

# Issues of sexual harassment in unpaid work

## Submission to the Australian Human Rights Commission National Inquiry into Sexual Harassment in Australian Workplaces

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### Executive summary

We are concerned that there is a significant gap in the existing coverage of federal protections against sexual harassment in that individuals engaged in unpaid work experience, whether undertaken as a part of a course of study or independently to gain experience, may not be receiving adequate protections against sexual harassment in the workplace. Paradoxically, as we explain, individuals engaged in *unlawful* unpaid internships may be entitled to protections. However, it is for a court to determine if that is the case. Those individuals undertaking lawful unpaid work experience or other unpaid work-based learning are not extended federal legal protection against sexual harassment.

In this regard we believe that Australia is significantly out of step with many other countries. In a report for the International Labour Organisation (ILO) in 2018 three of the authors of this submission considered the extent to which prohibitions against sexual harassment in 13 countries protected unpaid interns or trainees.<sup>5</sup> We concluded that with notable exceptions in the United States and Australia, prohibitions against discrimination and harassment were either framed broadly enough to extend coverage to unpaid interns, or had been interpreted

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1 Associate Professor, University of Adelaide Law School. The research which informs this submission has been conducted with the support of Australian Research Council's Discovery Projects funding scheme ('Regulating Post-Secondary Work Experience: Labour Law at the Boundary of Work and Education', DP150104516). These issues are also further explored in two journal articles: Anne Hewitt, "Avoiding the trap of exploitative work: A national approach to making work-integrated learning effective, equitable and safe" (2018) 31(2) *Australian Journal of Labour Law*; and Anne Hewitt, Rosemary Owens and Andrew Stewart, "Mind the gap: Is the regulation of work-integrated learning in higher education failing students?" (2018) 43(2) *Monash University Law Review* 234.

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5 Andrew Stewart, Rosemary Owens, Anne Hewitt and Irene Nikoloudakis, *The Regulation of Internships: A Comparative Study* (International Labour Organisation, 2018).

to cover them. We also noted that there had been moves in several jurisdictions within the United States to remedy this gap in legislative protection.<sup>6</sup>

This gap in federal protection is of significant concern, given the statistics about the incidence of sexual harassment of university students undertaking work-based learning. The Australian Human Rights Commission's 2017 National Report on Sexual Assault and Sexual Harassment at Australian Universities concluded that a significant percentage of sexual harassment against university students occurred in a workplace in which they were placed as a part of their university studies.<sup>7</sup> In addition, as part of research the authors are currently undertaking, which has involved interviews with representatives of 15 universities around Australia, we have been informed of a number of instances of sexual harassment perpetrated against students engaged in work-based learning.

We would strongly advocate that the federal prohibitions of sexual harassment be extended to cover all participants in the workplace, whether they are there as learners or workers, or on a paid or unpaid basis. Failure to do so compounds the vulnerability of already vulnerable individuals, including those seeking to gain a foothold on the employment ladder through unpaid work experience, and those learning in the workplace.

## Introduction

Workplace learning is becoming an increasingly common experience for those transitioning from formal education into the workforce.<sup>8</sup> However, there is a great deal of variety within the workplace learning experiences undertaken. It might be a short- medium- or longer-term placement within a workplace, an internship, or a work-based learning opportunity undertaken as a part of a course of study. It might be organised independently, or through a broker, or by a university or a school. In some industries, work experience is verging on mandatory.<sup>9</sup> And it looks like the requirement for work experience is becoming a permanent

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6 Various States, including California, Oregon, Maryland, Connecticut and the District of Columbia, have extended protections against discrimination or harassment (and, in some jurisdictions, both) to unpaid interns; Lachman, Samantha (2016), 'A Shocking Number Of States Don't Protect Unpaid Interns From Discrimination And Sexual Harassment', *Huffington Post*, 28 May 2016.

7 Other studies of sexual harassment, discrimination and abused in the context of workplace learning include: M Emslie, 'Supporting Students Who Are Sexually Harassed on Placement: A Case Study from Youth Work Field Education' (2009) 9 *J of Practice Teaching and Learning* 6; G E White, 'Sexual Harassment during Medical Training: The Perceptions of Medical Students at a University Medical School in Australia' (2000) 34 *Med Educ* 980; J Curtis, I Bowen and A Reid, 'You Have No Credibility: Nursing Students' Experiences of Horizontal Violence' (2007) 7 *Nurse Educ Pract* 156; S Gair and Y Thomas, 'Ensuring Safe Passage: Identifying the Threat of Workplace Violence against Tertiary Students' (2008) 24 *J Occ Health Safety, Aust and NZ* 43; J Maidment, 'Problems Experienced by Students on Field Placement: Using Research Findings to Inform Curriculum Design and Content' (2003) 56 *Aust Soc Work* 50.

8 In a 2016 survey of unpaid work in Australia, a third of Australians (34%) aged 18 - 64 reported undertaking at least one episode of unpaid work experience in the last five years: Damian Oliver et al, *Unpaid Work Experience in Australia: Prevalence, nature and impact* (Department of Employment, 2016) 5. Perlin discusses the growth of unpaid work for students and graduates in the US in Ross Perlin, *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy* (Verso, revised ed, 2012) ch 2.

9 This is the case, for example, in creative industries. See Sabina Siebert and Fiona Wilson, 'All work and no pay: consequences of unpaid work in the creative industries' (2013) 27(4) *Work, Employment and Society* 711.

feature of the graduate labour market, as individuals struggle to gain the experience and contacts they need to enter the paid workforce.

The growing prevalence of workplace learning is blurring the line between work and education. Some of these arrangements are primarily considered to be ‘work’, while others are understood as merely ‘learning’. It is also increasing the segmentation of the labour market, with some parts ‘inside’ the protective regulation of labour law while others are ‘outside’ it, which in turn risks increasing the precarious position of those entering the workforce, particularly young people.<sup>10</sup>

This submission considers a specific aspect of this regulatory problem, the extension of protection of prohibitions against sexual harassment to participants in unpaid work experience.

### **Prohibitions of sexual harassment and unpaid work experience**

Unpaid workers are potentially vulnerable to being the subject of discrimination or harassment within the workplace.<sup>11</sup> For example, the recent Australian Human Rights Commission report into sexual harassment and assault in universities reported that for the 2% of students who had been sexually harassed or sexually assaulted in a university setting in 2015 or 2016, the most recent incident had occurred in a workplace as part of university studies.<sup>12</sup> Perpetrators included colleagues and clients at a workplace outside university.<sup>13</sup>

The extension of legislation that offers protection against harassment within the workplace to those engaged in unpaid work experience is patchy. In Australia, there is no consistent position.<sup>14</sup> The main federal statute, the *Sex Discrimination Act 1984* (Cth), covers a range of workplace relationships. But it does not appear to extend to unpaid work experience – unless it is possible to identify an employment contract, as discussed below. The same is true of the prohibition against discriminatory treatment in section 351 of the federal *Fair Work Act 2009* (Cth).

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10 For recent attention to some of these issues, see Productivity Commission, *Workplace Relations Framework, Final Report* (2015), especially ch 5, 251ff–262 ff, and ch 25, 823ff. See also International Labour Organisation, *Non-standard employment around the world: Understanding challenges, shaping prospects* (International Labour Office 2016).

11 Newman, Daley and Bogo reported discrimination against gay and lesbian students engaged in work integrated learning: Peter Newman, Andrea Daley and Marion Bogo, ‘Breaking the silence: Sexual orientation in social work field education’ (2009) 45(1) *Journal of Social Work Education* 7. In September 2017 the ABC reported allegations of sexual harassment of medical students on placement in a Darwin hospital: Kristy O’Brien, ‘Royal Darwin Hospital doctors stood down over sexual assault allegations’ ABC Online 2 September 2017 at <http://www.abc.net.au/news/2017-09-02/two-royal-darwin-hospital-doctors-accused-of-sexual-assault/8866804>. Australia’s tertiary students are also increasingly diverse, which may increase the likelihood of students being subject to discrimination. See, eg, Nick Parr, ‘Who Goes to University? The Changing Profile of Our Students’ 25 May 2015 *The Conversation* <<https://theconversation.com/who-goes-to-university-the-changing-profile-of-our-students-40373>>

12 Camilla Gebicki, Romana Pomeroy, Georgia Flynn, Noleen Grogan, Emma Hunt, Jessica Bell, Kishor Napier Raman and Alexandra Meagher, *Change the course: National report on sexual assault and sexual harassment at Australian universities* (Australian Human Rights Commission, 2017) 68.

13 Ibid 87.

14 Stewart, Andrew & Owens, Rosemary (2013), *Experience or Exploitation? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia*, Fair Work Ombudsman, Melbourne, 107-109.

There are also limitations in the protections against harassment that apply to students engaged in unpaid learning in the workplace. For example, the *Sex Discrimination Act 1984* (Cth) applies to a broad range of working relationships, including partnerships, commission agents, contract work and employment (including prospective employees).<sup>15</sup> Employment is defined to include part-time and temporary employment, work under a contract for services, and work as a Commonwealth employee.<sup>16</sup> However, the Act does not extend coverage to unpaid workers who are not employees.

The *Fair Work Act 2009* (Cth) does not overlook students engaged in work-integrated - learning (WIL); it deliberately excludes them from most protections. Section 351 of the *Fair Work Act 2009* (Cth) prohibits employers from engaging in a range of discriminatory adverse actions against employees and prospective employees. But students undertaking unpaid 'vocational placements' are not treated as employees for most purposes under this legislation. A 'vocational placement' is defined to mean:

A placement that is:

- (a) undertaken with an employer for which a person is not entitled to be paid any remuneration; and
- (b) undertaken as a requirement of an education or training course; and
- (c) authorised under a law or an administrative arrangement of the Commonwealth, a State or a Territory.

An example of such a placement is a period of unpaid 'practical legal training' undertaken as a requirement of being admitted to practice as a lawyer.<sup>17</sup>

Where a student or job-seeker is undertaking unpaid work experience that is *not* associated with an authorised education or training course, it may be possible to establish that they are doing pursuant to what is in reality – if not necessarily in appearance – an employment contract.<sup>18</sup> This is especially plausible 'where a person is performing productive work for an organisation, under an arrangement whereby they will either gain experience or be considered for an ongoing job'.<sup>19</sup> If so the arrangement is likely to be unlawful, since the employer will not have complied with minimum wages set by an award, enterprise agreement or minimum wage order. The Fair work Ombudsman has successfully taken action against a number of national system employers for failing to pay or underpaying interns doing productive work while gaining experience or auditioning for a job.<sup>20</sup> Research suggests that

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<sup>15</sup> *Sex Discrimination Act 1984* (Cth) ss 14-17.

<sup>16</sup> *Ibid* s 4.

<sup>17</sup> See *Upton v Geraldton Resource Centre* [2013] FWC 7827; *Klievens v Capello Rowe Lawyers* [2017] FWC 5126.

<sup>18</sup> As to the common law principles used to determine the existence of such a contract see Stewart and Owens, *Experience or Exploitation?*, above, ch 6.

<sup>19</sup> *Ibid*, see xxiii.

<sup>20</sup> See *Fair Work Ombudsman v Crocmedia Pty Ltd* [2015] FCCA 140; *Fair Work Ombudsman v Aldred* [2016] FCCA 220; *Fair Work Ombudsman v AIMG BQ Pty Ltd* [2016] FCCA 1024.

there are many unlawful work experience arrangements of this type.<sup>21</sup> But it is hard to be certain of the status of any given internship, without going to court and getting a ruling.

There is one part of the *Fair Work Act 2009* (Cth) that definitely *does* apply to students and job seekers undertaking unpaid work experience. This is Part 6-4B, which allows workers to apply to the Fair Work Commission for protection against workplace bullying, at least where they are working for a constitutional corporation or the Commonwealth or in a Territory.<sup>22</sup> The term ‘worker’ is given the same meaning as under work health and safety laws,<sup>23</sup> which, as noted below, extend to anyone doing unpaid work experience, whether part of a course or not.

In contrast, some state and territory anti-discrimination statutes extend protections from sexual harassment and discrimination to students engaged in work experience. For example, the *Equal Opportunity Act 1984* (SA) prohibits a person subjecting to sexual harassment ‘a person with whom he or she works’.<sup>24</sup> That Act goes on to provide that ‘a person works with another if both carry out duties or perform functions, in whatever capacity and *whether for payment or not*, in or in relation to the same business or organisation’ (emphasis added).<sup>25</sup> These provisions clearly include interns and students undertaking formal work based learning within an organisation. The same Act prohibits discrimination on a range of bases<sup>26</sup> against ‘employees’, a term defined to include unpaid workers.<sup>27</sup> In Victoria, Part 6 of the *Equal Opportunity Act 2010* (Vic) extends protection from sexual harassment to ‘an unpaid worker or volunteer’.<sup>28</sup> This would arguably include a student learning in the workplace. In contrast, the prohibitions against discrimination in that legislation do not expressly extend to unpaid workers.

## Other jurisdictions

Laws prohibiting workplace discrimination or harassment in some countries are broad enough to cover unpaid workers, even if they are not necessarily employed. For example, Canadian equality laws have generally been interpreted to cover unpaid work, even in the absence of specific extensions to that effect.<sup>29</sup> Similarly, in Germany, the main equality laws are framed so as to cover those engaged to perform work for the purpose of vocational training.<sup>30</sup> In the United Kingdom the prohibitions against discrimination, harassment and victimisation at work under Part 5 of the *Equality Act 2010* apply not just to employers, but to the activities

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21 See Andrew Stewart et al, ‘The Nature and Prevalence of Unlawful Unpaid Work Experience in Australia’ (2018) 31(2) *Australian Journal of Labour Law* 157.

22 See Andrew Stewart, *Stewart’s Guide to Employment Law* (Federation Press, 5th ed, 2015) ch 21.3.

23 *Fair Work Act 2009* (Cth) s 789FC(2), adopting the definition in s 7 of the *Work Health and Safety Act 2011* (Cth).

24 *Equal Opportunity Act 1984* (SA) s 87(1)(a).

25 *Ibid* s87(9)(c).

26 *Ibid* s85B.

27 *Ibid* s5(1).

28 *Equal Opportunity Act 2010* (Vic) s 4(1).

29 See eg *Vancouver Rape Relief Society v Nixon* [2005] BCCA 601; *Rocha v Pardons and Waivers of Canada* [2012] HRTO 2234.

30 General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*) s 6(1).

of an ‘employment service-provider’, a term defined in section 56 to include a provider of vocational training or work experience.<sup>31</sup>

France also specifically prohibits the harassment of students engaged in formal educational internships. According to Article 124-12 of the *Code de l'éducation*, interns are entitled to the rights and protections of Articles L1152-1 (protection against moral harassment) and L1153-1 (protection against sexual harassment) of the *Code du Travail*, under the same conditions as employees.

## Conclusion

It is hard to understand why the federal protections against sexual harassment and discrimination are not extended to unpaid workers. Such workers are often either volunteering their time for altruistic reasons or are seeking to gain important experience and develop their skills in an unfamiliar environment. This can lead to vulnerabilities, which may be compounded by what will usually be a distinct power imbalance between those engaged in unpaid work experience and the workplace host.<sup>32</sup> The present exclusion from protections against discrimination and harassment is not easily justified.

As we have previously argued

no-one should suffer the indignity of harassment or discrimination at work; everyone should be able to take breaks from work, recognising that they are not a machine but a human person; and a workplace should be where productive work is undertaken for the benefit of another, it should be paid for, whether or not it also forms part of a (formal or informal) learning experience.<sup>33</sup>

There are valid reasons to argue that this principle should apply to unpaid participants in the workplace as well as those being paid. The regulatory ‘gap’ in the coverage of Federal prohibitions of sexual harassment is problematic. Given the growth in unpaid work experience and the evidence of harassment of unpaid workers and students involved in work based learning, we strongly advocate that the regulatory regime should recognise and respond to the vulnerability of those engaged in unpaid work experience by extending them legal protections against discrimination and harassment.

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31 See eg *Blackwood v Birmingham & Solihull Mental Health NHS Foundation Trust* [2016] EWCA Civ 607.

32 For example, in *GLS v PLP* [2013] VCAT 221 a lawyer was accused of a number of counts of sexual harassment against a Graduate Diploma of Legal Practice student who was undertaking the 80-day practical experience required by her course in the lawyer’s firm. In this situation, the lawyer not only had power in relation to quality of the work experience and future references for the student, he was also required to sign off on her practical experience and as such was effectively acting as a gatekeeper for her to gain access to the legal profession.

33 Anne Hewitt, Rosemary Owens, Andrew Stewart and Joanna Howe, ‘At the intersection of Education and Work: Young People, Equality and Regulation of the Labour Market’ in John Howe, Anna Chapman and Ingrid Landau (eds), *The Evolving Project of Labour Law* (2017) Federation Press 102, 115. See also Rosemary Owens and Andrew Stewart ‘Regulating for Decent Work Experience: Meeting the Challenge of the Rise of the Intern’ (2016) 155 *International Labour Review* 679.