13 July 2021

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

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*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
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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:*

- *Legal advice, assistance and representation to people who have experienced sexual harassment;*
- *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;*
- *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;*
- *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**).*

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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 distorts 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 %YWXVEPME...W SYXHEXIH discrimination law framework and lack of comprehensive human rights protection.

Some small positive first steps in the Bill include:

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

- The need for a clear positive duty on employers in the SDA;
- The need to regulate and re0 g0 G[( )] and 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.*

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sexual harassment in workplaces where the power gaps are particularly great. While we
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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,
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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*
> [SVOTPEGI VMKLX ERH E WEJIX] VMKLX ERH MR XLI 'SQQMWWM
> *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
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*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

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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 ˆdefence %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 req*YMVIQIRX XLEX GVIEXIW QENSV KETW MR ER IQTPS]IV...W *sexual harassment. 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 atemporary visa and was sexually harassed while working MR XLI EKVMGYPXYVEP MRHYWXV] 8LES...W IQTPS]I

[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.*

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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

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Recommendation 3: Amend the SDA to clearly recognise the ability of bystanders to bring victimisation complaints and include the use of XLI XIVQ ˆF]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 ˆAmend 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.

#MeToo: Legal Responses to Sexual Harassment at Work

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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.

‡ 'O 'o rvice NSW

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.

Chapter 6 covers confidentiality and settlement agreements, and recommends the introduction of a law to regulate the use of confidentiality clauses in sexual harassment introductio

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 (}Œu }( ]• Œ]u]v š]}v P]v•š ‰ Œ•}v Ç Œ •}v }(šZ ‰

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 subregulation 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) introduc

‘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.

<u>Coverage</u>

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, good, 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

Coverage

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

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.

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
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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
Z]v}µ• (}Œ šZ oo P ‰ Œ‰ šŒ š}Œ[• Œ ‰µš š]}v šZ š]š
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)

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 •µ((]] vš]vš Œ •š]v • Æµ o Z Œ ••u vš organisations [illegible] •µ Z • community legal centres, and trade unions, should have standing to bring a complaint to address systemic sexual harassment in their own right.

Recommendation:

12) The federal government should amend the Australian Human Rights Commission Act

the next five years.[31] 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 [redacted] 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.

: } [s shifts were changed to her disadvantage after she complained about the chef. She [redacted] ef learned of her

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 SDA,[22] 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

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

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

Recommendation:

20) The federal government should amend subregulation 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 Z }•š (Œ [iµŒ]•]ncš]with section 570Œ 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

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 ^Iv}Á]vPoÇ }v Œv _]v }všŒ Àvš]}v section under the SDA, and vš š their employer winds up the company, there are much more limited opportunities for a }u‰o]v vš š} š I š]}v P]v•š]Œ š}Œ]v šZ]Œ ‰ Œ•}v 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 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 towards addressing 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.

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5 Other areas for reform

Third party protection

Case study Am

While section 28A(1A) of the SDA, as discussed 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

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.

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

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

2. Has the client notified their employer and insurer of the injury caused by sexual harassment? Has the client provided a Á}ŒI cŒmpensation certificate of capacity? Is the client suffering from a diagnosable psychiatric injury that impairs at o •š íñ9 }(šZ o] vš[• ÁZ}o ‰ Œ•}v Ndominant šZ]viµŒÇ caused by reasonable action taken by the employer

To make a Á}ŒI cŒmpensation claim, the client may be able to obtain a grant from the Workers Compensation Independent Review Office (WIRO) • šZ š Á]oo }À Œ šZ o] v 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 o

}(Z }µ o ì%%]vP[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[• compensation claim.

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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 living. K v Z Œ (]Œ•š •Z](šU 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

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

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- • Z }stop- • Z } ‰ [Z µ istš } • •

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
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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

Sexual harassment policies

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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's Œ/ •‰}v 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.

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[68] Center for Talent Innovation, What #Metoo means for Corporate America Key findings (Survey Report, 2018)
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(Media Release, 11 July 2017).
[69] Ibid.
[70] Ibid.
[71] United States Equal Employment Opportunity Commission, above n 67.
[72] ‚µPZ d:]v Œ] PU o]•• > W ŒŒÇ v Œ}o d <µo]IU Z^ Æµ o ,Œ ••µ
Australian v h^ ‰‰Œ} Z •[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 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]

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

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

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

Appendix A: Sexual harassment 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:

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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 }uu]šš }À Œ šZ îì Ç Œ••]v šZ / WZ[•]v ‰š]}v v ‰ to how best implement the ICCPR, such as:

> ^dZ }uu]šš Z • o•} }(š v] }Á v}Œ Àš ^š $v•Œ‰ŒÀš}Œ•ša[Œ ‰} 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 su]• Œ]u]v[78]š]}v X _

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harassment in the workplace is appropriate, and legislation should criminalize and
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/>K[•]• Œ]u]v š]}v ~ u‰ cation) Convention K958 C111

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

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

HumanRights 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