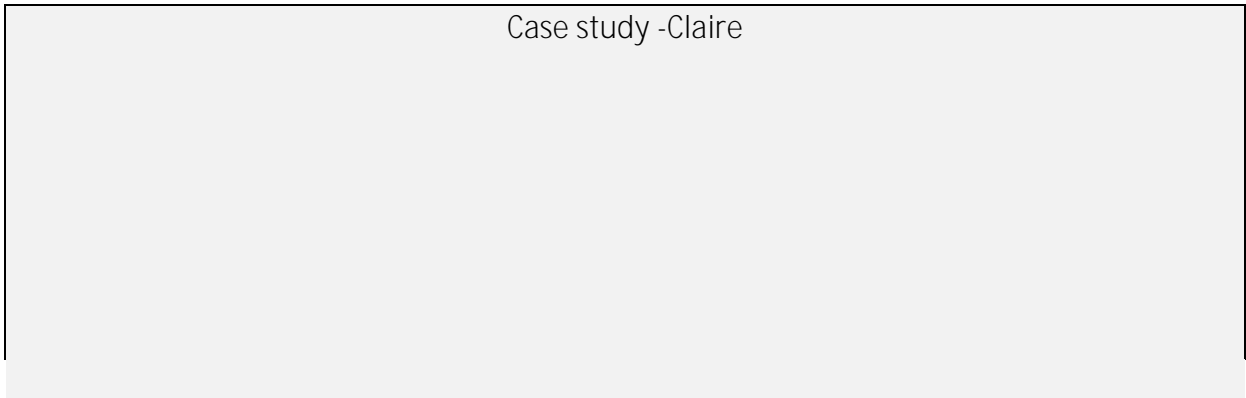
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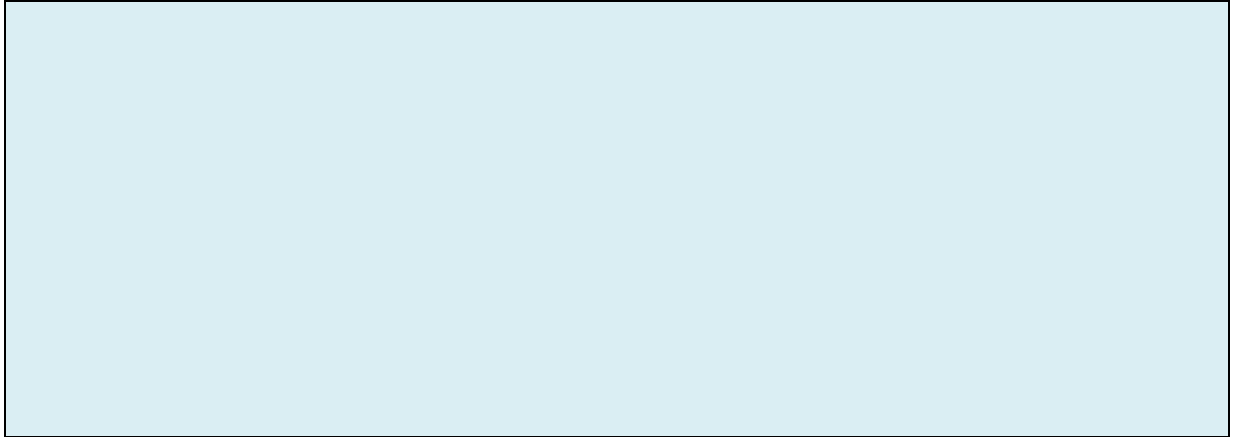
8 International student visa holders



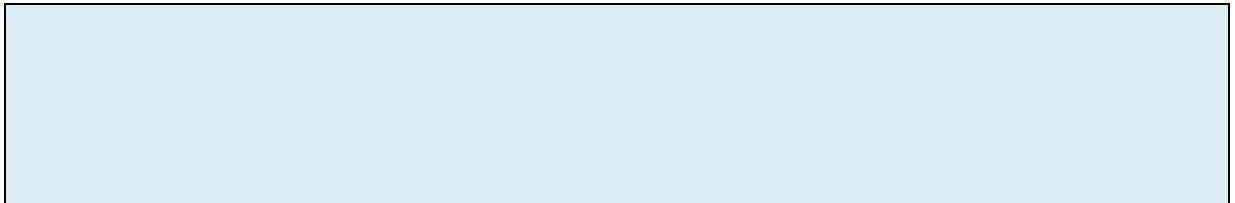




Sexual harassment policies



Training on sexual harassment



Reporting and investigating



Appendix A: Sexual harassment under international human rights law

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Appendix B

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

Appendix C: List of Endorsements

