

FRUIT PICKING IN FEAR: AN EXAMINATION OF SEXUAL HARASSMENT ON AUSTRALIAN FARMS

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Sexual harassment at work is prohibited by federal and state anti-discrimination laws. Sexual assault is also an offence under state criminal legislation. Despite this, it remains nearly impossible for legal action to be taken against perpetrators of sexual harassment of temporary migrant women at their workplaces in the Australian horticulture industry. This article provides a detailed examination of the reasons why temporary migrant women on farms are particularly vulnerable to sexual harassment, and the barriers they face to accessing justice within the legal system.

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I INTRODUCTION

The final straw for us both was when he suggested we work naked for him, and then complained when we came back to see we both weren't naked ... We told our hostel manager that we wouldn't work for him again and explained what happened. He didn't seem too shocked or fussed.¹

This vignette from a British working holiday maker ('WHM') is one of many that have emerged since *Four Corners*' groundbreaking exposé of exploitative working conditions on Australian farms in 2015.² This exposé blew the lid on 'slave-like conditions' on farms, predominantly manifested through non-payment or substantial underpayment of wages via a network of highly exploitative labour hire contractors.³ Amidst this were disturbing accounts of young women being sexually harassed, including being propositioned to perform sexual favours in exchange for work or visa extensions. In one case a victim's employment was terminated after she complained, whilst another victim's complaint was completely ignored.⁴

In October 2017, the breaking of the Harvey Weinstein scandal by *The New York Times* and the rise of the #MeToo movement shone a spotlight on sexual

¹ Claire Hubble, 'The Sleaze and Danger of Working 88 Days on an Australian Farm', *Vice* (Web Page, 4 June 2019) <<https://www.vice.com/en/article/neaqwb/the-sleaze-and-danger-of-working-88-days-on-an-australian-farm>>, archived at <<https://perma.cc/U8GQ-M3S8>>.

² 'Slaving Away', *Four Corners* (Australian Broadcasting Corporation, 2015) <<https://www.abc.net.au/4corners/slaving-away-promo/6437876>>. See also Katri Uibu, 'Backpackers Allege They Were Asked to Work Half-Naked, Offered Money for Sex Acts on Australian Farm', *ABC News* (Web Page, 25 March 2021) <<https://www.abc.net.au/news/2021-03-25/backpackers-allege-farmer-asked-them-for-sex-for-money/100019130>>, archived at <<https://perma.cc/RJ26-TS4V>> ('Backpackers Allege They Were Asked to Work Half-Naked'); Adam McCleery, 'Backpacker Says She Was Sexually Harassed and Paid As Low as \$2.50 an Hour to Work on a Rural Australian Farm as She Claims Working Holiday Visas Are an "Abuse of Human Rights"', *Daily Mail* (online, 15 September 2020) <<https://www.dailymail.co.uk/news/article-8732793/Backpacker-says-sexually-harassed-paid-70-two-months-work-Australian-farm.html>>, archived at <<https://perma.cc/R33P-U69S>>; Ben Graham, 'Young Backpackers Describe Farm Work's Seedy Underbelly', *News.com.au* (online, 29 November 2017) <<https://www.news.com.au/finance/work/at-work/young-backpackers-describe-farm-works-seedy-underbelly/news-story/1ed97861da0c387101fe7c5ae554eb80>>, archived at <<https://perma.cc/6CZT-JUZX>>.

³ See, eg, Caro Meldrum-Hanna, Ali Russell and Mario Christodoulo, 'Labour Exploitation, Slave-Like Conditions Found on Farms Supplying Biggest Supermarkets', *ABC News* (Web Page, 7 May 2015) <<https://www.abc.net.au/news/2015-05-04/supermarkets-food-outlets-exploit-black-market-migrant-workers/6441496?nw=0&r=HtmlFragment>>, archived at <<https://perma.cc/NW4U-KJ8S>>. See generally 'Slaving Away' (n 2).

⁴ 'Slaving Away' (n 2) 0:34:50–0:35:38, 0:39:32–0:41:13.

harassment at work, although this has tended to focus on white-collar workers.⁵ In 2021, the accounts of Australian of the Year Grace Tame and former parliamentary staffer Brittany Higgins drew renewed focus to the vulnerability of young women and women in the workplace to sexual harassment.⁶ However, the plight of low-wage workers, like the temporary migrant women described above, has largely been absent from widespread public scrutiny, advocacy and sympathy, which have tended to coalesce around more high-profile victims.⁷

Despite the disturbing examples of workplace sexual harassment provided in this opening, it is important to acknowledge that there is a wide range of behaviour that is encompassed by the term 'sexual harassment'.⁸ In some cases, the behaviour is sexual assault, which may trigger a civil action or constitute a crime prosecuted by the police or the Director of Public Prosecutions.⁹ Typically, in the horticulture industry, sexual assaults are the cases that have reached public attention through media reports and government inquiries. Nonetheless, it is likely that the horticulture industry also has a problem with a range of behaviours that amount to other forms of sexual harassment. Sexual harassment is typically defined in Australian legislation as occurring when the perpetrator 'makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed' or 'engages in other unwelcome conduct of a sexual nature in relation to the person harassed', in circumstances in which 'a reasonable person ... would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated'.¹⁰ Examples of sexual harassment from the case law include physical contact,¹¹ display of pornographic

⁵ Marissa Ditkowsky, '#UsToo: The Disparate Impact of and Ineffective Response to Sexual Harassment of Low-Wage Workers' (2019) 26(2) *UCLA Women's Law Journal* 69, 72–6.

⁶ Julia Kanapathipillai, 'Survivor Advocate Grace Tame Named Australian of the Year', *The Canberra Times* (online, 26 January 2021) <<https://www.canberratimes.com.au/story/7098828/survivor-advocate-grace-tame-named-australian-of-the-year>>, archived at <<https://perma.cc/65HG-QAVS>>; 'Staffer Brittany Higgins Allegedly Raped in Office of Senior Government Minister Linda Reynolds inside Parliament House', *ABC News* (Web Page, 15 February 2021) <<https://www.abc.net.au/news/2021-02-15/brittany-higgins-rape-claim-parliament-house-defence-minister/13154736>>, archived at <<https://perma.cc/AT5H-ELAW>>.

⁷ Ditkowsky (n 5) 97, 139. Cf 'Slaving Away' (n 2).

⁸ In this article, 'sexual harassment' is used to refer to sexual assault as well.

⁹ For a discussion of sexual harassment, sexual assault and other commonly used terms, see Sarah L Cook, Lilia M Cortina and Mary P Koss, 'What's the Difference between Sexual Abuse, Sexual Assault, Sexual Harassment and Rape?', *The Conversation* (Web Page, 7 February 2018) <<https://theconversation.com/whats-the-difference-between-sexual-abuse-sexual-assault-sexual-harassment-and-rape-88218>>, archived at <<https://perma.cc/5PMH-74TG>>.

¹⁰ *Sex Discrimination Act 1984* (Cth) s 28A. Equal opportunity laws in the states and territories adopt identical or very similar definitions: see, eg, *Discrimination Act 1991* (ACT) s 58; *Anti-Discrimination Act 1977* (NSW) s 22A; *Equal Opportunity Act 2010* (Vic) s 92.

¹¹ See, eg, *Ewin v Vergara* [No 3] (2013) 307 ALR 576, 579 [4], 582 [23], [25] (Bromberg J).

material¹² and conduct of a sexual nature such as staring at a woman's breasts.¹³ Sexual harassment is prohibited by anti-discrimination legislation, which operates through a system which is based on a highly individualised complaints process reliant upon individuals who have been subjected to sexual harassment to report it and to hold harassers and employers to account.¹⁴

Whilst scholars have exposed non-compliance with labour standards in the Australian horticulture industry, they have largely focused on the temporary migrant pathways into the industry, the non-payment or underpayment of wages, and occupational health and safety risks.¹⁵ This research has established that the horticulture industry has an entrenched problem with substantial wage underpayments,¹⁶ compounded by the difficulty in applying and enforcing the piece rates provision in the *Horticulture Award 2020* (Cth).¹⁷ In contrast, this

¹² See, eg, *Lee v Smith* [2007] FMCA 59, [8], [198] (Conolly FM).

¹³ See, eg, *Kumari v Bervar Pty Ltd* (2019) 290 IR 456, 461–2 [36] (Member Johnson).

¹⁴ See *Australian Human Rights Commission Act 1986* (Cth) pt IIB. For criticism of individualised complaint mechanisms, see Paula McDonald, Sara Charlesworth and Tina Graham, 'Developing a Framework of Effective Prevention and Response Strategies in Workplace Sexual Harassment' (2015) 53(1) *Asia Pacific Journal of Human Resources* 41, 46–8, 51–2; Laura Good and Rae Cooper, "'But It's Your Job to Be Friendly": Employees Coping with and Contesting Sexual Harassment from Customers in the Service Sector' (2016) 23(5) *Gender, Work and Organization* 447, 449.

¹⁵ See generally Joanna Howe et al, 'Slicing and Dicing Work in the Australian Horticulture Industry: Labour Market Segmentation within the Temporary Migrant Workforce' (2020) 48(2) *Federal Law Review* 247 ('Slicing and Dicing Work'); Alexander Reilly et al, 'Working Holiday Makers in Australian Horticulture: Labour Market Effect, Exploitation and Avenues for Reform' (2018) 27(1) *Griffith Law Review* 99; Joanna Howe et al, *Sustainable Solutions: The Future of Labour Supply in the Australian Vegetable Industry* (Report, The University of Adelaide, 1 February 2017) 87, 92–3, 104 ('*Sustainable Solutions*'); Joanna Howe et al, *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry* (Report, The University of Adelaide, January 2019) 5, 10–11, 97–8 ('*Towards a Durable Future*'); Elsa Underhill and Malcolm Rimmer, 'Layered Vulnerability: Temporary Migrants in Australian Horticulture' (2016) 58(5) *Journal of Industrial Relations* 608 ('Layered Vulnerability'); Elsa Underhill and Malcolm Rimmer, 'Itinerant Foreign Harvest Workers in Australia: The Impact of Precarious Employment on Occupational Safety and Health' (2015) 13(2) *Policy and Practice in Health and Safety* 25 ('Itinerant Foreign Harvest Workers in Australia'); Stephen Clibborn, 'It Takes a Village: Civil Society Regulation of Employment Standards for Temporary Migrant Workers in Australian Horticulture' (2019) 42(1) *University of New South Wales Law Journal* 242.

¹⁶ See, eg, Howe et al, 'Slicing and Dicing Work' (n 15) 249; Reilly et al (n 15) 102, 105; Howe et al, *Sustainable Solutions* (n 15) 8; Howe et al, *Towards a Durable Future* (n 15) 10; Underhill and Rimmer, 'Layered Vulnerability' (n 15) 618–19, 622; Underhill and Rimmer, 'Itinerant Foreign Harvest Workers in Australia' (n 15) 31; Clibborn (n 15) 244–5.

¹⁷ See, eg, the admission by the Australian Fresh Produce Alliance about the difficulty of applying this provision in its submission to the Australian Workers' Union's (AWU's) application to amend the *Horticulture Award 2020* (Cth) to introduce a statutory floor for piece rates:

article seeks to examine non-compliance in relation to legal standards relating to sexual harassment at work. Without further empirical research, the extent of sexual harassment cannot be definitively known and is beyond the scope of this article, but it is flagged here as an important, albeit methodologically challenging,¹⁸ area for future research.

The purpose of this article is more defined. We seek to explore whether temporary migrant farm workers are especially vulnerable to sexual harassment in the workplace. First, we examine the incidence of sexual harassment on Australian farms. This examination begins with an explanation of the research methods, which use evidence from official inquiries, media reports and original qualitative research to develop a fuller picture of the issue. Second, we explore the systemic factors which produce vulnerability to sexual harassment and the barriers to justice that prevent temporary migrant farm workers from remedying workplace sexual harassment.

We argue that, in addition to the well-documented barriers faced by temporary migrant farm workers to remedy exploitation and access legal remedies relating to wage underpayment,¹⁹ there are particularly high barriers which make it virtually impossible for a temporary migrant worker to take legal action relating to sexual harassment in the horticulture industry. Although there are media reports and reports on social media forums about sexual harassment of temporary migrant farm workers, there is scant evidence of legal action being taken by either the police or victims. Scholars have critiqued the effectiveness of anti-discrimination law more generally as failing to protect victims because it is based on a negative rather than a positive duty and is predicated on an individual complaints model which has very limited capacity to challenge incidents of sexual harassment and transform workplace cultures.²⁰ However, this

Australian Fresh Produce Alliance, Submission to Australian Workers' Union, *Application to Vary the Horticulture Award 2020* (11 June 2021) 2–3 [6]. The Fair Work Commission ultimately introduced an hourly wage floor under piece rates from 28 April 2022: *Application by Australian Workers' Union to Vary Clause 15 of the Horticulture Award 2020* [2022] FWCFB 4, [20]–[21], [170] (Ross J, Catanzariti VP and Commissioner Riordan).

¹⁸ These difficulties are expanded on below in Part II(A).

¹⁹ See, eg, Bassina Farbenblum and Laurie Berg, 'Migrant Workers' Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman' (2017) 23(3) *Australian Journal of Human Rights* 310; Iain Campbell et al, 'Precarious Work and the Reluctance to Complain: Italian Temporary Migrant Workers in Australia' (2019) 29(1) *Labour and Industry* 98.

²⁰ Belinda Smith, 'A Regulatory Analysis of the *Sex Discrimination Act* 1984 (Cth): Can It Effect Equality or Only Redress Harm?' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006) 105, 106, 109–10, 112–13.

article argues that these problems are substantially heightened for temporary migrant workers on farms.

An intersectional approach to sexual harassment sees gender as intersecting with other forms of discrimination and systems of power to produce an intensified risk for some groups of workers and to affect how they experience sexual harassment.²¹ In the case of the horticulture industry, this intersectionality is multifaceted, as gender, visa status, temporariness, deportability, dependence on unregulated contractors and accommodation providers, and reliance on farm work for an immigration outcome serve to amplify the imbalance of power in the employment relationship. In this context of overlapping and intersecting vulnerabilities, it is striking that the recent Australian Human Rights Commission ('AHRC') report of its inquiry into sexual harassment at work in Australia does not specifically recognise visa status in its list of descriptors for 'at-risk populations'.²² This list includes: sex; age; sexual orientation, gender or intersex status; Aboriginal or Torres Strait Islander status; disability; culturally or linguistically diverse background; and insecure work status.²³ Although temporary migrant women share many of these listed characteristics, their precarious immigration status as temporary visa holders intensifies the risk of sexual harassment.

We also draw upon scholarship establishing a nexus between precarious work and an increased risk of sexual harassment.²⁴ Precariously employed individuals have been found to be more prone to experiencing unwanted sexual behaviour at the workplace compared with workers in non-precarious settings.²⁵ We hypothesise that as the horticulture industry has an entrenched problem of non-compliance with labour standards,²⁶ sexual harassment is also likely to be more common, although less reported and remedied because of the aforementioned issue of intersectionality which exacerbates unequal power

²¹ For further reading on intersectionality, see generally Shreya Atrey, *Intersectional Discrimination* (Oxford University Press, 2019).

²² Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 161 ('Respect@Work').

²³ *Ibid.*

²⁴ Marvin Reuter et al, 'Precarious Employment and Self-Reported Experiences of Unwanted Sexual Attention and Sexual Harassment at Work: An Analysis of the European Working Conditions Survey' (2020) 15(5) *PLOS ONE* e0233683:1–19, 2; Alison Reid et al, 'Descriptive Study of Workplace Demand, Control and Bullying among Migrant and Australian-Born Workers by Gender: Does Workplace Support Make a Difference?' (2020) 10(6) *BMJ Open* e033652:1–10.

²⁵ See Reuter et al (n 24).

²⁶ See Howe et al, 'Slicing and Dicing Work' (n 15) 249–50. See also the discussion of the eight official inquiries below in Part II(B)(1).

relations. There is a pressing need for further research to understand the extent of the problem so that legal, policy, institutional and other responses can be found.

II TEMPORARY MIGRANT FARM WORKERS AND SEXUAL HARASSMENT AND ASSAULT

This Part illuminates the vulnerability that generally arises at the intersection between aspects of the legal framework governing sexual harassment and temporary migrant work in the horticulture industry. We first establish the methodological approach we have taken to evaluate the incidence of sexual harassment on Australian farms. This is followed by an examination of evidence of the incidence of this conduct since 2015.

A Research Methods

Given the importance of understanding how law operates in practice and the efficacy of current laws, particularly in the context of equality law, empirical research is essential, adding an important dimension that traditional doctrinal scholarship cannot provide.²⁷ It is difficult to evaluate temporary migrant farm workers' experiences of sexual harassment and assault, due to both the nature of the complaints and reporting process, and the disparate, transient and often inaccessible characteristics of the temporary migrant workforce. There are inherent difficulties in quantifying the incidence of sexual harassment in an industry like horticulture that is defined by seasonality, geographical dispersion, reliance on contractors, and a largely temporary migrant workforce. Government cooperation would be required to conduct a quantitative survey of the workforce, as this would be the only way to obtain the contact details of the entire sample of visa holders. However, even if this were achieved, there would be constraints, as this sample would exclude undocumented migrants who are not on a valid visa or are breaching a visa condition. Undocumented workers are a substantial subset of the horticulture labour force.²⁸

This article, therefore, adopts a qualitative mixed-method approach to evaluate temporary migrants' experiences of sexual harassment and sexual assault

²⁷ Dominique Allen and Alysia Blackham, 'Using Empirical Research to Advance Workplace Equality Law Scholarship: Benefits, Pitfalls and Challenges' (2018) 27(3) *Griffith Law Review* 337, 339–40; Alysia Blackham, 'Empirical Research and Workplace Discrimination Law' (2019) 3(2) *Brill Research Perspectives in Comparative Discrimination Law* 1, 1–2.

²⁸ National Agricultural Labour Advisory Committee, *National Agricultural Workforce Strategy: Learning to Excel* (Report, December 2020) 189–90 ('*National Agricultural Workforce Strategy*'), citing Howe et al, *Towards a Durable Future* (n 15) 36–40.

on farms. The first source of data is submissions to and reports of government and other official inquiries, together with media reports, that provide examples and analyses of sexual harassment and sexual assault involving temporary migrant farm workers. Since 2015 there have been eight relevant government inquiries that have examined temporary migrant work, farm labour supply or sexual harassment in the workplace.²⁹ Due to the limitations of this dataset, this article also draws on original data sourced from interviews and focus groups to obtain a more complete picture of the experiences of temporary migrants on farms in relation to sexual harassment and sexual assault. These were conducted as part of a broader study of labour challenges on Australian farms which included interviews and focus groups with a total of 355 individuals across 13 regions located in six Australian states and territories between June 2016 and December 2018.³⁰ This qualitative approach is the most appropriate to address our research aims and to provide rich insight into the challenges faced by temporary migrant women working in the horticulture industry in Australia. The interviews and focus groups were audio-recorded and transcribed. The research team then manually coded the transcripts using NVivo software. The research team used a coding strategy that was deductive and inductive, utilising an *a priori* coding structure based on existing research, then adapting it as new themes emerged from the data.³¹

B Incidence of Sexual Harassment and Sexual Assault on Farms

Labour standards in the horticulture industry have been placed under increasing scrutiny by government, media and scholars since 2015.³² The focus of attention has largely been on wage underpayments, non-payment of wages, and

²⁹ *National Agricultural Workforce Strategy* (n 28); Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia* (Report, December 2017) ('*Hidden in Plain Sight*'); Senate Education and Employment References Committee, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (Report, March 2016) ('*A National Disgrace*'); *Victorian Inquiry into the Labour Hire Industry and Insecure Work* (Final Report, 31 August 2016) ('*Victorian Inquiry*'); *Respect@Work* (n 22); Fair Work Ombudsman, *Harvest Trail Inquiry: A Report on Workplace Arrangements along the Harvest Trail* (Report, 2018) ('*Harvest Trail Inquiry*'); Fair Work Ombudsman, *Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program* (Report, October 2016) ('*417 Visa Inquiry*'); *Report of the Migrant Workers' Taskforce* (Report, March 2019).

³⁰ The outcomes of this study are published in Howe et al, *Towards a Durable Future* (n 15). For complete detail of methodology, refer to app A of the report.

³¹ For a full statement of the methodology of this project, see Howe et al, *Towards a Durable Future* (n 15) app A.

³² See above nn 1–3, 15, 29 and accompanying text.

poor workplace health and safety standards involving temporary migrants. Less attention has been given to sexual harassment on farms, although, as this section demonstrates, there is growing awareness of this problem.

1 *Official Inquiries*

No official inquiry has directly examined the experiences of temporary migrant farm workers in relation to sexual harassment and sexual assault. Despite this, several inquiries have exposed, to some degree at least, the sexual harassment and sexual assaults experienced by temporary migrant women in the Australian horticulture industry.

The most recent is the National Agriculture Labour Advisory Committee report released in March 2021, which is the result of a nine-month inquiry into the future of the agriculture workforce.³³ The subject of this inquiry was the broad range of issues that affect the agriculture workforce, including the supply chain, future potential for mechanisation of work, and education and training pathways for Australian youth. A chapter of this report is dedicated to examining visa programs that provide the bulk of the horticulture industry's harvest workforce.³⁴ This chapter identified a problem of exploitation and found that reports of unlawful and unethical practices were not uncommon,³⁵ although the report made no attempt to quantify the extent of these practices and relied on reports from relevant stakeholders rather than direct evidence from farm workers. This report has only one mention of sexual harassment, made in the context of a Canadian case study, stating that undocumented migrant workers are at a much greater risk of sexual exploitation.³⁶

The 2020 AHRC report, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*, highlighted a substantial problem of sexual harassment of temporary migrant women in the horticulture industry.³⁷ This report referred to an account of a woman raped in broad daylight in a field by her employer who told her 'she would be deported if she refused to have sex with him'³⁸ and frequent reports of sexualised comments made to women fruit-pickers. The AHRC heard that 'the barriers to reporting sexual harassment for workers on temporary visas meant that some [perpetrators] were able to act with impunity'.³⁹ The report detailed experiences of temporary migrants who

³³ *National Agricultural Workforce Strategy* (n 28) xiii.

³⁴ *Ibid* ch 7.

³⁵ *Ibid* 194 [7.2.1].

³⁶ *Ibid* 55 [4.3.1].

³⁷ *Respect@Work* (n 22). See, eg, at 190, 245.

³⁸ *Ibid* 191.

³⁹ *Ibid*.

were threatened with the possibility of their visas being revoked if they told anyone after being sexually assaulted by their employers.⁴⁰ The report also noted a worker's observations that many farms do not have complaints processes or procedures in place and that they have limited information on how to respond to complaints.⁴¹ The report provides a quote from a worker who gave evidence that

[i]n agriculture and farming ... there aren't policies, and there aren't [human resources staff], especially in farming. That's something that is not commonplace at all. I've also found that nine times out of ten, the owner is the operator and is the HR [manager], and he's also possibly the harasser, and the person you're supposed to report to ... so agriculture and rural spaces are really quite isolating for a victim.⁴²

The report noted the particular vulnerability of undocumented migrant farm workers who face additional barriers when reporting sexual harassment and assault to the police.⁴³ The report also heard evidence of poor police responses to migrant workers on temporary visas after they reported workplace sexual harassment and assault:

80% of farmworkers in Australia are on visas or undocumented ... Police are overstepping their mark, and based on your visa status is how they will treat your complaint ... They're not interested in pursuing justice for a transient visa holder.⁴⁴

The Migrant Workers' Taskforce was established as part of the government's response to the revelation of significant wage underpayments in certain industry sectors.⁴⁵ Although its report, released in March 2019, extensively reviewed exploitation of temporary migrants in the Australian labour market, with a particular focus on WHMs and international students, the report did not examine the experiences of these cohorts in relation to sexual harassment. The focus of the report was squarely on wage exploitation and other forms of coercive behaviour which lead to workers not reporting wage underpayments to the authorities.⁴⁶ Notably, the Fair Work Ombudsman's ('FWO's') submission to the

⁴⁰ Ibid.

⁴¹ Ibid 249.

⁴² Ibid.

⁴³ Ibid 191.

⁴⁴ Ibid 581.

⁴⁵ *Report of the Migrant Workers' Taskforce* (n 29) 13.

⁴⁶ See especially *ibid* ch 2.

Migrant Workers' Taskforce highlighted the sexual harassment experienced by WHMs on farms, although this was not explored in the report.⁴⁷

The FWO's Harvest Trail inquiry report, released in 2018, found widespread non-compliance amongst investigated employers.⁴⁸ However, the focus of these investigations was largely on monetary and related breaches of the *Fair Work Act 2009* (Cth).⁴⁹ This meant the report detailed substantial wage underpayments and failures to keep appropriate records and payslips. The report made no mention of sexual harassment or sexual assault.

In addition to its inquiry specifically on harvest labour, the FWO also undertook an inquiry into the working conditions of WHMs on the 417 visa.⁵⁰ This inquiry examined the experiences of WHMs across the Australian labour market. However, given that a substantial number of WHMs extend their visa through completing farm work,⁵¹ the report did address the exploitation of WHMs in the horticulture industry. The report states that the FWO received information from consulates that many WHMs did not report

sexual harassment or underpayment of minimum entitlements for fear that employers would deny that the 88 day specified work requirement had been undertaken ...⁵²

The report also observed:

Safety concerns are raised where young, especially female, travellers with limited English, and who often travel alone, are encouraged through the 417 second year visa requirements to travel to remote areas to undertake [farm] work.⁵³

The report provided evidence of unpaid work on farms undertaken by WHMs, which was more prevalent amongst this cohort prior to May 2015 when the law was changed to prevent unpaid farm work counting towards a visa extension.⁵⁴ The report notes that the Australian branch of Willing Workers on Organic Farms (WWOOF), an international organisation that operates in 70 countries

⁴⁷ Ibid 113, discussing *417 Visa Inquiry* (n 29).

⁴⁸ *Harvest Trail Inquiry* (n 29) 26.

⁴⁹ See, eg, *ibid* 4.

⁵⁰ *417 Visa Inquiry* (n 29) 3–4.

⁵¹ See *ibid* 9.

⁵² *Ibid* 16–17.

⁵³ *Ibid* 27–8.

⁵⁴ *Ibid* 28–33; Joanna Howe, Andrew Stewart and Rosemary Owens, 'Temporary Migrant Labour and Unpaid Work in Australia' (2018) 40(2) *Sydney Law Review* 183, 201.

and places ‘volunteers’⁵⁵ on farms, informed the inquiry that ‘it takes complaints relating to sexual harassment ... extremely seriously but only usually receives one such complaint per year.’⁵⁶

The Joint Standing Committee on Foreign Affairs, Defence and Trade released its report, *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia*, in 2017.⁵⁷ For the purpose of further investigating the prevalence of exploitation of migrant workers, the Committee held a public hearing in Mildura, Victoria where it heard substantial evidence of exploitation of migrants on farms, including not just wage underpayments but non-payment of wages and confiscation of passports.⁵⁸ This report did not focus on sexual harassment and sexual assault, and there is no mention of this in relation to temporary migrant farm work in the report.

The Victorian Inquiry into the Labour Hire Industry and Insecure Work’s 2016 report found horticulture to be one of three key sectors characterised by non-compliant labour hire practices largely underpinned by exploitation of temporary migrants.⁵⁹ The inquiry heard evidence from temporary migrant women who had experienced sexual harassment in the horticulture industry. One witness gave evidence that they had observed the sexual harassment of one worker and attempted to communicate with migrant workers who were too intimidated and fearful to respond.⁶⁰ Another witness reported that when she did complain about sexual harassment, she was told that ‘if she was not happy she should leave.’⁶¹ A backpacker proprietor gave evidence that he had observed practices of growers and contractors involving sexual harassment.⁶²

The 2016 report, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, of the Senate Education and Employment References Committee’s

⁵⁵ While conventionally a ‘volunteer’ may be thought of as someone who is undertaking work on an altruistic basis for a non-profit organisation rather than a commercial operation, there is no clarity around this concept under Australian law: see Jill Murray, ‘The Legal Regulation of Volunteer Work’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006) 696.

⁵⁶ *417 Visa Inquiry* (n 29) 31–2.

⁵⁷ *Hidden in Plain Sight* (n 29).

⁵⁸ *Ibid* 272–6 [9.13]–[9.20].

⁵⁹ *Victorian Inquiry* (n 29) 147, 152–9 [4.2.1].

⁶⁰ *Ibid* 154. For other reports of women being afraid to speak up about sexual harassment, see Vera L Chang, ‘After #MeToo, This Group Has Nearly Erased Sexual Harassment in Farm Fields’, *Civil Eats* (Web Page, 9 March 2020) <<https://civileats.com/2020/03/09/after-metoo-this-group-has-nearly-erased-sexual-harassment-in-farm-fields>>, archived at <<https://perma.cc/YB89-HF8T>>.

⁶¹ *Victorian Inquiry* (n 29) 157.

⁶² *Ibid* 158.

inquiry into the impact of Australia's temporary work visa programs found vulnerability and exploitation to be key problems affecting temporary migrant workers.⁶³ Nonetheless, these problems were largely conceived as relating to wages, conditions, safety and entitlements, and the inquiry did not focus on sexual harassment. The report made one reference to this issue, with a witness providing evidence that the conditions around the granting of a second year WHM visa render 417 visa workers vulnerable to exploitation, particularly by labour hire contractors who were known to establish conditions that 'you have to provide sexual favours in order to receive a second visa'.⁶⁴

In sum, the substantial focus of official inquiries to date has been on non-compliance with labour law in relation to wage underpayments, occupational health and safety and other forms of wage-related exploitation. Other than the report by the AHRC, which focused explicitly on sexual harassment and sexual assault in the workplace, but was not limited to farm employers or temporary migrants, there has not been significant inquiry work in this area. Recognising this gap, the AHRC identified a need for further research that

explicitly examines the overlapping vulnerabilities between at-risk populations, work arrangements and risks associated with specific industries or occupational groups. Building an evidence base on sexual harassment is necessary to advance policy and develop initiatives tailored to sectors, contexts and workers most at-risk of sexual harassment.⁶⁵

2 *Qualitative Study*

This section draws upon data from a three-year project which examined labour challenges on Australian farms.⁶⁶ Although the primary focus of this study was on labour challenges in the Australian horticulture industry more broadly, instances of sexual assault and sexual harassment were reported to the research team.

Interviews with labour hire intermediaries revealed that there was a common practice in the industry where growers specified workers with particular attributes or personal characteristics that they desired. Intermediaries reported some growers only requested female migrant workers to be supplied to their farm, a request they believed was based on an ulterior motive to do with the perceived vulnerability of female migrants to sexual exploitation. As one intermediary stated:

⁶³ *A National Disgrace* (n 29) pt IV.

⁶⁴ *Ibid* 167 [7.24].

⁶⁵ *Respect@Work* (n 22) 198.

⁶⁶ This project is the authors' own, involving interviews and focus groups with stakeholders.

[T]here was one case where a particular person used to come and get nothing but girls, and take them away, and we go, 'No, that's it.' And one particular farmer got very specific with a girl. I said, 'Look, this can't happen.' So we involved the police, and the police went out there and spoke to him. ... And every time he come and ask for workers, 'Look, we've got no one.' In some cases, look, I tell people [unclear]. In some other cases, when it's really, really bad, we actually make sure that everybody knows that's what he does. But in cases where we don't want to risk it, we just say, 'We don't have anybody for you.'⁶⁷

Two findings of the report arising out of the study were a norm of non-compliance with labour standards and a substantial power imbalance between employers and contractors on the one hand and temporary migrants on the other.⁶⁸ The feeling that temporary migrants had no choice but to accept exploitative work — in order to gain a visa extension for WHMs, or to stay in the country for visa holders on the Seasonal Worker Programme ("SWP"), or to earn remuneration for undocumented migrants — was also perceived as contributing to a failure to report sexual harassment and sexual assault. One interviewee told the research team, 'migrants have been bullied to submit to something that they shouldn't be — they shouldn't say yes to but they have no choice.'⁶⁹ Another interviewee reported:

One of the girls I knew, like the guy told her, so if she had sex with him he would sign off on her 88 days that day and I was like, 'call in and tell them' but she was like, 'I'm working on his farm. I just want to get my 88 days and be done with it' and so she didn't do anything, she didn't report it, she just found a different farmer to work for but I didn't know who he was really, so I didn't feel like I could call it in.⁷⁰

These examples demonstrate the difficulty in reporting sexual harassment and sexual assault both in terms of third-party observers and in terms of the constraints on victims themselves.

Structural aspects of working on the harvest trail were also found to produce vulnerability to sexual harassment and assault. Temporary migrants reported difficulty obtaining transport to remote locations, including sharing cars with strangers, and living with strangers in cramped accommodation in hostels, in private share houses and on farms. For example, an interviewee reported a

⁶⁷ Interview with Labour Hire Intermediary (Stephen Clibborn, Griffith Case Study, 23 April 2018).

⁶⁸ Howe et al, *Towards a Durable Future* (n 15) 5, 100.

⁶⁹ Interview with Community Centre Organiser (Stephen Clibborn, Griffith, 24 April 2018).

⁷⁰ Focus Group with 10 Working Holiday Makers (Joanna Howe, Melbourne, 31 January 2018).

chance encounter with undocumented migrants who had absconded from the SWP:

One day we went to the petrol station, and two girls were there, standing there, they asked me if I was Tongan. I said yes, and they said they came off the bus and didn't know where to go. They just heard that you've got to come to Griffith to find farm work as there's Tongans around here who can help.⁷¹

This demonstrates the reliance on word-of-mouth recommendations to find farm work in regional locations and the vulnerability of the two female migrants in this situation to exploitation, given that they were waiting in a remote location in search of assistance from people they had only just met. In fact, we found that most temporary migrants sourced farm work through informal, unregulated means such as Gumtree and Facebook, and very few used the official jobs board managed by Harvest Labour Services. The interviewee also shared experiences of two other migrant women who had also absconded from the SWP:

[T]hey were telling us how they were beaten up by a contractor, because they were texting some of the boys, they were in the same group as them, but they were staying in a different house, the girls, from the boys. Because they were all texting each other, someone told the contractor, and they were beaten up, by an extension cord, electrical cord ... I didn't believe it, but then one of them took off her jumper and showed us where all these marks were from that. ... They didn't leave straight away; they stayed there a few more days, to try to get their stuff, and their passports, so they could run away. ... [T]he contractor will just sleep in the car outside, and watch them, so no one walks outside.⁷²

Although this was one of the most egregious examples of assault provided to the research team, a key finding was the dominance, power and control exerted by contractors over the provision of farm work, accommodation and transport. The role of contractors in sexual exploitation was also borne out in a disturbing experience shared by a group of three WHMs in a focus group, who had each experienced sexual harassment and sexual assault by the same contractor whilst previously working on a farm in Shepparton.⁷³ They described an incident involving a male contractor who would touch workers under their clothes while picking fruit and that it was 'all the Asian girls' who would be subjected to his

⁷¹ Interview with Tongan Community Member (Stephen Clibborn, Griffith, 25 April 2018).

⁷² *Ibid.*

⁷³ Focus Group with Three Working Holiday Makers (Joanna Howe, Orange, 28 June 2018).

unwanted attention. They reported that there were over 20 women who this happened to. When asked why they didn't leave that situation, one stated:

[B]ecause we don't have a choice ... need to get second visa, yes, so we still working but we also tell to manager ... and she's from Taiwan, she said she can't help us because the driver also touch her but it's like she's — how can I say? — it's a feeling, 'don't care, don't care' ... but actually she's care because she is come from, come with her husband but she cannot say anything.⁷⁴

When the WHMs agreed as a group to report it to the farmer, the contractor was moved to another farm location owned by the farmer, but no further action was taken.⁷⁵ The WHMs stated that this was 'because they got relation, some kind of relative with the pick boss.'⁷⁶ Although they had tried to find a lawyer, they said:

[I]t really difficult because we don't have proof ... that why we give up because at the moment we needed second year visa.⁷⁷

The WHMs also said they phoned the FWO and used the translation service but that 'they just said, talk to a lawyer' and 'we can't help'.⁷⁸ The WHMs reported feeling angry and helpless with no one to turn to for support or redress.

We also found that law enforcement agencies struggled to encourage reports and gather evidence of sexual harassment and assault. An interview with a member of the Queensland Police Service in Stanthorpe shed light on the incidence of, and difficulties in investigating and pursuing reports of, sexual harassment and sexual assault. He gave an example of one successfully prosecuted case:

We had one Iraqi gentleman who, yeah, basically he organised accommodation for backpackers, female backpackers visiting the area and he organised transport, accommodation and yeah, sexual favours for accommodation. Sexual harassment of women. He ... got charged with a number of offences.⁷⁹

However, while the police officer believed it happened a lot, there was under-reporting of sexual assaults by temporary migrant women farm workers, making it difficult to build a case against the perpetrators:

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Interview with Stanthorpe Police Officer (Stephen Clibborn, Stanthorpe, 21 January 2016).

I think language barrier, yeah I think it's one. It's something, if it does happen to an overseas girl who has limited English, yeah, definitely. I say it's going on quite often. ... Unless it's really serious. If it's you know fondling or whatever, they'll probably say, I'm going back in six months anyway so there's no point reporting it. And we have the other instance and we have had it before where girls have been raped. And they have made a complaint and we've charged the offender and the same thing happens. They go back overseas and that's the end of it ... we can't get them back to give evidence. Yeah. It creates a bit of havoc for us.⁸⁰

This points to how the secretive, sensitive, and stigmatised nature of sexual harassment, which already makes it hard for law enforcement agencies to uncover, is combined with the transience of the temporary migrant workforce. Cumulatively, these factors make it almost impossible for the police to investigate and prosecute perpetrators.

3 *Conclusion*

These two datasets expose the problem of noncompliance with labour standards on Australian farms in relation to the employment of temporary migrants and the substantial power imbalance and vulnerability of this group when compared with employers and contractors. Although existing research has largely focused on this non-compliance in terms of wage-related exploitation, it appears that this is accompanied by a substantial level of under-reported incidences of sexual harassment and assault. The stories which have been reported are disturbing and serious and point to the substantial vulnerability of temporary migrant farm workers.

III FACTORS CAUSING VULNERABILITY AND BARRIERS TO JUSTICE

Anytime you have people under the control of their bosses, there will end up being sexual manifestations of that power differential.⁸¹

Temporary migrant women face a set of circumstances that render them more vulnerable to sexual harassment than non-migrant women. Their circumstances also render them fearful and powerless to speak up as individuals and fight against sexual harassment. In this Part we explain and analyse these vulnerabilities and fears in the context of the Australian horticulture industry. The 2018 survey conducted by the AHRC on the general population found that

⁸⁰ *Ibid.*

⁸¹ Chang (n 60), quoting Ambassador Luis C deBaca, former director of the United States Office for Sex Offender Monitoring, Apprehending, Registering, and Tracking.

39 per cent of women had experienced workplace sexual harassment in the previous five years.⁸² Although there have not been any large-scale surveys seeking to identify the prevalence of temporary migrant women's experiences of sexual harassment, the prevalence for temporary migrant women on farms is likely to be higher. The vulnerabilities discussed in this Part mean it is highly likely that temporary migrant women in the horticulture industry are enduring more sexual harassment than women who are citizens or permanent residents, and perhaps even more than temporary migrant women employed in other industries. Media reports are used in this Part to develop a fuller anecdotal picture of the factors causing vulnerability and the barriers to justice faced by temporary migrants experiencing sexual harassment on Australian farms.

A Immigration Status

A major reason why temporary migrant women in the horticulture industry are more vulnerable to sexual harassment and more fearful to complain than non-migrant women is their reliance on their employer for their migration status. Temporary migrant women who are employed on farms typically fall into one of three categories of visa workers. In each of these categories, an employer's normal power in the employment relationship is supplemented by power over the worker's migration status through the capacity to disrupt it. First, there are seasonal workers from the Pacific under the dedicated Temporary Work (International Relations) (subclass 403) visa, employed through the SWP.⁸³ Secondly, there are WHMs under the Working Holiday (subclass 417)⁸⁴ and Work and Holiday (subclass 462) visas.⁸⁵ Thirdly, in addition to temporary migrants on

⁸² Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (Report, 2018) 8.

⁸³ 'Temporary Work (International Relations) Visa', *Department of Home Affairs: Immigration and Citizenship* (Web Page, 4 April 2022) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-work-403>>, archived at <<https://perma.cc/N9PY-T3KS>>; 'Seasonal Worker Program Stream', *Department of Home Affairs: Immigration and Citizenship* (Web Page, 4 April 2022) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-work-403/seasonal-worker-program>>, archived at <<https://perma.cc/P5T4-JN3V>>. For evidence of exploitation, see, eg, *Victorian Inquiry* (n 29) 157–9, 302–3, 318.

⁸⁴ 'Working Holiday Visa', *Department of Home Affairs: Immigration and Citizenship* (Web Page, 1 July 2021) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/work-holiday-417>>, archived at <<https://perma.cc/HX9W-Q8DT>>. For evidence of exploitation, see, eg, *Victorian Inquiry* (n 29) 161–3, 178–9, 305–12.

⁸⁵ 'Work and Holiday', *Department of Home Affairs: Immigration and Citizenship* (Web Page, 1 July 2021) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/work-holiday-462>>.

visas with an entitlement to work, there is a large, but at present inadequately quantified, number of migrants working in the industry without an entitlement to work, collectively referred to as undocumented workers. These include migrants on visas without work rights (such as tourists), migrants whose visas have expired, and migrants with a valid visa with work rights but who work in breach of a condition of their visa. Within the horticulture labour market, these different categories of visa workers are typically employed as harvest workers involved in the picking, packing and grading of fresh fruit and vegetables. In each of these three categories, a temporary migrant woman has inherent aspects of her immigration status that render her more vulnerable to sexual harassment — a discussion to which we now turn.

WHMs' increased vulnerability to sexual harassment stems from a need to work in the horticulture industry in order to gain a visa extension. There is no precise data on the number of WHMs working in horticulture. However, as early as 2006, it was noted that WHMs were the 'backbone of the harvest labour supply'.⁸⁶ In the intervening decade, WHMs' labour contribution has become even more profound as the size of the WHM program has increased and, in particular, because of the introduction in 2005 of a second-year visa extension for WHMs who complete an 88-day period of 'specified work'.⁸⁷ The program has also been opened up to new partner countries, many with far lower minimum wages than Australia, such as Taiwan and South Korea.⁸⁸ In 2018–19 there were 37,418 WHMs on the 417 visa who were granted a second-year extension on their visa, with a likely 90 per cent of these earning this extension through working for 88 days in the horticulture industry.⁸⁹ In more recent times, the WHM program has been reformed to further increase the supply of labour to

462>, archived at <<https://perma.cc/AB98-T5H5>>. Holders of the Work and Holiday visa are considered part of the broader category of WHMs, and have been counted within the examples of exploitation explored by the *Victorian Inquiry* (n 29): at 161–3, 178–9, 305–12.

⁸⁶ Senate Standing Committee on Employment, Workplace Relations and Education, Parliament of Australia, *Perspectives on the Future of the Harvest Labour Force* (Report, October 2006) 14 [2.6].

⁸⁷ 'Regional Australia' is all of Australia except the Australian Capital Territory and the major capital cities. 'Specified work' includes various types of low-skilled work performed in the agriculture, mining and construction industries: see *Migration Regulations 1994* (Cth) sch 2, cl 417.111 (definitions of 'regional Australia', 'specified work') ('*Migration Regulations*'); 'Specified Subclass 417 Work', Department of Home Affairs: *Immigration and Citizenship* (Web Page, 1 June 2022) <<https://immi.homeaffairs.gov.au/what-we-do/whm-program/specified-work-conditions/specified-work-417>>, archived at <<https://perma.cc/XSW7-HJCY>>.

⁸⁸ Howe et al, *Towards a Durable Future* (n 15) 93. See also Joanna Howe and Irene Nikoloudakis, *A Critique of the Australian Working Holiday Programme: Options for Reform* (Report for the Consulate-General of the Republic of Korea, 2017) 30–1.

⁸⁹ Department of Home Affairs, *Working Holiday Maker Visa Program* (Report, 30 June 2019) 7 ('*WHM Visa Report*').

the horticulture industry. In particular, there is now the potential for WHMs on the 462 visa to work in the horticulture industry in northern Australia for 88 days in order to receive a second-year visa extension.⁹⁰ In 2018–19 there were 5,801 WHMs on the 462 visa who were granted a second-year extension on their visa.⁹¹ More recently, in July 2019, the Australian government introduced the possibility of a third-year visa extension for WHMs employed in horticulture for six months during the second year of their visa.⁹²

The possibility of a visa extension introduces a condition that makes WHMs highly dependent on their employers. Perpetrators of sexual harassment have used these migration laws to force migrant women to have sex or carry out sexual acts in exchange for their signature on the paperwork.⁹³ An investigation by the Australian Broadcasting Corporation ('ABC') into the experiences of sexual harassment by a number of WHMs found that the desire for a visa extension gave extra leverage to employers and made employees more vulnerable in the workplace.⁹⁴ One worker quoted in the story, who was subjected to frequent unwelcome sexual advances by a subcontractor on the farm, stated: '[w]e stayed, knowing that we were in a bad situation', because of the need to complete 88 days of farm work.⁹⁵ The FWO noted with concern the disclosure of

a cultural mindset amongst many employers wherein the engagement of 417 visa holders is considered a *licence* to determine the status, conditions and remuneration levels of workers ... without reference to Australian workplace laws.⁹⁶

The FWO's report concluded that a WHM's desire for a visa extension

⁹⁰ 'Specified Subclass 462 Work', *Department of Home Affairs: Immigration and Citizenship* (Web Page, 4 March 2022) <<https://immi.homeaffairs.gov.au/what-we-do/whm-program/specified-work-conditions/specified-work-462>>, archived at <<https://perma.cc/CU3T-4VFR>>.

⁹¹ *WHM Visa Report* (n 89) 8.

⁹² 'Third Working Holiday Maker (WHM) Visa Program: Starts on 1 July 2019', *Department of Home Affairs* (Web Page, 21 October 2019) <<https://www.homeaffairs.gov.au/news-subsite/Pages/2019-Mar/changes%20to%20the%20working%20holiday%20maker%20visa%20program%20from%201%20july%202019.aspx>>; 'Specified Subclass 417 Work' (n 87).

⁹³ See Katri Uibu, 'From Sexual Harassment to Being Underpaid: I've Seen How the Work-for-Visa System Is Broken', *ABC News* (Web Page, 31 July 2015) <<https://www.abc.net.au/news/2015-07-31/uibu-ive-seen-how-the-work-for-visa-system-is-broken/6661910>>, archived at <<https://perma.cc/GUP9-FRNU>> ('From Sexual Harassment to Being Underpaid').

⁹⁴ See Katri Uibu, 'There Are No Human Rights Here', *ABC News* (Web Page, 16 September 2020) <<https://www.abc.net.au/news/2020-09-15/backpacker-farm-workers-speak-of-wage-exploitation/12545294?nw=0>>, archived at <<https://perma.cc/2YDM-EX8R>>.

⁹⁵ *Ibid.*

⁹⁶ *417 Visa Inquiry* (n 29) 33 (emphasis added).

can have the unintended consequence of driving vulnerable workers to agree to work for below minimum entitlements and in some circumstances enter in to potentially unsafe situations.⁹⁷

Seasonal workers from the Pacific are also vulnerable to sexual harassment due to their immigration status. These workers are dependent upon their employers for remuneration and for sponsorship to remain in Australia and to return for future harvest seasons.⁹⁸ Studies on employer sponsorship indicate that such vulnerability is especially pronounced for temporary migrant workers in low-skilled occupations with limited access to union representation.⁹⁹ The desire of many Pacific workers to return for subsequent harvest seasons provides clear disincentives for them to report workplace sexual harassment. A Pacific worker may calculate that the potential benefit of reporting is outweighed by the potential risk of not being sponsored for subsequent seasons. This desire to return means it is unlikely that the reported stories of sexual harassment capture the full extent of exploitation within the SWP.¹⁰⁰ Further, there is enormous pressure on temporary migrant women holding 403 visas to not lose their jobs. Workers under the SWP are subject to condition 8107 which, among other things, prohibits these visa holders from ceasing to be employed by the employer in relation to which their visa was granted.¹⁰¹ To make matters worse, during the period of their job search in the event that they have lost employer sponsorship, they do not have access to Centrelink unemployment benefits or most other forms of government financial support.¹⁰²

Of all three categories of visa workers, temporary migrant women who have an undocumented status are the most vulnerable to sexual harassment on farms. The vulnerability of undocumented workers lies in their unlawful status. Irrespective of the reason for which they are undocumented, whether it be

⁹⁷ Ibid 49–50.

⁹⁸ Howe et al, *Towards a Durable Future* (n 15) 108.

⁹⁹ Chris F Wright, Dimitria Groutsis and Diane van den Broek, 'Employer-Sponsored Temporary Labour Migration Schemes in Australia, Canada and Sweden: Enhancing Efficiency, Compromising Fairness?' (2017) 43(11) *Journal of Ethnic and Migration Studies* 1854, 1862–3.

¹⁰⁰ For examples of the sexual harassment stories reported at a Mildura community forum, see, eg, Emma Field, 'Seasonal Worker Program Exploitation Claims Raised at Mildura Forum', *The Weekly Times* (online, 31 October 2017) <<https://www.weeklytimesnow.com.au/news/national/seasonal-worker-program-exploitation-claims-raised-at-mildura-forum/news-story/6e49e03051905d7204fbb35753e0bd64>>, archived at <<https://perma.cc/R3ZM-Y5S5>>.

¹⁰¹ *Migration Regulations* (n 87) sch 2 cl 403.611(2), sch 8 cl 8107(1)(a).

¹⁰² 'Residence Descriptions', *Services Australia* (Web Page, 25 February 2022) <<https://www.servicesaustralia.gov.au/individuals/services/centrelink/jobseeker-payment/who-can-get-it/residence-rules/residence-descriptions>>.

breach of a valid visa's work condition, or because a visa term has expired, an undocumented worker is liable to immediate arrest and deportation.¹⁰³ This means this group of women is highly unlikely to report sexual harassment or to access help. As the AHRC has reported, '[w]e heard of a migrant woman working on a farm who was threatened with deportation if she refused to have sex with her boss'.¹⁰⁴ As the National Agricultural Labour Advisory Committee notes, 'undocumented workers are at highest risk of exploitation, due to the fact that they are unlikely to report mistreatment for fear of losing their visa and ability to stay in Australia'.¹⁰⁵ In the United States, sexual harassment of undocumented migrant women on farms has been called a 'pandemic' with one report finding that nearly all farmworkers interviewed had experienced sexual violence.¹⁰⁶

Additionally, a large proportion of temporary migrant women in Australia come from countries with high wage differentials to Australia, such as Pacific nations or partner countries in the subclass 462 WHM programme. Many migrant workers from these countries work in Australia and send money to their families at home because their income in Australia is often higher than what they can earn by working in their home countries.¹⁰⁷ As losing their migration status and the right to work in Australia is a very detrimental outcome for both their personal financial situation and any family who rely on their remittances, they are more vulnerable to sexual harassment and less likely to report it when it occurs. Migrant workers have almost no power to report sexual exploitation in the agriculture industry, because supervisors and more senior workers have tremendous power in multifaceted ways over their employment — they can

¹⁰³ *Migration Act 1958* (Cth) ss 13–15, 189, 196, 198.

¹⁰⁴ 'Sexual Harassment: "Just Part of the Job"', *Australian Human Rights Commission* (Web Page, 7 December 2018) <<https://humanrights.gov.au/about/news/opinions/sexual-harassment-just-part-job>>.

¹⁰⁵ *National Agricultural Workforce Strategy* (n 28) 190.

¹⁰⁶ Ariel Ramchandani, 'There's a Sexual-Harassment Epidemic on America's Farms', *The Atlantic* (online, 30 January 2018) <<https://www.theatlantic.com/business/archive/2018/01/agriculture-sexual-harassment/550109>>, archived at <<https://perma.cc/T8HF-4D55>>. See also 'Rape in the Fields', *Frontline* (Public Broadcasting Service, 2013) <<https://www.pbs.org/wgbh/frontline/film/rape-in-the-fields>>; Human Rights Watch, 'US: Sexual Violence, Harassment of Immigrant Farmworkers: Protect Immigrants through Violence against Women Act, Other Laws', (online, 15 May 2012) <<https://www.hrw.org/news/2012/05/15/us-sexual-violence-harassment-immigrant-farmworkers>>.

¹⁰⁷ Howe and Nikoloudakis (n 88) 20. See also Interview with Joanna Howe (Eleanor Hall, *The World Today*, 1 December 2016) <<https://www.abc.net.au/worldtoday/content/2016/s4585151.htm>>, archived at <<https://perma.cc/8BW5-2MZY>>.

offer, deny or discontinue work, lower the income the workers receive, and make the workers' conditions very difficult.¹⁰⁸

B *Fear of Losing Their Jobs*

Prior to border restrictions introduced because of the COVID-19 pandemic,¹⁰⁹ the perception that temporary migrants on farms were easily replaceable put temporary migrant women in a position where they were more vulnerable to sexual harassment. A perception of labour oversupply gave temporary migrant women very little bargaining power and they were correspondingly fearful of losing their jobs. This fear was heightened for temporary migrant women by the risk of deportation and the loss of remittances for dependent family members. We found that WHMs reported certain growing regions as having an oversupply of WHMs looking for farm work to complete their 88 days.¹¹⁰ WHMs reported that growers 'really didn't care about labour laws because they knew there were literally hundreds of backpackers coming through all the time that they could exploit' and that 'farms don't care if people leave after a few days because there are always new backpackers who try the job or even stay working despite the bad money because they can't find something else'.¹¹¹ This perception of being easily replaced and competing with other WHMs for farm work has the potential to increase the vulnerability of WHMs to sexual harassment as they are less likely to complain about it because of a fear of losing paid work.

Similarly, for temporary migrant women in the SWP, there is also a vulnerability arising from a fear of losing their jobs because the visa restricts mobility. A SWP visa holder is prevented from moving between employers in Australia,¹¹² which heightens worker vulnerability and acts as a disincentive to leave an exploitative situation or to report mistreatment. An interviewee explained

¹⁰⁸ See Carla Henry and Jacqueline Adams, 'Spotlight on Sexual Violence and Harassment in Commercial Agriculture: Lower and Middle Income Countries' (Research Department Working Paper No 31, International Labour Office, May 2018) 43.

¹⁰⁹ Restrictions preventing almost all temporary migrants from entering Australia during the COVID-19 pandemic, including those under the WHM and SWP visa programs, removed the main sources of labour supply to the horticulture industry: see Heli Askola, Helen Forbes-Mewett and Olha Shmihelska, *Migrant Precariousness in the Time of COVID-19: Migrant Workers, Risks and Rights* (Report, January 2021) 4; Howe et al, *Towards a Durable Future* (n 15) 15, 63.

¹¹⁰ Focus Group with 22 Working Holiday Makers (Joanna Howe, Sydney, 28 February 2018).

¹¹¹ Focus Group with 10 Working Holiday Makers (Joanna Howe, Melbourne, 31 January 2018).

¹¹² 'Seasonal Worker Program Stream', *Department of Home Affairs: Immigration and Citizenship* (Web Page, 4 April 2022) <<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-work-403/seasonal-worker-program>>, archived at <<https://perma.cc/8WPG-3PVU>>.

that a number of women workers in the SWP who were employed in the Griffith region did not want him to make a complaint about mistreatment for a variety of reasons:

At one time I wanted to [report a complaint]. I was talking to a friend of mine and she said: ‘Why don’t you go and report them to the police? Or why don’t you ring [the hotline]?’ But when I talked to the girls, they were scared, they were embarrassed. They were scared but they wouldn’t say why. Maybe there are relatives or members of their families that won’t have another chance to come back again, because people in Tonga won’t recruit them because of these things here, they will start talking and things like that. So I never did. But I did go and get them help. I went to the priest to ask them if they get ... some warm clothing for them. ... I think they were ashamed of being talked about, or maybe people would not believe what they’re saying.¹¹³

Undocumented workers also have an acute fear of losing their jobs because they face a more restricted labour market. As they do not have a legal right to work on farms, they are often heavily reliant on labour hire contractors to source farm work.¹¹⁴ This makes temporary migrant women who are undocumented more vulnerable to sexual harassment because they know that losing their jobs means an immediate loss of an income and that they may be unable to find other work. An inquiry into the labour hire industry has found that contractors commonly blacklist workers who make complaints about pay or other mistreatment.¹¹⁵

These constraints mean that most temporary migrants do not access the legal system when they experience sexual harassment. A temporary migrant woman interviewed as part of a media investigation into sexual harassment exemplifies the fear of temporary migrant women of losing their job on a farm. She stated: ‘The way the system works enables and allows these kinds of people to do these kinds of things, because everyone is so desperate to get this type of work.’¹¹⁶ This is consistent with the observation of the AHRC that reduced opportunities to enter the labour market impact on a worker’s willingness to speak

¹¹³ Interview with Tongan Community Member (Stephen Clibborn, Griffith, 25 April 2018).

¹¹⁴ Marie Segrave, *Exploited and Illegal: Unlawful Migrant Workers in Australia* (Report, July 2017) 42; Elsa Underhill et al, ‘Migration Intermediaries and Codes of Conduct: Temporary Migrant Workers in Australian Horticulture’ (2018) 153(3) *Journal of Business Ethics* 675, 681.

¹¹⁵ See, eg, *Victorian Inquiry* (n 29) 110, 118, 140, 350.

¹¹⁶ Sarah Mullins, ‘“Sleep with Me ... or I Rape You”: Backpackers Speak Out Ahead of Working Visa Change’, *ABC News* (Web Page, 16 June 2019) <<https://www.abc.net.au/news/2019-06-16/calls-to-regulate-backpacker-work-ahead-of-federal-visa-changes/11186178?nw=0>>, archived at <<https://perma.cc/X3X6-GBK9>>.

out on sexual harassment. The following quotes from stakeholder evidence presented to the AHRC are illustrative of this point:

[For migrant workers], workplace rights are kind of a secondary issue to being secure in the country, which often means having permanent residency, and they won't do anything to jeopardise that, which means they put up with all the awful things that we know.¹¹⁷

[M]igration status places women in an unequal position where more often women will prioritise financial need over personal safety [and] thus not report their experiences. The situation is similar for women engaged in domestic work.¹¹⁸

C Poor English Language Skills

English language proficiency is important, among other factors, for the safety of workers; for their capacity to resist unwelcome sexual advances, raise issues with their employers, and report to authorities; and for their ability to live effectively in Australia. Although most of the media reports of sexual harassment of temporary migrant women on farms focus on WHMs from European backgrounds, in particular the United Kingdom, it is possible that this type of conduct is more widespread but that workers from non-European backgrounds are less likely to report sexual harassment. The *Four Corners* exposé in 2015 showed footage of a British migrant worker who recounted being chastised by a grower who had 'wanted Asian girls [instead]'.¹¹⁹ We found that strong perceptions of ethnicity and race conditioned growers' demand for WHMs from different countries, with a 'general preference for workers from Asian countries rather than Europeans'.¹²⁰ As one grower stated, '[the labour hire contractors] know I prefer Asians'.¹²¹ This preference stemmed from racialised perceptions that workers from Asian countries were more productive and compliant. There is no English language requirement for either WHMs or the SWP, and many temporary migrant women in these programs have a poor English language ability, which is a substantial barrier, making it difficult for them to complain directly to their employers, negotiate with their employers and access information about their legal rights, external complaints mechanisms and support services.

¹¹⁷ *Respect@Work* (n 22) 185.

¹¹⁸ *Ibid.*

¹¹⁹ 'Slaving Away' (n 2) 0:17:52–0:18:01.

¹²⁰ Howe et al, *Towards a Durable Future* (n 15) 14.

¹²¹ *Ibid.*

D Low Unionisation

Paradoxically, despite their need for additional labour protection, temporary migrant women are typically less likely to seek trade union assistance or to be members of a trade union. A national survey conducted in 2017 found that only four per cent of temporary migrant workers stated that they were trade union members,¹²² compared with approximately 10 per cent of workers in the private sector.¹²³ Although unionisation varies by industry, employment opportunities for temporary migrant women are often concentrated in under-unionised sectors, such as hospitality and horticulture.¹²⁴ The cost of union membership for temporary migrant workers in low-wage work is also often prohibitive.¹²⁵ Nonetheless, the importance of unions in assisting workers to rectify non-compliance with labour standards was indicated in a recent study of temporary migrants' ability to access legal remedies in Australia, which found that workers who relied on unions or community organisations were far more successful in achieving some rectification of underpayments.¹²⁶

Although there are inherent challenges to recruiting temporary migrant farm workers, the United Workers Union ('UWU') has had some success in recruiting this group as union members. For example, midway through 2016, it was revealed that the National Union of Workers (now the UWU) had successfully forced Costa Group to the bargaining table at its Guyra, New South Wales, site after 200 of its workers (mainly WHMs) signed a petition indicating

¹²² Bassina Farbenblum and Laurie Berg, *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia* (Report, October 2018) 14 ('*Wage Theft in Silence*').

¹²³ Bradley Bowden, 'Three Charts On: The Changing Face of Australian Union Members', *The Conversation* (online, 5 July 2017) <<https://theconversation.com/three-charts-on-the-changing-face-of-australian-union-members-80141>>, archived at <<https://perma.cc/WXT2-WBQ8>>. Data compiled by the Australian Bureau of Statistics in 2020 indicated that private sector union membership now stood at 9.2 per cent: Ewin Hannan and Stephen Lunn, 'Workers in Private Sector Turn Their Backs on Unions', *The Australian* (online, 12 December, 2020) <<https://www.theaustralian.com.au/nation/casual-workers-hit-hard-by-covid-union-membership-continues-to-fall/news-story/83d37e927164668092be6bf0382e9e7>>.

¹²⁴ Stephen Clibborn and Chris F Wright, Submission No 42 to Senate Select Committee on Temporary Migration, *Inquiry into the Impact of Temporary Migration on the Australian Economy, Wages and Jobs, Social Cohesion and Workplace Rights and Conditions* (25 March 2020) 10–12; Joo-Cheong Tham and Judy Fudge, 'Unsavory Employer Practices: Understanding Temporary Migrant Work in the Australian Food Services Sector' (2019) 35(1) *International Journal of Comparative Labour Law and Industrial Relations* 31, 40–1; Underhill and Rimmer, 'Layered Vulnerability' (n 15) 612.

¹²⁵ Reilly et al (n 15) 108.

¹²⁶ Farbenblum and Berg, *Wage Theft in Silence* (n 122) 30.

their support for enterprise bargaining.¹²⁷ The UWU has also been active in recruiting SWP workers and in recruiting and organising undocumented migrant farm workers. The latter is

a group which has traditionally never been unionised in Australia. To overcome the reluctance of this group to unionise, the UWU has employed union organisers from the same ethnic background and language of the main source countries of undocumented workers and developed key contacts over a long period of time within certain horticultural regions. The UWU has also employed in-house migration lawyers to assist undocumented farm workers to apply for other visas so that they can regularise their immigration status.¹²⁸

The role of the UWU in helping enforce labour standards in the horticulture industry for undocumented migrant farm workers was recognised by the Fair Work Commission in November 2016.¹²⁹ The Commission exercised a rarely used power to allow the UWU access to the employment records of every worker employed on a vegetable farm in Victoria because of clear evidence of widespread wage underpayments.

Although the UWU has had some success in organising temporary migrant farm workers and representing them in efforts to reclaim unpaid wages, their record on advocating for women in respect of sexual assault and sexual harassment is scant. There is one media report of the UWU speaking on behalf of a group of eight Taiwanese women who were on subclass 417 WHM visas. These women were trapped in debt bondage and required to perform sexual favours for their contractor in order to pay for their accommodation, which was linked to their farm work.¹³⁰ The absence of strong advocacy by unions on behalf of temporary migrant women in relation to sexual harassment on farms could

¹²⁷ Ben Schneiders, 'Historic Win for Low-Paid Farm Workers at Supermarket Supplier', *The Sydney Morning Herald* (online, 30 July 2016) <<http://www.smh.com.au/national/investigations/historic-win-for-lowpaid-farm-workers-at-supermarket-supplier-20160729-gqgenh.html>>, archived at <<https://perma.cc/JGX5-ZUZX>>.

¹²⁸ Joanna Howe, 'Temporary Migrant Workers and Trade Unions in Australia: A Complex Relationship' in Caroline Kelly and Joo-Cheong Tham (eds), *Democracy, Social Justice and the Role of Trade Unions: We the Working People* (Anthem Press, 2021) 139, 146.

¹²⁹ Richard Baker, Nick McKenzie and Ben Schneiders, 'Another Supermarket Fruit Supplier Caught Allegedly Underpaying Migrants', *The Sydney Morning Herald* (online, 15 November 2016) <<http://www.smh.com.au/business/workplace-relations/another-supermarket-fruit-supplier-caught-allegedly-underpaying-migrants-20161115-gspu0v.html>>, archived at <<https://perma.cc/HZ5J-7NZB>>.

¹³⁰ Tory Shepherd, 'Backpackers Used for Sex', *The Advertiser* (online, 5 December 2019) <<https://www.adelaidenow.com.au/news/south-australia/sa-riverland-backpackers-expected-to-perform-sexual-favours-to-get-enough-work-to-pay-bills/news-story/0b0d62b6c6ddcadf7d16f1746df92d39>>.

perhaps be attributable to the failure of unions more generally to address this issue. Unions have been criticised for their

responses to sexual harassment [which] have been shaped by their position in labor markets that remain highly segmented by gender and race, with male dominated unions playing a passive role vis-à-vis female targets of sexual harassment.¹³¹

E *No Legal Right to Vote*

Temporary migrant women, as non-citizens, do not have the right to vote in Australia.¹³² The management of Australia's labour migration program is characterised by a high degree of executive decision-making, which has led to deficiencies in public accountability and transparency.¹³³ Joo-Cheong Tham has identified that temporary migrant workers tend to be excluded from consultation around how their interests are affected by proposed regulatory changes.¹³⁴ This is despite the fact that changes in the rules of visa schemes have a profound impact upon visa applicants and visa holders. When it comes to advocating for special laws or legal changes to protect their interests, temporary migrant women have to rely on the goodwill of politicians for whom they have no right to vote. There is no political gain for these politicians to advocate on behalf of this group and they are not mandated to act in temporary migrant women's interests. This makes it very important for temporary migrant women's issues to be visible to and to receive the support of the voting public. Otherwise, it is very likely their issues will be ignored. In this context, trade unions are in an ideal position to raise public awareness and to ensure temporary migrant women's interests are protected. The media has also played an increasingly important role in drawing attention to the vulnerability of temporary migrants at work.

F *Characteristics of the Horticulture Labour Market*

A key factor contributing to the vulnerability of temporary migrant women to sexual harassment on farms is the nature of the horticulture labour market,

¹³¹ Ana Avendaño, 'Sexual Harassment in the Workplace: Where Were the Unions?' (2018) 43(4) *Labor Studies Journal* 245, 245.

¹³² See 'Enrol to Vote', *Australian Electoral Commission* (Web Page, 11 February 2022) <<https://www.aec.gov.au/enrol>>, archived at <<https://perma.cc/W99K-RYZQ>>.

¹³³ Joo-Cheong Tham, 'Law-Making and Temporary Migrant Labour Schemes: Accountability and the 457 Visa Scheme' (2009) 17(1) *Australian Journal of Administrative Law* 18.

¹³⁴ *Ibid* 20.

which is characterised by segmentation of temporary migrant labour, geographically dispersed work locations, weak enforcement of labour standards, and a heavy reliance on migration intermediaries and contractors for recruitment. Cumulatively, these attributes of the market create the conditions in which it is likely that temporary migrant women will be more vulnerable to sexual harassment on farms and have little recourse for help.

There is now considerable evidence of the precarity of temporary migrant workers employed in the Australian horticulture industry.¹³⁵ The competition between visa classes contributes to non-compliance with labour standards. The variety of regulatory architecture between visas, and whether a worker has a documented or undocumented status, make some groups of workers more likely to accept wages and conditions that do not comply with the law. An online survey that asked 4,322 temporary migrants about their lowest-paid jobs ever in Australia found that the worst-paid jobs were in fruit and vegetable picking, where 15 per cent of respondents said they had earned \$5 an hour or less, and 31 per cent had earned \$10 an hour or less.¹³⁶ We found considerable evidence that growers and contractors exploited the segmentation of the horticulture labour market to recruit workers that were more likely to accept poor wages and conditions. A community representative in the Mildura case study stated:

We need to talk about the cohorts within this space separately, because the backpacker, what they face versus the undocumented versus the permanent resident ... visa holder[s all have] different ... layers of exploitability ... Backpackers are exploitable because they want to get the 88 days' kick on visa, and that could be exploitable in the sexual with the young woman or whatever the case may be ... And then you've got the undocumented, who are just completely precarious.¹³⁷

In this way, segmentation of the horticulture labour market increases worker vulnerability to sexual harassment because employers can exploit aspects of the

¹³⁵ See, eg, 'Slaving Away' (n 2); *Harvest Trail Inquiry* (n 29); Ben Doherty, 'Hungry, Poor, Exploited: Alarm over Australia's Import of Farm Workers', *The Guardian* (online, 3 August 2017) <<https://www.theguardian.com/global-development/2017/aug/03/hungry-poor-exploited-alarm-over-australias-import-of-farm-workers>>, archived at <<https://perma.cc/3UR6-Q6BT>>; Nick McKenzie, Richard Baker and Saiful Hasam, 'Fruits of Their Labour: Investigation into Exploitation of Migrant Fruit Picking Workers in Australia', *The Sydney Morning Herald* (online, 14 November 2016) <<https://www.smh.com.au/interactive/2016/fruit-picking-investigation>>, archived at <<https://perma.cc/4LJ8-CXYG>>; Underhill and Rimmer, 'Layered Vulnerability' (n 15); *A National Disgrace* (n 29); *Hidden in Plain Sight* (n 29); *417 Visa Inquiry* (n 29).

¹³⁶ Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Worker Survey* (Report, November 2017) 5, 30.

¹³⁷ Howe et al, *Towards a Durable Future* (n 15) 12.

visa framework to exercise greater control and power over certain categories of temporary migrant women.

Temporary migrant women are also vulnerable to sexual harassment when working in remote locations, particularly when they do not have their own transport. This physical isolation creates an environment of vulnerability to sexual harassment, as well as cutting victims off from access to services and complaints mechanisms. One media report gave a disturbing account of how a farmer attempted to sexually assault a young female WHM when he was driving her home from work.¹³⁸ Although she managed to escape the car, the farmer followed her into a ditch and continued his attempted assault. She fought him off but ultimately returned to the vehicle so that he could drive her home, given that she was in a remote location and was entirely reliant on him for transport.¹³⁹ In the media report she chillingly describes her return journey as one where she ‘crossed her legs together so hard they were bruised the next day’.¹⁴⁰ The unintended consequence of the increased vulnerability through isolated work in regional areas was witnessed and documented in another ABC investigation, which was a story involving a WHM who reported: ‘I could not sleep that night, because the male farmer had threatened to pay a “surprise” visit’.¹⁴¹ This was also underscored by media reports of a Belgian backpacker who was tied up and sexually assaulted in a disused pig shed in regional South Australia by a man who answered her Gumtree advertisement looking for farm work.¹⁴²

There are also quite weak employment law enforcement institutions in the horticulture industry which render temporary migrant women susceptible to many forms of non-compliance with labour standards, including sexual harassment and assault. The FWO has limited capacity to effectively enforce employment laws due to the geographically dispersed locations of farms, difficulties locating some labour hire contractors, and under-resourcing of the

¹³⁸ Mullins (n 116).

¹³⁹ Jennifer Feller, ‘Backpackers Reveal Stories of Sexual Assault, Exploitation while Working on Australian Farms’, *ABC News* (Web Page, 8 June 2018) <<https://www.abc.net.au/news/2017-07-17/rosie-ayliffe-uncovers-backpacker-farm-work-horror-stories/8687868>>, archived at <<https://perma.cc/P893-YMGM>>.

¹⁴⁰ Mullins (n 116).

¹⁴¹ Uibu, ‘From Sexual Harassment to Being Underpaid’ (n 93).

¹⁴² Kathryn Bermingham, ‘Man on Trial over Rape, Kidnap of Backpacker on His Pig Farm’, *The Sydney Morning Herald* (online, 5 February 2019) <<https://www.smh.com.au/national/man-on-trial-over-rape-kidnap-of-backpacker-on-his-pig-farm-20190205-p50vwc.html>>, archived at <<https://perma.cc/X7FS-8WPC>>.

inspectorate.¹⁴³ The police have also struggled to investigate incidences of sexual assault, in the rare times in which they are reported, because of the transient nature of the workforce and the difficulty of obtaining evidence and proof.¹⁴⁴ As previously discussed,¹⁴⁵ unions also have a limited, albeit growing, presence in the horticulture sector.

Additionally, the industry's reliance on unregulated labour hire contractors and accommodation providers to source, transport and house its workforce has created greater opportunities for migrant worker exploitation.¹⁴⁶ In particular, this has produced vulnerabilities for temporary migrant women when contractors — and in some cases employers — have tied the provision of their accommodation to working on a particular farm. In one situation, a temporary migrant woman reported being required, as a condition of employment, to stay in her employer's house that had many cameras installed, which she described as one of 'the worst experiences' of her life.¹⁴⁷ She observed that only temporary migrant women were employed on this farm and that a failure to respond to a male manager's sexual advances would result in bullying at work.¹⁴⁸ Another media report referred to sexually predatory behaviour of a hostel owner who would enter the shower area whilst the temporary migrant women were taking showers based on an excuse that he had an urgent message to deliver.¹⁴⁹ Unscrupulous farm labour contractors, therefore, often wield immense power over migrants' lives — hiring, exploiting, and dismissing them arbitrarily — in an environment characterised by intimidation.

¹⁴³ See Stephen Clibborn and Chris F Wright, 'Employer Theft of Temporary Migrant Workers' Wages in Australia: Why Has the State Failed to Act?' (2018) 29(2) *Economic and Labour Relations Review* 207, 214.

¹⁴⁴ Finance and Administration Committee, Parliament of Queensland, *Inquiry into the Practices of the Labour Hire Industry in Queensland* (Report No 25, June 2016) 25.

¹⁴⁵ See above Part III(D).

¹⁴⁶ Joanna Howe et al, 'A Critical Examination of the Relationship between Labour Hire Intermediaries and Growers in the Australian Horticulture Industry' (2019) 32(1) *Australian Journal of Labour Law* 83, 87–9, 95–6, 98, 100–2.

¹⁴⁷ Cait Kelly, "'Modern Slavery': This Is What It Is Really Like Working on Aussie Farms", *The New Daily* (online, 14 June 2021) <<https://thenewdaily.com.au/news/2020/11/16/farm-work-australia-exploitation>>.

¹⁴⁸ *Ibid.*

¹⁴⁹ Feller (n 139).

G Accessing the Legal System

The current legal system requires individual victims of sexual harassment to lodge complaints in order for legal action to be taken,¹⁵⁰ with the implication that incidents of sexual harassment are isolated and private interpersonal disputes rather than part of a wider cultural and behavioural problem that warrants systemic attention and public scrutiny.¹⁵¹ It is very costly to take a complaint beyond conciliation through to a hearing in a court, meaning it is likely unaffordable for most temporary migrants. The substantial length of time required to resolve complaints means the system is effectively out of reach for migrants on temporary, time-bound visas. A parliamentary report on sexual harassment in the United Kingdom found that, for some women, leaving their jobs was a more rational response than making a complaint, because what they wanted was for the behaviour to stop, and the way to make it stop was to leave their employers.¹⁵² Without a grievance mechanism that gives the workers employment and immigration security, perpetrators of sexual harassment remain in the shadows.¹⁵³

Although the FWO's profile has increased amongst temporary migrants, likely owing to its information and education campaigns amongst migrants, inquiry work relating to industries in which migrants work, and substantial work on behalf of migrants, the awareness of anti-discrimination tribunals is unlikely to be high amongst this cohort. Additionally, the anti-discrimination bodies which oversee the legislation are not empowered to enforce the law.¹⁵⁴ Furthermore, the available remedies largely consist of individual compensation, and there are no sanctions such as penalties, punitive damages, or corrective orders.¹⁵⁵ Notably, the exposure draft of the Migration Amendment (Protecting

¹⁵⁰ Elizabeth Shi and Freeman Zhong, 'Addressing Sexual Harassment Law's Inadequacies in Altering Behaviour and Preventing Harm: A Structured Approach' (2020) 43(1) *University of New South Wales Law Journal* 155, 159.

¹⁵¹ Belinda Smith, 'Fair and Equal in the World of Work: Two Significant Federal Developments in Australian Discrimination Law' (2010) 23(3) *Australian Journal of Labour Law* 199, 204, 219.

¹⁵² Women and Equalities Committee, *Sexual Harassment in the Workplace* (House of Commons Paper No 725, Session 2017–19) 26.

¹⁵³ The Fair Food Program is an example of an initiative which proactively addresses sexual harassment of migrant farm workers and gives them a right to remain in their job if they have made a complaint of sexual harassment through the grievance mechanism: Chang (n 60).

¹⁵⁴ See, eg, Dominique Allen, 'Strategic Enforcement of Anti-Discrimination Law: A New Role for Australia's Equality Commissions' (2010) 36(3) *Monash University Law Review* 103, 103–4.

¹⁵⁵ Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 194–6 [7.4.7].

Migrant Workers) Bill 2021 (Cth) introduced no measures to address sexual harassment of migrants — a further indication that sexual harassment is viewed as an individual problem rather than a systemic one.

Where sexual harassment amounts to a criminal offence, it is also difficult for the prosecution to prove each element of the offence beyond reasonable doubt. In one media report, a temporary migrant woman described the frustrating experience of reporting a sexual assault to the police only to be told that they would not be taking the matter further as it was the victim's word against the farmer's and there was no other corroborating evidence.¹⁵⁶ In this case, the police later contacted the young woman and informed her that another female WHM had claimed that she had been sexually assaulted by the same farmer, who has since pleaded guilty and been convicted of sexual assault.¹⁵⁷

These barriers, combined with the factors discussed above, make it near impossible for temporary migrant women to take legal action against a perpetrator of sexual harassment and for perpetrators to be held to account.

H *Summary*

This Part has argued that there are myriad barriers to justice for sexual harassment which render temporary migrant women in the horticulture industry highly vulnerable. This discussion of the barriers is not meant to serve as a definitive list of every legal or situational barrier that affects the enforcement of rights of temporary migrant women on farms, but is intended as an introduction to various types of issues that these women might face in accessing justice. Cumulatively, these barriers are substantial and pose a significant risk that temporary migrant women will be susceptible to sexual harassment in the horticulture industry, and may have little agency or opportunity to access assistance or make a complaint.

IV CONCLUSION

Given that equality under labour law is a key justification for continuing to admit temporary migrant workers, it is essential to ensure temporary migrants are free to access legal remedies. This includes protection from sexual harassment and sexual assault in the workplace, which is a foundational aspect of labour law and anti-discrimination law in Australia and serves as a safeguard against other forms of exploitation.

¹⁵⁶ Feller (n 139).

¹⁵⁷ *Ibid.*

Our examination demonstrates that although the precarity of temporary migrant workers on Australian farms is now well established, there is emerging, disturbing evidence of incidences of sexual harassment and sexual assault. To date, the evidence has been largely anecdotal, but the examination in this article demonstrates that this is not an isolated problem or marginal phenomenon. In fact, the sexual harassment of temporary migrant women on farms is likely to be a consequence of the broader systemic problem of non-compliance with labour standards in the horticulture industry and the entrenched power imbalance between temporary migrant women on farms and contractors and farmers.

Our examination indicates that it is virtually impossible for temporary migrant workers to bring claims under federal labour law or anti-discrimination law, and they are unable to obtain adequate remedies. This is likely the product of a range of practical and legal obstacles created by the intersection between the conditions of temporary migrant labour and the elements and procedures of the laws designed to prohibit sexual harassment and sexual assault in the workplace.

First, a range of practical barriers and structural factors make temporary migrant farm workers more vulnerable to sexual harassment and assault and impede their ability to make reports and complaints. The horticulture industry's reliance on the contractor model, the remote location of farms, the lack of community networks, poor English language ability and limited political agency mean that temporary migrant women are highly vulnerable to sexual harassment and sexual assault on farms.

Secondly, many temporary migrant farm workers are unaware of how to report and seek redress for sexual harassment and sexual assault at work. The focus of the regulator, the FWO, is on wage-related exploitation and non-compliance with record-keeping requirements in the *Fair Work Act 2009* (Cth). There is no equivalent regulator to enforce anti-discrimination law, and complaints of sexual harassment are dealt with on an individual basis. To the extent the relevant unions have sought to assist temporary migrants, they have largely focused on addressing wage theft and status regularisation for undocumented migrants, and not on addressing the problem of sexual harassment on farms. The police also face immense challenges in receiving and investigating reports because of the transient nature of the temporary-migrant farm workforce and the constraints on this workforce in making complaints due to their dependence on their employers for employment, income and immigration status.

At its core, the law prohibiting sexual harassment and sexual assault at work serves to protect employees in the workplace from sexual exploitation. The current failure to provide temporary migrant workers with protection contributes

to their vulnerable status in the Australian labour market and to the creation of a second-class workforce with a different set of rights from other workers with security of residency in Australia.