

MIND THE GAP: IS THE REGULATION OF WORK-INTEGRATED LEARNING IN HIGHER EDUCATION WORKING?

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Many students feel that they are caught in a catch-22: they cannot gain work experience because they cannot find a job, but they cannot secure a job without having work experience. Consequently, opportunities to gain experience while studying, including work-integrated learning ('WIL') associated with university study, are becoming increasingly important, and the position of students undertaking work experience increasingly vulnerable. Students who wish to engage in WIL face a range of challenges, including accessing quality opportunities, maximising the learning benefits they can obtain from the experience, and ensuring they are treated appropriately within the workplace. Consideration of these issues indicates that the regulation of WIL is both complicated and fractured, not least because WIL may be envisaged as either 'work' or 'learning' — each of which is regulated by different actors through different regulatory schemes and with different objectives.

This article introduces the concept of WIL, identifies some of the reasons for its rapid growth in the tertiary sector in recent years, and considers the ways it is regulated in Australia. It argues that, as a consequence of the gaps and lack of transparency in the current regulatory approach, the law is complicit in maintaining the precarious position of students trying to enter the workforce. Failing to extend protections against discrimination and harassment to those engaged in WIL, and failing to provide a sufficiently consistent or transparent regime to ensure educational quality, compound students' existing vulnerability. This is contrasted with the regulatory systems in other countries, notably France, which offer protections to workplace learners against exploitation and seek to ensure educational outcomes.

I INTRODUCTION

Whether called an 'internship', 'placement', 'work experience' or 'volunteer work', and whether organised by an educational provider or otherwise (indirectly

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through a commercial broker or government or directly by a student acting independently), workplace learning is becoming an increasingly common experience for those transitioning from formal education into the workforce.¹ In some industries, work experience is verging on mandatory.² As the International Labour Organization ('ILO') stated in 2013:

Work experience is highly valued by firms and so the lack of such experience constitutes a major obstacle for first-time jobseekers. Many young people are trapped in a vicious circle: they are unable to acquire work experience because they cannot find a first job, but they cannot obtain a job because they do not have work experience.³

And it looks like the requirement for work experience is becoming a permanent feature of the graduate labour market, not only in Australia but also internationally. In the United Kingdom, for example, the Social Mobility Commission reported in 2016 that work experience and internships were the new 'must have', and that '[n]early half of the recruiters who took part in the Highfliers 2016 graduate labour market research survey stated that graduates who have had no previous work experience would have little or no chance of receiving a job offer from their organisation'.⁴

The changing nature of labour markets is compounded by high rates of youth unemployment and underemployment in Australia, as well as in many other countries.⁵ In Australia, the evidence indicates that recent graduates from

- 1 In a 2016 survey of unpaid work experience in Australia, 'a third of Australians (34%) aged 18–64 reported [undertaking] at least one episode of [unpaid work experience] in the last five years': Damian Oliver et al, 'Unpaid Work Experience in Australia: Prevalence, Nature and Impact' (Report, Department of Employment (Cth), December 2016) 5. Perlin discusses the growth of unpaid work for students and graduates in the US in Ross Perlin, *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy* (Verso, revised ed, 2012) ch 2.
- 2 This is the case, for example, in creative industries: see Sabina Siebert and Fiona Wilson, 'All Work and No Pay: Consequences of Unpaid Work in the Creative Industries' (2013) 27 *Work, Employment and Society* 711. In the context of the United Kingdom legal profession, Allen and Overy's retiring senior partner, David Morley, stated in 2016 that 'work experience is the new job currency': Georgina Stanley, Interview with David Morley (Video Interview, 31 March 2016) 01:15 <<http://www.legalweek.com/sites/legalweek/2016/03/31/work-experience-is-the-new-job-currency-allen-overys-morley-on-driving-social-mobility-in-law/?slreturn=20170518223129>>.
- 3 ILO, *Global Employment Trends for Youth 2013: A Generation at Risk* (2013) 64.
- 4 Social Mobility Commission, *State of the Nation 2016: Social Mobility in Great Britain* (2016) 143, citing High Fliers Research, 'The Graduate Market in 2016: Annual Review of Vacancies & Starting Salaries at Britain's Leading Employers' (Report, 2016) 25–6. See also Perlin, above n 1, 28–9.
- 5 In Australia, it was reported in March 2017 that almost one-third of Australian young people are unemployed or underemployed, the highest level in almost 40 years: Brotherhood of St Laurence, *Generation Stalled: Young, Underemployed and Living Precariously in Australia* (March 2017) 3 <http://library.bsl.org.au/jspui/bitstream/1/9409/1/BSL_Generation_stalled_young_underemployed_2017.pdf>, citing Australian Bureau of Statistics, *6202.0 — Labour Force, Australia, Feb 2017: Table 22 Underutilised Persons by Age and Sex — Trend, Seasonally Adjusted and Original* (February 2017) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6202.0Feb%202017?OpenDocument>>. The ILO has noted the dire employment situation for the young internationally: 'young people (aged 15–24) are expected to continue to fare worse than their adult (aged 25 and over) counterparts': ILO, *World Employment Social Outlook: Trends 2017* (2017) 28; 'Unemployment figures understate the true extent of youth labour market challenges since large numbers of young people are working, but do not earn enough to lift themselves out of poverty': ILO, *World Employment Social Outlook: Trends for Youth 2016* (2016) vii.

university struggle to find full-time work in their chosen fields and, despite some improvements in the labour market and a more buoyant economy, employment prospects for them are still significantly worse than before the global financial crisis.⁶ Little wonder that many students and graduates accept non-standard forms of employment, including unpaid internships, and seek alternative avenues for gaining workplace experience, including WIL opportunities as part of their university study.⁷ The growing prevalence of workplace learning is blurring the line between work and education. Some of these arrangements are primarily considered to be ‘work’, while others are understood as merely ‘learning’. It is also increasing the segmentation of the labour market, with some parts ‘inside’ the protective regulation of labour law while others are ‘outside’ it,⁸ which in turn risks increasing the precarious position of those entering the workforce, particularly young people.⁹

This intersection of work and education presents a significant regulatory challenge. The concept of regulation is wider than law. It is concerned more broadly with ‘the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification’.¹⁰ It is well recognised that legal regulation plays a critical role in the construction, constitution and maintenance of labour markets,¹¹ and the importance of the topic continues to attract scholarly interest.¹² Regulatory theory recognises the importance of a wide range of systematic attempts by both public and private

- 6 See Quality Indicators for Learning and Teaching, ‘2017 Graduate Outcomes Survey: National Report’ (Report, Social Research Centre, January 2018) <https://www.qilt.edu.au/docs/default-source/gos-reports/2017/2017_gos_national_report_final_accessiblea45d8791b1e86477b58fff00006709da.pdf?sfvrsn=ceb5e33c_4>.
- 7 In this article, the term ‘WIL’ is used to refer specifically to learning experiences organised by universities and in which students are required to participate, usually for academic credit. This is discussed further in Part II.
- 8 As to ‘segmentation’, see, eg, Katherine Van Wezel Stone, ‘Green Shoots in the Labor Market: A Cornucopia of Social Experiments’ (2015) 36 *Comparative Labor Law and Policy Journal* 293; Brian Langille, ‘“Take These Chains from My Heart and Set Me Free”: How Labor Law Theory Drives Segmentation of Workers’ Rights’ (2015) 36 *Comparative Labor Law and Policy Journal* 257; Julia Lopez, ‘Formalizing the Segmentation of Workers’ Rights: Tensions among Regulatory Levels’ (2015) 36 *Comparative Labor Law and Policy Journal* 281; Mark Freedland, ‘The Segmentation of Workers’ Rights and the Legal Analysis of Personal Work Relations: Redefining a Problem’ (2015) 36 *Comparative Labor Law and Policy Journal* 241.
- 9 For recent attention to some of these issues, see Productivity Commission, *Workplace Relations Framework: Productivity Commission Inquiry Report* (2015) vol 1, 251–62; at vol 2, 823–6. See also ILO, *Non-Standard Employment Around the World: Understanding Challenges, Shaping Prospects* (2016).
- 10 Julia Black, ‘Critical Reflections on Regulation’ (2002) 27 *Australian Journal of Legal Philosophy* 1, 26.
- 11 See, eg, 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); Hugh Collins, Paul Davies and Roger Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer Law International, 2000); Sangheon Lee and Deirdre McCann (eds), *Regulating for Decent Work: New Directions in Labour Market Regulation* (ILO and Palgrave Macmillan, 2011).
- 12 See, eg, John Howe, ‘Labour Regulation Now and in the Future: Current Trends and Emerging Themes’ (2017) 59 *Journal of Industrial Relations* 209.

actors to influence behaviour for certain goals and outcomes and, to that end, is particularly concerned with the operation of the law in practice, including so-called ‘soft law’ and the enforcement of the law. Thus, for example, the role that universities or migration agents or enforcement bodies, such as the Fair Work Ombudsman, play in relation to work experience will be of interest under regulatory theory, in addition to any relevant legislation or court or tribunal decisions.

This article considers a specific aspect of this regulatory problem: the regulation of WIL and its effect on the experiences of participants. In the area of WIL, there is a high degree of regulatory complexity. This arises not only because of the intersection of various areas of law (labour law and education law), which also operate at various jurisdictional levels (federal and state), but also because of the number of regulatory actors involved and the nature of the various roles they perform. As well as those actors recognised as having a public ordering function,¹³ other bodies — such as enforcement agencies,¹⁴ actors with regulatory functions,¹⁵ and universities which develop and provide WIL opportunities — also influence the manner in which WIL becomes the vehicle for the provision of education through work. WIL has also been chosen as the focus because of its expansion in recent years, which means its regulation affects a growing number of potentially vulnerable student participants. Significant concerns have been identified with WIL, including issues of equity of access,¹⁶ participant exploitation,¹⁷ and educational efficacy.¹⁸ This article focuses on the extent to which labour laws extend protections to those engaging in WIL, and the capacity of educational regulation to ensure students undertaking WIL receive real learning benefits. The analysis enables conclusions to be drawn about whether or not the current regulatory environment is contributing to the precarious position of students trying to transition into the workforce. The importance of this issue is demonstrated by the lengthy duration of some work experience, including examples where this has occurred through informal extensions of WIL. For example, the Australian case of *Fair Work Ombudsman v Crocmedia Pty Ltd* concerned young radio producers (one studying and one a recent graduate)

13 Such as parliamentary legislation, as well as public certification and audit agencies, such as the Tertiary Education Quality and Standards Agency (‘TEQSA’).

14 The Fair Work Ombudsman, as well as decisions of tribunals and courts.

15 For example, the various bodies setting accreditation standards for, and having oversight of, various professions (such as nursing, teaching, engineering and the legal profession, to name a few).

16 For example, students from non-English speaking backgrounds may have difficulty securing high-quality WIL placements, or students may be subject to discrimination which limits their capacity to secure or complete a WIL placement. See discussion in Carol-joy Patrick et al, *The WIL [Work Integrated Learning] Report: A National Scoping Study* (Queensland University of Technology, 2008) 24–8.

17 For example, students may be asked to engage in unethical work practices. See, eg, *Cheating the App Store: PR Firm has Interns Post Positive Reviews for Clients [Updated]* (22 August 2009) TechCrunch <<http://www.mobilecrunch.com/2009/08/22/cheating-the-app-store-pr-firm-has-interns-post-positive-reviews-for-clients/>>. Students could also be required to engage in risky activities without adequate training or precautions: see, eg, Perlin, above n 1, 15.

18 Jackson considers a range of issues which can impede skills development and learning in the context of WIL. See Denise Jackson, ‘Employability Skill Development in Work-Integrated Learning: Barriers and Best Practice’ (2015) 40 *Studies in Higher Education* 350.

who had undertaken multiple shifts of ‘work experience’ per week over many months,¹⁹ and the United States case of *Glatt v Fox Searchlight Pictures Inc* involved graduate and student interns working for many months for free on the film *Black Swan*.²⁰

Parts II and III of this article explore the concept of WIL and the reasons for its growth. Part IV considers the extent to which WIL is regulated by the Commonwealth’s Fair Work legislation, work health and safety laws, and prohibitions of discrimination and sexual harassment. Part V considers the tertiary education regulation scheme. Part VI highlights the limited effect of national regulation and the consequential reliance on intra-institutional regulation. The lack of transparency in internal regulation, combined with the efficiency and reputational pressures on institutions, raises concerns about whether this regulatory approach is sufficient to ensure WIL is a genuine opportunity for learning, not merely exploitation. We argue that WIL falls into this latter category when the nature of the placement, the work undertaken, or the supervision or other arrangements are such that the participant cannot achieve the learning objectives associated with the course of study they are undertaking. This is contrasted briefly with regulation in some other countries, including France where the regulation of workplace learning endeavours both to protect students in the workplace and ensure they achieve appropriate educational outcomes. This analysis informs the conclusions drawn in Part VII.

II INTRODUCING WIL

WIL is an umbrella term used to describe an enormous diversity of learning experiences. The Australian Learning and Teaching Council states that WIL is most commonly used to describe programs in which

students engage with workplaces and communities as a formal part of their studies ... A commonly expected outcome of these student WIL experiences is gaining new knowledge, understandings and capabilities, and mastering skills considered essential to particular workplace practices. The underlying assumption is that students cannot learn these skills and knowledge in formal classrooms.²¹

For the purposes of this article, WIL is defined to include a range of strategies that promote students’ learning by engaging them in aspects of real work, and

19 [2015] FCCA 140 (29 January 2015).

20 811 F 3d 528 (2nd Cir, 2016).

21 Janice Orrell, Australian Learning and Teaching Council, *Good Practice Report: Work-Integrated Learning* (2011) 5 (citations omitted). See also Debra D Burke and Robert Carton, ‘The Pedagogical, Legal, and Ethical Implications of Unpaid Internships’ (2013) 30 *Journal of Legal Studies Education* 99, 101–7.

are a requirement of a university course of study, usually for academic credit.²² According to this definition, WIL encompasses initiatives in which students engage in real-world workplace activities, such as internships and clinical placements in businesses, or industry projects which might be completed on-campus. Each of these learning experiences is united by the fact they are a component of a university curriculum and that students' learning is situated within the act of working.²³ This article does not specifically consider extracurricular or 'open market' internships, which raise a series of important issues beyond the scope of this analysis, although we acknowledge that in certain factual situations the intersection of WIL and open market internships can pose difficult regulatory challenges.²⁴ In addition, WIL in other education contexts may raise unique issues and regulatory problems that are not specifically considered. This article focuses specifically on WIL within universities which are self-accrediting under the *Tertiary Education Quality and Standards Agency Act 2011* (Cth).²⁵

When considering the forms of WIL, it is worth making explicit that not all WIL opportunities resemble the classic 'internship' in which a student works (full- or part-time) in an office or other place of work. New forms of WIL — such as industry projects which are completed remotely or on-campus, rather than in the workplace, or a remote placement with a host organisation which doesn't have a physical office — are becoming increasingly common.

Perhaps because of its diversity, the number of students engaging in WIL is difficult to gauge precisely. However, a 2016 nationally representative survey of unpaid work experience among working-age Australians (hereafter '2016 Survey') demonstrated that unpaid work experience is common in Australia, with 58 per cent of respondents aged 18–29 and 26 per cent of respondents aged 30–64 having participated in at least one period of unpaid work experience in the last five years.²⁶ Approximately half of that unpaid work experience was associated with some form of formal education or training, and 20 per cent was part of university study.²⁷ Evidence such as this demonstrates that WIL is extensively utilised in the

22 This is similar to the definition proposed by Craig Cameron, who defined WIL as 'a tertiary program which combines and integrates learning with its workplace application in the workplace': Craig Cameron, 'The Vulnerable Worker? A Labor Law Challenge for WIL and Work Experience' (2013) 14 *Asia-Pacific Journal of Cooperative Education* 135, 136. However, the definition in this article differs in that it is restricted to WIL programs offered by universities, not all tertiary education providers.

23 Lesley Cooper, Janice Orrell and Margaret Bowden, *Work Integrated Learning: A Guide to Effective Practice* (Routledge, 2010) 1.

24 For example, where work experience is not part of a course of study there is a possibility that a student undertaking it is an 'employee' and is entitled to the protections of the *Fair Work Act 2009* (Cth): Andrew Stewart and Rosemary Owens, 'Experience or Exploitation?: The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia' (Report, Fair Work Ombudsman, January 2013) 137–50, 249–53.

25 All 40 Australian universities are authorised as self-accrediting institutions under the *Tertiary Education Quality and Standards Agency Act 2011* (Cth): see TEQSA, *National Register* (2017) <<https://www.teqsa.gov.au/national-register>>.

26 This survey undertaken on behalf of the Commonwealth Department of Employment considered all forms of unpaid work experience (not just WIL): Oliver et al, above n 1, 24.

27 Ibid 6, 26.

Australian higher education context, with particularly high numbers of students in some disciplines; for example, education and health, in which work placements have a long history.²⁸ In fact, the numbers participating in WIL are probably higher than the 2016 Survey suggests, because some students are paid for their WIL placements.

Because of the high numbers of students engaged in WIL, it is important for Australian educators to carefully evaluate whether or not it is functioning effectively. There are a range of different measures by which this could be gauged. One is stakeholder perception of its utility. '[P]ragmatic or operational' benefits have been reported for all three stakeholder groups in WIL: students, employers and academic institutions.²⁹ The 2016 Survey confirmed that tertiary student participants perceive their WIL experience as positive: 70.4 per cent of respondents who had undertaken unpaid work experience as a part of a tertiary education course agreed or strongly agreed it would help them find paid employment,³⁰ and 73.5 per cent indicated they were satisfied or very satisfied with the experience.³¹ However, student stakeholders are naturally invested in WIL, and may not be best placed to objectively evaluate the pedagogy. This seems true in light of the issues, risks, and complications associated with WIL which have been identified by the tertiary education regulator.³² These issues, risks, and complications are numerous and will not be fully canvassed here. However, they can be illustrated through a brief discussion of two key concerns: assurance of learning outcomes, and issues of equity and access. These areas demonstrate the vulnerabilities of students engaged in WIL, who may be relying on their placement to deliver educational and work-related outcomes, and who are often young and relatively inexperienced. These issues are also of international relevance; for example, the 2017 United Kingdom Institute for Public Policy Research report on internships, *The Inbetweens*, identified equity of access and high-quality learning opportunities as priority issues in internships.³³

28 Ali Radloff and Hamish Coates, Australian Council for Educational Research, *Doing More for Learning: Enhancing Engagement and Outcomes: Australasian Survey of Student Engagement: Australasian Student Engagement Report* (2010) 27. This is also confirmed by the 2016 Survey data: Oliver et al, above n 1, 39.

29 Richard K Coll et al, 'An Exploration of the Pedagogies Employed to Integrate Knowledge in Work-Integrated Learning' (2009) 43(1) *Journal of Cooperative Education & Internships* 14, 15.

30 Oliver et al, above n 1, 51. Similar results were identified in a 2011 Survey of Canadian students engaged in WIL: Miriam Kramer and Alex Usher, 'Work-Integrated Learning and Career-Ready Students: Examining the Evidence' (Intelligence Brief No 5, Higher Education Strategy Associates, November 2011) 7, 19–21.

31 Oliver et al, above n 1, 42.

32 TEQSA, *Guidance Note: Work Integrated Learning* (Version 1.2, 11 October 2017), 3–4 <<https://www.teqsa.gov.au/sites/g/files/net2046/f/guidance-note-work-integrated-learning-v1-2.pdf?v=1508210872>>.

33 Carys Roberts, 'The Inbetweens: The New Role of Internships in the Graduate Labour Market' (Report, Institute for Public Policy Research, April 2017) 8.

A Assurance of Learning Outcomes

First, there is evidence that the learning outcomes WIL can deliver are dependent on the details of participants' individual experience.³⁴ Perlin's 2012 book describes many examples of US students engaged in WIL who are passing their time by undertaking menial tasks in the workplace, with limited on-site supervision, insufficient academic guidance, or limited access to tools and support to assist them to integrate their workplace experiences with the rest of their studies, and learning little or nothing through their placement.³⁵ The literature suggests there are two key factors to ensuring that students' WIL experience is, in fact, educative: (1) integrating WIL within well-planned course structures which 'effectively prepare and support students in their WIL experience';³⁶ and (2) liaising and ensuring the placement itself is a 'good' one.³⁷ The importance of these factors has been explicitly recognised by the Tertiary Education Quality and Standards Agency ('TEQSA').³⁸

B Equity of Access

The second issue is equity of access. Even if WIL pedagogies are managed to ensure they deliver learning outcomes to participants, they can hardly be regarded as successful if they are not accessible to a diverse range of students. As Gidley et al state:

34 For example, a 2013 survey of 13 000 young people in 27 European countries revealed that '18 % of traineeships were reported to have insufficient learning content' and that 'those who had done a standard traineeship were significantly less likely to find a job afterwards': European Commission, *Commission Staff Working Document: Executive Summary to the Impact Assessment Accompanying the Document Proposal for a Council Recommendation on a Quality Framework for Traineeships*, SWD(2013) 496 final (4 December 2013) 4, citing TNS Political & Social, 'The Experience of Traineeships in the EU: Flash Eurobarometer 378' (Report, Directorate-General for Employment, Social Affairs and Inclusion, European Commission, November 2013) ('*Flash Eurobarometer Survey*'). For the purposes of the survey, 'traineeship' was 'understood as a limited period of work experience and training spent in a business, public body or non-profit institution by students or young graduates': at Q1. This encompasses workplace learning which is not linked to formal education, and therefore beyond the scope of WIL as being discussed here.

35 See generally Perlin, above n 1.

36 Jackson, above n 18, 364.

37 Nick Wilton, 'The Impact of Work Placements on Skills Development and Career Outcomes for Business and Management Graduates' (2012) 37 *Studies in Higher Education* 603. Wilton's research in the United Kingdom demonstrated that work placements did not have universally positive outcomes on the employment prospects of all participants.

38 TEQSA's role in relation to the regulation of WIL is discussed further in Part V. However, it is worth noting that the *Higher Education Standards Framework (Threshold Standards) 2015* (Cth) requires that all courses of study assess whether students have acquired the specified learning outcomes: at 1.4; that all facilities, including those where external placements are undertaken, are fit for purpose: at 2.1; and that WIL is quality assured, including the quality of supervision of student experiences: at 5.4. The importance of this is further emphasised in TEQSA, *Guidance Note: Work Integrated Learning*, above n 32.

quality in higher education is synonymous with a broad interpretation of social inclusion in higher education in that both are concerned with equitable access, participatory engagement and empowered success.³⁹

As has been noted in the context of open market unpaid internships, inequity in access risks promoting ‘inequalities of opportunity that we have been striving diligently to reduce in courts, schools, and communities’.⁴⁰ However, the issue of equity of access is for the same reasons of no less (and in fact of even greater) significance in relation to WIL.

Indeed, there are a number of key equity and access issues that arise specifically in the context of WIL.⁴¹

First, there are often costs associated with undertaking WIL, particularly if the work placement is either remote from the students’ usual place of study, or the work must be undertaken full-time. The costs include forgoing paid work for the period of the placement:⁴² this is not only a matter of a WIL student forgoing pay during the relevant period (because, although there are exceptions, in many cases WIL is not paid), but also their unavailability to undertake their usual paid work will often entail a risk that they lose their paid job altogether. Other costs incurred by the student may include travel, accommodation and other miscellaneous expenses (such as the need to purchase appropriate clothing)⁴³ associated with the work placement.⁴⁴ For some, there will be costs of alternative care for children or other dependants while the work placement is undertaken. These costs may impact disproportionately on some students, even to the extent of being prohibitive for them. For example, the Australian Bureau of Statistics reported in 2013 that the main source of income for 61 per cent of Australian

39 Jennifer M Gidley et al, ‘From Access to Success: An Integrated Approach to Quality Higher Education Informed by Social Inclusion Theory and Practice’ (2010) 23 *Higher Education Policy* 123, 142.

40 Perlin, above n 1, xv. The British Low Pay Commission noted the ‘potentially damaging impact ... on social mobility’ of unpaid internships for university graduates because they ‘[inhibit] labour market access for particular groups who cannot afford to undertake them’: Low Pay Commission, *National Minimum Wage: Low Pay Commission Report 2012* (2012) 88. These access and equity issues may compound the exclusive nature of recruitment for particular careers, particularly those in which experience is necessary: see, eg, Sutton Trust, ‘Internship or Indenture?’ (Research Brief, November 2014) <<http://www.suttontrust.com/researcharchive/internships/>>.

41 These issues are specific to WIL and are more distinctive than the broader issues of persistent underrepresentation of low socioeconomic status people and Indigenous students in Australian universities. For discussion of that topic, see Centre for the Study of Higher Education, University of Melbourne, ‘Participation and Equity: A Review of the Participation in Higher Education of People from Low Socioeconomic Backgrounds and Indigenous People’ (Report, Universities Australia, March 2008).

42 In the 2016 Survey, 51.5 per cent of respondents who had undertaken unpaid work experience as a part of their higher education course indicated that they had cut back on their hours of paid work for the duration of the unpaid placement: Oliver et al, above n 1, 47.

43 Paula McDonald, Damian Oliver and Deanna Grant-Smith, ‘The Growing Cost of Internships Could Add to Inequality’, *The Conversation* (online), 20 June 2016 <<https://theconversation.com/the-growing-cost-of-internships-could-add-to-inequality-60371>>.

44 In the 2016 Survey, 27 per cent of students paid for their own insurance, 40.4 per cent had to travel for longer than an hour to reach the place where they were undertaking unpaid work experience, and 26.7 per cent had to live away from home to undertake the work experience: Oliver et al, above n 1, 47.

higher education students was a wage or salary.⁴⁵ For many of these students, the capacity to study flexibly (including part-time and after hours) may be essential to allowing them to participate in tertiary education, and consequently participation in a full-time, inflexible work placement as a requirement of WIL is often impossible. In this context it is notable that respondents in the 2016 Survey who undertook unpaid work experience as part of a higher education course tended to report the longest placement durations. Fifteen per cent reported placements that lasted approximately four weeks full-time, while 18.7 per cent reported that their most recent placement was more than four weeks full-time.⁴⁶

A second access issue relates to those courses in which students are required to organise their own WIL placement. If the university does not offer substantive and substantial support in this process, there is a real possibility that some students — for example, those with poor English language skills, or without contacts in the relevant industry — will be unable to organise a suitable placement.⁴⁷ Others will organise a sub-optimal placement,⁴⁸ for instance, as a consequence of information-asymmetry, whereby students are not able to evaluate the quality of a placement before commencing it.⁴⁹

There is also a risk that discrimination may exclude some students from participating in WIL.⁵⁰ There is ample evidence that discrimination remains a significant obstacle to some members of society participating in the workforce⁵¹

45 Australian Bureau of Statistics, *4102.0 — Australian Social Trends, July 2013: Hitting the Books: Characteristics of Higher Education Students* (25 July 2013) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features20July+2013>>.

46 Oliver et al, above n 1, 30.

47 In a graduate context in the UK, the importance of connections and knowledge of the opaque routes which might be used to secure a placement, and a lack of the confidence required to follow those routes have been identified as barriers to high quality internships: Roberts, above n 33, 21–4. Some of the barriers to participation in an Australian context were identified in Patrick et al, above n 16, 24–8.

48 In a graduate context, Hunt and Scott note that even after removal of financial barriers, and controlling for grades and institutional prestige, those from disadvantaged backgrounds still struggle to secure high quality internships in the UK. See Wil Hunt and Peter Scott, 'Participation in Paid and Unpaid Internships among Creative and Communications Graduates: Does Class Advantage Play a Part?' in Richard Waller, Nicola Ingram and Michael R M Ward (eds), *Higher Education and Social Inequalities: University Admissions, Experiences, and Outcomes* (Routledge, 2018) 190, 191.

49 The problems students face in locating accurate information about internships has been noted in the EU: see European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a Quality Framework on Traineeships — Second-Stage Consultation of the Social Partners at European Level under Article 154 TFEU*, COM(2012) 728 final (5 December 2012) 6. <<http://ec.europa.eu/transparency/regdoc/rep/1/2012/EN/1-2012-728-EN-F1-1.Pdf>>. For an example in the United States, see Jon Geller et al, 'A Call for Internship Quality Control' (2012) 240 *Journal of the American Veterinary Medical Association* 939, 940.

50 Discrimination was included among the list of barriers to securing graduate internships in the 2017 UK report, *The Inbetweeners*: Roberts, above n 33, 23.

51 For example, the South Australian Equal Opportunity Commission accepted 124 complaints in 2013–14 and 127 in 2012–13, most of which related to disability and race discrimination in the workplace: Equal Opportunity Commission (SA), 'Annual Report 2013–2014' (Report, 2014) 20. The Victorian Equal Opportunity and Human Rights Commission accepted 1053 complaint files in 2013–14, most of which were also related to employment: Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2013/14* (2014) 22.

and it is probable that some WIL pedagogies will replicate this inequity among the student population.⁵² Student participants are also potentially vulnerable to being the subject of discrimination or harassment within the workplace.⁵³ For example, the recent Australian Human Rights Commission report into sexual harassment and assault in universities reported that for two per cent of students who had been sexually harassed or sexually assaulted in a university setting in 2015 or 2016, ‘the most recent incident had occurred in a workplace as part of university studies’,⁵⁴ and that ‘[p]erpetrators included colleagues and clients at a workplace outside university’.⁵⁵ While there is limited research on the effect of being subjected to discrimination or harassment while engaged in WIL, it seems safe to assume it would, amongst other impacts, negatively affect learning.⁵⁶

III WHY HAS WIL BEEN GROWING?

A Demand from Students

One of the factors contributing to the growth of WIL is the demand from university students. In a slow economic environment, students are eager to gain a foothold in the industry of their choice, and work experience is often perceived as a way to do this. For some students, the opportunity to enter a workplace as part of an institutionally sanctioned WIL program may be a means to this end. Indeed, there is considerable evidence that students perceive they obtain benefits from learning in a workplace in terms of personal skill development and securing employment. For example, in the 2016 Survey, 28.3 per cent of respondents who had undertaken unpaid work experience as part of their university study indicated they were offered paid employment at the conclusion of the work

52 Some astonishing examples of discrimination against interns have been reported in the United States, such as the case of Joanna Jackson, a 41-year-old college student with excellent grades who applied for an internship at Boston-based magazine, *The Atlantic Monthly*, in 2001 but was refused because of her age. The magazine’s internship coordinator explained that ‘just as kindergarten is for five year olds there is an age cut-off point for our program’: Exhibit E, *Jackson v Atlantic Monthly*, Massachusetts Commission Against Discrimination (02BEM00448), quoted in David C Yamada, ‘The Employment Law Rights of Student Interns’ (2002) 35 *Connecticut Law Review* 215, 221.

53 Newman, Daley and Bogo reported discrimination against gay and lesbian students engaged in WIL: Peter A Newman, Marion Bogo and Andrea Daley, ‘Breaking the Silence: Sexual Orientation in Social Work Field Education’ (2009) 45 *Journal of Social Work Education* 7. In September 2017, the ABC reported allegations of sexual harassment of medical students on placement in a Darwin hospital: Kristy O’Brien, ‘Royal Darwin Hospital Doctors Stood Down over Sexual Assault Allegations’, *ABC News* (online), 3 September 2017 <<http://www.abc.net.au/news/2017-09-02/two-royal-darwin-hospital-doctors-accused-of-sexual-assault/8866804>>. Australia’s tertiary students are also increasingly diverse, which may increase the likelihood of students being subject to discrimination. See, eg, Nick Parr, ‘Who Goes to University? The Changing Profile of Our Students’, *The Conversation* (online), 25 May 2015 <<https://theconversation.com/who-goes-to-university-the-changing-profile-of-our-students-40373>>.

54 Australian Human Rights Commission, *Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities* (2017) 68.

55 *Ibid* 87.

56 For a discussion of the impacts of experiencing sexual harassment or assault during university study, see *ibid* ch 4.

experience period,⁵⁷ and 70.4 per cent of respondents agreed or strongly agreed it would be helpful for them in finding future paid employment.⁵⁸ However, it is worth noting that the 2016 Survey was inconclusive as to whether participation in unpaid work experience did actually improve future employment prospects.⁵⁹ Similar positive perceptions have been identified overseas. For example, in a 2011 survey of Canadian university students, 42 per cent reported having taken part in institutionally organised WIL.⁶⁰ Of those, a high proportion (87–92 per cent) agreed or strongly agreed with the proposition that their WIL experience ‘had a positive impact on critical and analytical thinking, problem solving and decision making skills’.⁶¹ The same students were confident their participation in WIL would positively affect their ability to find work in their field of study after graduation.⁶² However, the same study also reported positive student perceptions of volunteering and paid work not formally associated with their study, suggesting there was not a significant ‘value-add’ from participating in a WIL program as contrasted to other work experience.⁶³

B ‘Work-Ready’ Workforce

Another factor behind the growth of WIL is increasing pressure from industry for university graduates to be ‘work-ready’.⁶⁴ Traditional university courses have not always been perceived as achieving this. For example, a 2007 Business Industry and Higher Education Collaboration Council report which sought to advise the Commonwealth Government on ways to improve employability skills⁶⁵ stated: ‘[b]roadly speaking industry representatives are satisfied with the technical or discipline-specific skills of graduates, but for some there is a perception that employability skills are under-developed’.⁶⁶

57 Oliver et al, above n 1, 52.

58 Ibid 51.

59 Ibid 9.

60 Kramer and Usher, above n 30, 7.

61 Ibid 15.

62 Ibid 21.

63 Ibid 15–18.

64 ‘More than ever we need professionals who are responsive to economic, social, cultural, technical and environmental change and can work flexibly and intelligently across business contexts. Australian industry requires new graduates who ... have the practical skills to work effectively in their roles.’: Mitch Cleary et al, Precision Consultancy, *Graduate Employability Skills: Prepared for the Business, Industry and Higher Education Collaboration Council August 2007* (2007) 1.

65 The Department of Education, Employment and Workplace Relations recommended that employability skills be defined as ‘the non-technical knowledge, skills and attributes required to effectively participate in the workforce’: Ithaca Group, ‘Employability Skills and Attributes Framework’ (Background Paper, Department of Education, Employment and Workplace Relations (Cth), August 2011) 2.

66 Cleary et al, above n 64, 2. In March 2015, Universities Australia chief executive Belinda Robinson said ‘[i]ndustry has really been wringing its hands for quite some time around the job readiness of some graduates’: Naomi Woodley, ‘University Students to Undertake Work Experience as Part of National Strategy to Boost Their “Job Readiness”’, *ABC News* (online), 11 March 2015 <<http://www.abc.net.au/news/2015-03-11/national-strategy-aims-to-improve-job-readiness-of-university-students/6297716>>.

In this context, pedagogies that are perceived to help students develop employability skills, such as WIL with its focus on learning situated within work, attract increased support. Evidence of this is seen in a 2014 national survey which reported that employers in the science, technology, engineering and mathematics ('STEM') industries believed 'work placements and work experience were ... one of the most effective teaching methods for helping students acquire the skills they need in the workplace'.⁶⁷

Backing for WIL extends beyond individual institutions or industries. In 2015, the Australian Collaborative Education Network, Universities Australia, Australian Chamber of Commerce and Industry, Australian Industry Group, and the Business Council of Australia released a National Strategy on Work Integrated Learning in University Education.⁶⁸ This Strategy states the value of WIL in no uncertain terms:

WIL is aimed at improving the employability of graduates by giving them valuable practical experience which is directly related to courses being studied at university. WIL also improves the transition from university to work and productivity outcomes for the employer and the economy.⁶⁹

The Strategy records the intention of its partner organisations to work together to 'target barriers, boost enablers and expand opportunities to partner in WIL from the perspectives of universities, employers and students'.⁷⁰ While the impact of the Strategy cannot yet be measured, it demonstrates a substantial commitment to WIL from both industry and the education sector.

There are clearly costs to host organisations in establishing and running a high quality WIL placement; for example, in supervising and training students, devising projects in which they can be involved, and in providing feedback on their work. However, it should also be noted that there is a risk that unscrupulous employers perceive WIL as a source of cheap labour. As Roberts recently noted, in a graduate context, '[e]mployers benefit from internships, as they offer a low-cost source of highly skilled labour, with wages lower than entry-level starting salaries and in some cases non-existent, and entail less risk than taking on a graduate in a full-time permanent position'.⁷¹ Some of the same arguments can be applied to WIL students. In some fields, they may have relevant skills and they are potentially a source of cheap or free labour.

67 Deloitte Access Economics, 'Australia's STEM Workforce: A Survey of Employers' (Report, Office of the Chief Scientist, 23 June 2014) 4.

68 Australian Collaborative Education Network et al, *National Strategy on Work Integrated Learning in University Education* (2015) <<http://cdn1.acen.edu.au/wp-content/uploads/2015/03/National-WIL-Strategy-in-university-education-032015.pdf>>.

69 Ibid 1.

70 Ibid 3.

71 Roberts, above n 33, 8.

C Support Within the Education Sector

Integrating learning and practice is one legitimate response to the employment pressures discussed above, and many institutions have incorporated a commitment to WIL in their strategic plans.⁷² The experience of educators also confirms that learning in a practical context can have real benefits for students,⁷³ including that students have ‘more interest in the subject matter, and are better motivated to learn. They work harder, and pay closer attention to what is happening. They tend to learn things at a deeper level, and thus to remember them longer’.⁷⁴

The workload implications in developing and maintaining high quality WIL experiences for students are well recognised. For example, Orrell notes the work involved in preparing WIL placements, preparing students to undertake WIL, and managing student pathways out of their WIL experience.⁷⁵ However, as Abeysekera noted in 2006, the addition of less rigorous WIL experiences can also be an easy route to ‘re-marketing’ a traditionally academic course with a ‘vocational’ aura that may make it more attractive to potential students seeking the highest future return for their investment in education.⁷⁶ Some law schools (amongst other discipline areas) have utilised this strategy, and regularly promote themselves to prospective students by emphasising their employability rates and the starting salaries of their graduates.⁷⁷ In addition, at a time when universities face enormous financial pressures, there is also a risk that WIL pedagogies may be implemented because they can be run in a cost-effective manner.⁷⁸ As Burke and Carton emphasise, educational providers receive tuition fees for WIL-based

- 72 For example, Griffith University has committed to providing students with ‘[a] transformational Griffith Experience that builds students’ self-confidence, employability, and capacity to apply their skills and knowledge to a range of contexts’ through a range of for-credit learning opportunities including WIL: Griffith University, *Griffith University Strategic Plan 2013–2017*, 4 <https://www.griffith.edu.au/__data/assets/pdf_file/0014/205502/Strategic-Plan-2013-2017.pdf>. The University of Adelaide commits to providing work experience opportunities for its students: University of Adelaide, *Beacon of Enlightenment: The University of Adelaide Strategic Plan 2013–2023* (2012) 10 <<https://www.adelaide.edu.au/VCO/beacon/beacon-of-enlightenment.pdf>>. La Trobe University commits to providing opportunities for all students to participate in ‘innovation and application in the workplace’: La Trobe University, *Future Ready: Strategic Plan 2013–2017* (2015) 4 <<https://www.latrobe.edu.au/about/downloads/La-Trobe-Strategic-Plan-November-2015.pdf>>.
- 73 Belinda McLennan and Shay Keating, ‘Work-Integrated Learning (WIL) in Australian Universities: The Challenges of Mainstreaming WIL’ (Paper presented at the ALTC NAGCAS National Symposium, Melbourne, June 2008) 3–4.
- 74 Howard R Sacks, ‘Student Fieldwork as a Technique in Educating Law Students in Professional Responsibility’ (1968) 20 *Journal of Legal Education* 291, 294. There is also evidence that engaging in WIL improves students’ ‘employability skills including team working, problem-solving, communication, information literacy and professionalism’: Jackson, above n 18, 351, citing Brett Freudenberg, Mark Brimble and Craig Cameron, ‘WIL and Generic Skill Development: The Development of Business Students’ Generic Skills through Work-Integrated Learning’ (2011) 12 *Asia-Pacific Journal of Cooperative Education* 79; Coll et al, above n 29.
- 75 Orrell, above n 21, 14–15.
- 76 Indra Abeysekera, ‘Issues Relating to Designing a Work-Integrated Learning Program in an Undergraduate Accounting Degree Program and Its Implications for the Curriculum’ (2006) 7(1) *Asia-Pacific Journal of Cooperative Education* 7, 7.
- 77 Margaret Thornton and Lucinda Shannon, ‘“Selling the Dream”: Law School Branding and the Illusion of Choice’ (2013) 23 *Legal Education Review* 249, 257–65.
- 78 Perlin, above n 1, ch 5.

courses, often ‘without having to provide classrooms, equipment, or substantial instruction from a professor’.⁷⁹ For many WIL courses, this criticism is no doubt unwarranted, with institutions ensuring, through a variety of means, a substantive academic experience integrated with a closely monitored and carefully structured period of work. However, we do recognise that this may not always be the case, despite the regulatory pressure to ensure universities contribute to students’ learning in WIL in an Australian context.⁸⁰

IV REGULATION OF WIL AS WORK

The nature of WIL is such that many students undertaking it will be participating in a workplace environment. This raises a number of legal issues, including whether students engaged in WIL are covered by the variety of legislation relating to employees and (sometimes) other workers in the workplace. These laws are examined below under the broad headings of employment-related benefits (such as pay and leave) and protection from discrimination and harassment and unsafe working conditions. This analysis provides a platform for general consideration of the extent to which student participants are covered by labour laws.

A Employment Benefits

Where WIL is undertaken as part of a formal education program in a workplace covered by the *Fair Work Act 2009* (Cth) (*‘Fair Work Act’*),⁸¹ the position regarding employment benefits, such as minimum wages and various types of leave, is superficially clear. The *Fair Work Act* provides that a person undertaking a ‘vocational placement’ is not regarded as an employee, and hence is not entitled to the minimum standards set by the Act.⁸² A vocational placement is defined in s 12 to mean an unpaid placement undertaken as a requirement of an education or training course and authorised under a federal, state or territory law or administrative arrangement. While the drafting and scope of this exception are not as clear as they might be,⁸³ it ensures that periods of unpaid work experience

79 Burke and Carton, above n 21, 123.

80 This will be discussed further in Part V below.

81 As to the coverage of this Act, which includes all non-government employers (other than certain smaller employers in Western Australia), see Andrew Stewart et al, *Creighton and Stewart’s Labour Law* (Federation Press, 6th ed, 2016) ch 6.

82 Sections 13, 15(1)(b), 30C(1)(a) and 30M(1)(a) each provide that the terms ‘employee’ or ‘national system employee’ do not include a person who is ‘on a vocational placement’: *Fair Work Act*.

83 The definition has been applied in *Corner v SkyCity Adelaide Pty Ltd* [2010] FWA 9259 (7 December 2010) [36]–[38] and *Sharp v J S Plumbing Ltd* [2011] FWA 7076 (21 October 2011) [28]–[31]; however, those cases do not shed much light into its meaning. For further discussion, see Stewart and Owens, ‘Experience or Exploitation?’, above n 24, 75–82. The definition was also briefly discussed in *Fair Work Ombudsman v Kjoo Pty Ltd* [2017] FCCA 3160 (20 December 2017) annex [7]–[9], in a context where the work arrangements were not a vocational placement because they were not (a) unpaid; (b) a requirement of any education or training course; nor (c) authorised by any law or administrative arrangement of the Commonwealth of Australia, or any state or territory.

undertaken as part of a higher or vocational education course are not (at least for most purposes) covered by the *Fair Work Act*, even if they might otherwise be capable of characterisation as employment.⁸⁴ By contrast, a ‘training’ program not associated with an accredited institution or provider will not attract the operation of the vocational placement exception;⁸⁵ and nor will an extracurricular ‘internship’ undertaken by a student or graduate hoping to gain experience that will gain them (paid) employment.⁸⁶ Paid placements will likewise fall outside the exception, even if undertaken to satisfy a course requirement.

With the exception of Victoria, the states have retained their own equivalents to the *Fair Work Act* for employees not covered by that Commonwealth Act.⁸⁷ In most states, this legislation applies only to employees in the public and local government sectors.⁸⁸ If a student is working as part of a WIL placement in one of those areas, their entitlements to pay and leave will depend on whether they satisfy the definition of ‘employee’ under the relevant legislation. The laws of each state and territory are different: some may include students undertaking unpaid work experience, while in other jurisdictions they are more likely excluded.⁸⁹

Even where the coverage of the state and federal legislation governing rights to leave and pay appears clear, applying the tests in practice could be complicated. In many instances, students might spend time in one workplace under different guises; for example, undertaking a WIL placement and doing paid work.⁹⁰ Or a host organisation may offer payment to a student. In such a situation, whether the student would be regarded as an employee or not becomes much more complex.

In addition, it is worth considering whether the law should look beyond the vocational placement exception, and determine whether employment benefits should extend to students undertaking WIL based on criteria such as the length of their placement or the nature of the work they are doing.

84 See, eg, *Upton v Geraldton Resource Centre* [2013] FWC 7827 (11 October 2013) [47]–[50], [58]; *Klievens v Cappello Rowe Lawyers* [2017] FWC 5126 (3 October 2017) [21]–[27].

85 See, eg, *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2014] FCA 1365 (12 December 2014).

86 See, eg, *Fair Work Ombudsman v Crocmedia Pty Ltd* [2015] FCCA 140 (29 January 2015); *Fair Work Ombudsman v Aldred* [2016] FCCA 220 (10 February 2016). In each of these cases, the interns were accepted to be employees and the employers were fined for not paying them the minimum wage applicable to their work.

87 *Industrial Relations Act 1996* (NSW); *Industrial Relations Act 1999* (Qld), *Fair Work Act 1994* (SA); *Industrial Relations Act 1984* (Tas); *Industrial Relations Act 1979* (WA).

88 See Stewart et al, above n 81, 111–12, 128–9.

89 See Stewart and Owens, ‘Experience or Exploitation?’, above n 24, 91–5.

90 See, eg, *Upton v Geraldton Resource Centre* [2013] FWC 7827 (11 October 2013). In that case, a graduate lawyer commenced a 75–80 day unpaid practical legal training (‘PLT’) placement with Geraldton Resource Centre. After 22 days, he was offered paid employment, but was later dismissed after just short of six months in the paid job. The Fair Work Commission held that since the PLT was not employment, he did not have the six months’ minimum employment period needed to bring an unfair dismissal claim: at [58]–[60].

B Protections Against Discriminatory Treatment

The extension of legislation that offers other types of protection within the workplace to tertiary students engaged in WIL is patchy. In some instances, students are deliberately excluded from the coverage of the protections. In others, the protections are simply not extended to students if they are unpaid, as they are not within the defined category of ‘worker’ to whom the legislation applies. In some other situations, WIL participants are protected.

Examples of the failure to expressly extend protections to students engaged in WIL can be found in the federal laws that prohibit discrimination and harassment at work. For example, the *Sex Discrimination Act 1984* (Cth) applies to a broad range of working relationships, including partnerships, commission agents, contract work and employment (including prospective employees).⁹¹ Employment is defined to include part-time and temporary employment, work under a contract for services, and work as a Commonwealth employee.⁹² However, the Act does not extend coverage to unpaid workers who are not employees. The *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth) similarly cover a range of workplace relationships but do not appear to extend to unpaid work.⁹³ To fall within these statutes, therefore, a student engaged in WIL would need to establish that they had been engaged to perform work pursuant to some form of contract.⁹⁴

The *Fair Work Act* does not overlook students engaged in WIL; it deliberately excludes them from most protections. Section 351 of the *Fair Work Act* prohibits employers from engaging in a range of discriminatory adverse actions against employees and prospective employees. But as noted above, students undertaking unpaid ‘vocational placements’ are not treated as employees for most purposes under this legislation. However, there is one part of the *Fair Work Act* that *does* apply to such students. This is pt 6-4B, which allows workers to apply to the Fair Work Commission for protection against workplace bullying, at least where they are working for a constitutional corporation or the Commonwealth or in a Territory.⁹⁵ The term ‘worker’ is given the same meaning as under work health

91 *Sex Discrimination Act 1984* (Cth) ss 14–17.

92 *Ibid* s 4 (definition of ‘employment’).

93 *Age Discrimination Act 2004* (Cth) s 5 (definition of ‘employment’), ss 18–21; *Disability Discrimination Act 1992* (Cth) s 4 (definition of ‘employment’), ss 15–18. Section 9 of the *Racial Discrimination Act 1975* (Cth) prohibits any:

act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life and also specifically prohibits discrimination in the context of employment: at s 15. Employment is narrowly defined in s 3 of that Act.

94 As to the common law principles used to determine the existence of such a contract, see Stewart and Owens, ‘Experience or Exploitation?’, above n 24, ch 6.

95 See Stewart et al, above n 81, ch 21.3.

and safety laws,⁹⁶ which, as noted below, extends to anyone doing unpaid work experience, whether part of a course or not.

Some state and territory anti-discrimination statutes extend protections from sexual harassment and discrimination to students engaged in work experience, but that is not uniformly the case.⁹⁷ For example, the *Equal Opportunity Act 1984* (SA) prohibits a person subjecting to sexual harassment ‘a person with whom he or she works’.⁹⁸ That Act goes on to provide that ‘a person works with another if both carry out duties or perform functions, in whatever capacity and *whether for payment or not*, in or in relation to the same business or organisation’.⁹⁹ These provisions clearly include interns and students undertaking WIL within an organisation. The same Act prohibits discrimination on a range of bases¹⁰⁰ against ‘employees’, a term defined to include unpaid workers.¹⁰¹ In Victoria, pt 6 of the *Equal Opportunity Act 2010* (Vic) extends protection from sexual harassment to ‘an unpaid worker or volunteer’.¹⁰² This would arguably include a student performing WIL. In contrast, the prohibitions against discrimination in that legislation do not expressly extend to unpaid workers and as a consequence probably do not cover many students engaged in WIL.

It is worth noting that state and federal legislation prohibits educational authorities discriminating against students on a range of grounds, including access to benefits.¹⁰³ In order to engage the protection of this legislation a student who was disadvantaged in terms of access to or participation in a WIL experience and who wished to claim that constituted prohibited discrimination by the educational provider would need to establish the disadvantage was on basis of one of the protected grounds (broadly sex (including caring responsibilities), race, disability, and age). However, many of the broadest provisions — for example to accommodate caring responsibilities — are imposed only on employers, and do not extend to educational providers.¹⁰⁴ And, in any event, disadvantage arising generally from social class/economic circumstances is not protected under the legislation. Even if it was theoretically conceivable, the prospect of proving all elements of discrimination (whether direct or indirect) so as to successfully engage an educational provider under the legislation is likely to be practically impossible. It is also possible that if a student engaged in WIL is discriminated against or harassed within their host organisation, the educational authority may be vicariously liable for that discrimination.¹⁰⁵ However, the nature of many

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

97 For further discussion of the coverage of the state and territory legislation, see Stewart and Owens, ‘Experience or Exploitation?’, above n 24, 107–9.

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

99 *Ibid* s 87(9)(c) (emphasis altered).

100 *Ibid* s 85B.

101 *Ibid* s 5(1) (definition of ‘employee’).

102 *Equal Opportunity Act 2010* (Vic) s 4(1) (definition of ‘employee’).

103 Specific federal prohibitions of discrimination in the context of education can be found in the *Sex Discrimination Act 1984* (Cth) s 21; *Age Discrimination Act 2004* (Cth) s 26; *Disability Discrimination Act 1992* (Cth) s 22. At state level, see, eg, *Equal Opportunity Act 1984* (SA) ss 37, 59, 74, 85I, 85ZE.

104 *Equal Opportunity Act 2010* (Vic) ss 17, 19.

105 See, eg, *Sex Discrimination Act 1984* (Cth) s 106.

WIL placements makes it highly unlikely that such a claim would be successful. Instead, it is probable that, unless some other factor is at play, in jurisdictions where state laws do not extend coverage to unpaid workers, students who are discriminated against or harassed while on placement will fall through the cracks of these protections.

However, as discussed above in relation to remuneration, the situation and status of each student engaged in WIL may be factually complicated. For example, in *GLS v PLP*, the tribunal found that Ms GLS, a Graduate Diploma of Legal Practice student undertaking a practical legal training placement, was an employee.¹⁰⁶ Central to this decision was a verbal agreement that she would be remunerated \$50 or \$100 per day (the amount varied during the course of her placement).¹⁰⁷ As a consequence of her status as an employee, Ms GLS was entitled to protections against sexual harassment in s 93 of the *Equal Opportunity Act 2010* (Vic) and her employer was liable for the sexual harassment to which he subjected her. There are other factual situations where students undertaking a WIL placement may receive protections under the same legislation. For example, educational institutions have an obligation to protect their students from sexual harassment, and if one student harasses another in a workplace while they are both undertaking a WIL placement, the institution could conceivably be liable under s 98. Conversely, if an unpaid student on a WIL placement was harassed by an employee of the host organisation while on placement, it is probable neither the host organisation nor educational institution would be liable.

C Protections against Unsafe Working Conditions

Other important protections are found in work health and safety laws. All Australian jurisdictions except Victoria and Western Australia have harmonised their work health and safety laws.¹⁰⁸ The model legislation applies to ‘workers’, which is broadly defined to include a person who carries out work in any capacity for a person conducting a business or undertaking, including work as an employee, a contractor, an outworker, an apprentice or trainee, a volunteer or ‘a student gaining work experience’.¹⁰⁹ In the states which have not yet adopted the model legislation, host organisations still have some form of obligation towards students undertaking WIL, even if those students do not fall within the legal definition of ‘employees’. In Victoria, employers are required to ‘ensure, so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health or safety arising from the conduct of the undertaking of the

106 *GLS v PLP* [2013] VCAT 221 (13 March 2013) [10]–[11], [49].

107 *Ibid* [49]. See also above n 90.

108 See *Work Health and Safety Act 2011* (ACT); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2012* (SA); *Work Health and Safety Act 2012* (Tas).

109 See *Work Health and Safety Act 2011* (Cth) s 7(1)(g), *Work Health and Safety Act 2011* (ACT) s 7(1)(g); *Work Health and Safety Act 2011* (NSW) s 7(1)(g); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) s 7(1)(g); *Work Health and Safety Act 2011* (Qld) s 7(1)(g); *Work Health and Safety Act 2012* (SA) s 7(1)(g); *Work Health and Safety Act 2012* (Tas) s 7(1)(g).

employer'.¹¹⁰ The Western Australian legislation imposes a similar obligation on a person who has 'control of ... a workplace where persons who are not employees of that person work or are likely to be in the course of their work',¹¹¹ as well as an obligation on an 'employer or self-employed person' to 'ensure that the safety or health of a person, not being (in the case of an employer) an employee of the employer, is not adversely affected wholly or in part' as a consequence of work being undertaken or any hazard arising from that work.¹¹²

D Summary

This complex legislative landscape is summarised in Table 1 below, which illustrates the variable and patchy regulation of WIL through labour law. Students engaged in WIL experiences in the workplace are deliberately excluded from the operation of some of the laws regulating the rights and entitlements of workers, overlooked and therefore possibly excluded by some legislation, and included by other schemes.

Table 1: Summary of Australian labour laws which apply to students undertaking WIL

	Pay and leave	Prohibitions of discrimination	Prohibition of sexual harassment	Work health and safety
Commonwealth	Excluded if unpaid	Overlooked	Overlooked	Included
State/territory	Overlooked	Included in some jurisdictions, overlooked in others	Included in some jurisdictions, overlooked in others	Included

V REGULATION OF WIL AS EDUCATION

A Tertiary Education Quality and Standards Agency

TEQSA is charged with regulating the higher education sector in Australia. It is an independent statutory authority, established by the *Tertiary Education Quality and Standards Agency Act 2011* (Cth) ('*TEQSA Act*').

The objects of the *TEQSA Act* include to protect and enhance 'excellence, diversity and innovation in higher education in Australia' and to 'encourage and promote a higher education system that is appropriate to meet Australia's social and economic needs for a highly educated and skilled population'.¹¹³ In order to do this, the *TEQSA Act* requires entities to be registered before they are able to offer

110 *Occupational Health and Safety Act 2004* (Vic) s 23(1).

111 *Occupational Safety and Health Act 1984* (WA) s 22(1).

112 *Ibid* s 21(2).

113 *TEQSA Act* ss 3(c)(iii), 3(d).

an Australian higher education award.¹¹⁴ Registered higher education providers must then either be authorised as self-accrediting (all 40 Australian universities are self-accrediting)¹¹⁵ or have each of the courses of study the institution offers accredited by TEQSA.¹¹⁶

To accredit a course of study, TEQSA must be satisfied that the course being assessed meets the Provider Course Accreditation and Qualification Standards (the ‘Standards’).¹¹⁷ For those institutions that are not self-accrediting, the accreditation process involves the institution providing TEQSA with evidence to establish that, inter alia, the learning outcomes of each course of study are specified;¹¹⁸ the methods of assessment are consistent with the learning outcomes being assessed;¹¹⁹ facilities, including those where external placements are undertaken, are fit for purpose;¹²⁰ student diversity is accommodated;¹²¹ a safe learning environment is fostered;¹²² and the teaching and learning activities are effective to ensure the achievement of student learning outcomes.¹²³ A list of the minimum evidence the institution must provide is presented in a TEQSA guide.¹²⁴ Importantly, an institution seeking accreditation must specifically provide details of any ‘arrangements for supervision of work-integrated learning’.¹²⁵ WIL is defined by TEQSA as ‘any arrangement where students undertake learning in a workplace outside of their higher education provider ... as a part of their course of study’.¹²⁶ The Standards specify that WIL arrangements must be ‘quality assured, including assurance of the quality of supervision of student experiences’.¹²⁷ However, the precise information TEQSA requires is not specified.

At the course-planning stage, the level of national oversight clearly differs markedly between self-accrediting and other registered higher education

114 Ibid s 4, pt 3.

115 Ibid s 45. Guidance about the process for being registered as self-accrediting is available at: TEQSA, *Application Guide for Self-Accrediting Authority* (Version 3.2, 24 August 2017) <<https://www.teqsa.gov.au/sites/g/files/net2046/f/application-guide-saa-3-2.pdf?v=1507677285>>.

116 Ibid pt 4. TEQSA can accredit a course of study that leads to a higher education qualification against Levels 5, 6, 7, 8, 9 or 10 of the Australian Qualifications Framework: at s 5 (definition of ‘higher education award’). Accreditation usually lasts for seven years and can be renewed before expiry: at pt 4 div 4. The Australian Qualifications Framework embodies the national policy for regulated qualifications in Australian education and training: see Australian Qualifications Framework Council, *Australian Qualifications Framework* (2nd ed, 2013) <<https://www.aqf.edu.au/sites/aqf/files/aqf-2nd-edition-january-2013.pdf>>.

117 *TEQSA Act* s 49(1)(b); *Higher Education Standards Framework (Threshold Standards) 2015* (Cth).

118 *Higher Education Standards Framework (Threshold Standards) 2015* (Cth) 1.4.1.

119 Ibid 1.4.3.

120 Ibid 2.1.1.

121 Ibid 2.2.1.

122 Ibid 2.3.4.

123 Ibid 3.1.3.

124 TEQSA, *Application Guide for Registered Higher Education Providers: New Course Accreditation, Renewal of Course Accreditation for Existing Providers* (6 September 2017), 12–14 <https://www.teqsa.gov.au/sites/g/files/net2046/f/applicationguide_courseaccredreaccred3.11.pdf>.

125 Ibid 13.

126 TEQSA, *Guidance Note: Work Integrated Learning*, above n 32, 1.

127 *Higher Education Standards Framework (Threshold Standards) 2015* (Cth) 5.4.1. Some of the factors that may be relevant to a quality WIL experience are discussed in Anne Hewitt, ‘Avoiding the Trap of Exploitative Work: A National Approach to Making Work-Integrated Learning Effective, Equitable and Safe’ (2018) 31 *Australian Journal of Labour Law* 100.

providers. A non-self-accredited institution is required to persuade TEQSA in advance that its courses, including all WIL opportunities embedded within units, will provide a quality learning experience for students. Self-accrediting universities, on the other hand, can integrate WIL into a curriculum without being required to provide advance evidence of appropriate supervision arrangements, assessment schemes, or relevance of WIL to learning objectives. However, higher education providers that are authorised to self-accredit remain responsible under the *TEQSA Act* for ensuring their self-accredited courses of study comply with the Standards. Therefore, all universities should be considering the detailed criteria in the Standards as part of their self-accreditation practice. Consistency with the Standards also forms the basis of compliance assessments under the *TEQSA Act*.¹²⁸ If a compliance audit reveals that a provider has failed to comply with the Standards, TEQSA can impose sanctions by shortening or cancelling the period of accreditation for the course of study.¹²⁹

As all Australian universities are self-accrediting, the majority of educational regulation of WIL (with the exception of TEQSA compliance audits and self-authorisation renewals) occurs internally, that is, conducted within those institutions. This means that there is generally a lack of transparency about the processes that different universities use to regulate WIL and the effectiveness of those processes to ensure equity of access and positive learning outcomes. It may be that self-accredited universities are rigorously applying the criteria in the Standards as part of their self-accreditation practice. However, it is not clear if this is consistently the case. In addition, TEQSA compliance audits and re-registrations are irregular (occurring up to every seven years).¹³⁰ And, while TEQSA's decisions are published in summary form, no other details of its review process, the material it considered, nor reasons for decisions are made publicly available.¹³¹

B Higher Education Support Act 2003 (Cth)

While TEQSA provides limited oversight of WIL pedagogies in self-accredited institutions, there are other regulatory measures which minimise the concern that educational providers face an incentive to offer WIL courses which allow for tuition to be charged without the need to incur significant expenses for facilities or instruction costs.¹³² Since 2005, Australian universities have had a funding imperative to offer structured learning support to students engaged in

128 *TEQSA Act* s 59.

129 *Ibid* s 99.

130 *Ibid* pt 5 div 2; TEQSA, *A Risk and Standards Based Approach to Quality Assurance in Australia's Diverse Higher Education Sector* (February 2015) 2 <<https://www.teqsa.gov.au/sites/g/files/net2046/f/risk-and-standards-based-approach-to-quality-assurance-in-australias-diverse-he-sector.pdf?v=1508891448>>.

131 A register of the decisions made by TEQSA can be found at: TEQSA, *Search the National Register* (2017) <<https://www.teqsa.gov.au/national-register>>.

132 Burke and Carton, above n 21, 123.

WIL: if they fail to do so, they cannot charge students to enrol in WIL courses.¹³³ The *Higher Education Support Act 2003* (Cth) provides that if units or topics which incorporate WIL are to be funded at the same level as other academic courses, they need to be directed and meet specific academic criteria as to the quality and nature of the university input.¹³⁴ The criteria relate to the level of oversight, direction and management that universities need to provide, and include formalising the support given to students on placement, as well as the educational content, standards of performance to be achieved, and assessment of student learning within WIL courses.¹³⁵ These provisions constitute a regulatory acknowledgement of the importance of these criteria for ensuring demonstrable learning outcomes for students. They are clearly articulated as threshold standards, and should be sufficient to assuage concerns that students are being charged fees for WIL experiences when the education provider has not put structures in place to ensure that those experiences provide a supported and appropriate learning opportunity. However, if completing WIL is a requirement of a particular course of study, but not located within a particular unit for which fees would be charged, then the *Higher Education Support Act 2003* (Cth) does not apply. Such arrangements and requirements for WIL are not uncommon.¹³⁶

VI CONSIDERING THE REGULATORY REGIME

Given the regulatory schema outlined above in Parts III and IV, it is particularly interesting to consider those situations where students engaged in WIL have been deliberately excluded from a significant legislative scheme regulating aspects of work. The ‘vocational placement’ exemption is clearly deliberate, although

- 133 Merrelyn Bates, ‘Work-Integrated Curricula in University Programs’ (2008) 27 *Higher Education Research & Development* 305, 305–6; Department of Education and Training (Cth), *Higher Education Administrative Information for Providers* (February 2015), 38–40 <https://docs.education.gov.au/system/files/doc/other/he_aip_february_2015_-_20150223_1.pdf>.
- 134 See *Higher Education Support Act 2003* (Cth) s 33-30(1) regarding non-payment for ‘work experience in industry’ and the definition of that term in sch 1 cl 1.
- 135 See *Administration Guidelines 2012* (Cth) 5.5.1 which provides that if the educational provider meets those criteria, then a placement is not regarded as ‘work experience in industry’. See also *Higher Education Administrative Information for Providers*, above n 133, 38.
- 136 Extended periods of work placements undertaken during holidays etc are a requirement of some courses of study. For example, the University of Adelaide’s School of Animal and Veterinary Sciences requires those taking the Bachelor of Science (Veterinary Bioscience) to complete 12 weeks of Animal Husbandry Extra Mural Studies (AHEMS): see School of Animal and Veterinary Sciences, *Extra Mural Studies (EMS)* (25 May 2018) The University of Adelaide <<https://www.adelaide.edu.au/vetsci/current-students/ems/>>. AHEMS is taken outside formal courses, and no university fees are charged to students undertaking it. Therefore, the *Higher Education Support Act 2003* (Cth) does not apply to AHEMS. A similar situation exists in engineering, where Engineering Australia demands students engage in at least 12 weeks of practical work: see Accreditation Board, ‘Accreditation Management System: Education Programs at the Level of Professional Engineer: Accreditation Criteria Guidelines’ (Document No G02, Engineers Australia, 30 August 2008) 17–18. In the University of Technology Sydney, Diploma in Engineering Practice students are required to undertake 48 weeks of paid or voluntary engineering work for which they do not receive academic credit, and for which they are not charged university fees. They do, however, receive credit for completing two preparatory and two reflective courses undertaken around their practical placements: see UTS: Engineering, *Engineering Practice Program Student Guide* (July 2016) University of Technology Sydney, 4–5 <<https://www.uts.edu.au/sites/default/files/EP%20Guide%202016.pdf>>.

no reason was given for its inclusion in the *Fair Work Act*, or the *Workplace Relations Act 1996* (Cth) that preceded it.¹³⁷ At least part of the rationale, however, must be that students undertaking unpaid work experience as part of a course of study are appropriately categorised as ‘learners’ rather than ‘workers’.¹³⁸ The bilateral relationships between host and student or the trilateral relationships between host, university and student are therefore assumed to be substantially different from work arrangements — say, those between employee and employer or between business, labour hire/work placement agency and employee — and consequently there is no requirement to ensure that students receive the pay, leave or other entitlements ordinarily extended to employees.

There are two significant problems with categorising students as learners rather than workers, both of which relate to the vulnerable position of students undertaking WIL.

A Learning versus Work

The first issue with the argument for restricting the application of labour laws to students engaged in WIL is that it is predicated on the assumption they are engaged in a learning experience which is different from ‘mere’ work. Burke and Carton summarise the position as follows: ‘To be a valid educational experience and not simply *work*, an internship must include a demonstrable assurance of learning outcomes’.¹³⁹

One way WIL could be distinguished from work is by considering the primary objective of WIL experiences.¹⁴⁰ In theory, WIL is primarily designed to benefit the student participant who is receiving a real educational benefit from their WIL experience. Logic dictates that this additional learning must be facilitated by assistance, support, or other learning structures associated with WIL to which other workers do not have access, and which maximise the learning potential of workplace activity beyond that which all participants (other workers) would experience. However, the *Fair Work Act* does not require in its own terms that a ‘vocational placement’ be a genuine learning opportunity;¹⁴¹ there is no requirement that learning outcomes be set or that the placement, other learning activities, or assessment be appropriate to achieve those outcomes. Nor is there any requirement regarding the level of supervision of the student by the educational provider or the workplace host. Rather, the definition of ‘vocational placement’ in s 12 of the *Fair Work Act* simply requires that it be ‘a requirement of an education

137 See Stewart and Owens, ‘Experience or Exploitation?’, above n 24, 76.

138 For an exploration and critique of that distinction, see Rosemary Owens and Andrew Stewart, ‘Regulating for Decent Work Experience: Meeting the Challenge of the Rise of the Intern’ (2016) 155 *International Labour Review* 679.

139 Burke and Carton, above n 21, 128 (emphasis in original).

140 The primary beneficiary test has been held to be determinative of whether an unpaid intern is an employee in the United States: *Glatt v Fox Searchlight Pictures Inc*, 811 F 3d 528, 536–8 (2nd Cir, 2016).

141 This point has also been made by Cameron, above n 22.

or training course' and 'authorised under a law or an administrative arrangement of the Commonwealth, a State or a Territory'.¹⁴² In so doing, it points implicitly to a different regulatory arena. Whether WIL students can be guaranteed to be engaging in more than 'mere work' therefore requires an examination of the effectiveness of the regulation of the 'vocational placement' or WIL from an educational perspective.

As shown above, TEQSA employs a 'light touch' approach in regulating self-accrediting providers. As a consequence, universities are largely responsible for the quality control of WIL programs through their internal regulatory processes, although under the overarching regulatory provision that those processes should ensure the institution complies with the *Higher Education Standards Framework (Threshold Standards) 2015*. TEQSA has produced guidelines about how the Standards apply to WIL in their *Guidance Note: Work Integrated Learning ('Guidance Note')*.¹⁴³ That *Guidance Note* stipulates that WIL must be 'well-conceived, educationally sound and its implementation ... quality assured and monitored by the provider'.¹⁴⁴ It also provides that the Standards relating to student wellbeing and safety apply to WIL as to any other form of student activity.¹⁴⁵ Finally, it is worth noting that the *Guidance Note* states 'WIL arrangements must be consistent with the guidance available from Fair Work Australia [sic: Fair Work Ombudsman] on work experience and internships'.¹⁴⁶

TEQSA's 2017 *Guidance Note* on WIL articulates reasonable expectations for universities in designing and implementing WIL programs. However, the earlier 2011 Standards¹⁴⁷ were much less explicit regarding WIL than those implemented in 2015¹⁴⁸ (discussed above), and the extent to which universities have implemented systems to engage with the updated regulatory requirements is unclear. A contributing factor to this lack of transparency is the policy that neither reasons for accreditation nor renewal decisions, nor material on which they are based, are published by TEQSA. This is compounded by the fact that the nature and effectiveness of the intra-university regulation of WIL is not usually open to public scrutiny. This lack of transparency has a number of consequences. Importantly, it means that it is not possible for the higher education community to effectively identify benchmarks for good practice in WIL. For example, it is not possible for an institution to compare its WIL supervision requirements, placement strategies, or assessment schemes to those in other courses which have been approved by TEQSA or by another self-accrediting authority. This limits the

142 As discussed above, this definition is not as clear as it might be. See above n 83 and accompanying text.

143 TEQSA, *Guidance Note: Work Integrated Learning*, above n 32.

144 *Ibid* 2.

145 *Ibid*.

146 *Ibid* 5. The Fair Work Ombudsman has published a Factsheet on unpaid work: Fair Work Ombudsman, *Unpaid Work* (June 2017) <<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/unpaid-work/unpaid-work>>.

147 *Higher Education Standards Framework (Threshold Standards) 2011* (Cth).

148 The 2015 Standards apply from 1 January 2017: *Higher Education Standards Framework (Threshold Standards) 2015* (Cth) item 4.

opportunities for development of national standards, and for informed competition between educational providers as to the quality of their WIL offerings. The lack of publicly available information also means students are ill-informed to critique the WIL opportunities with which they engage. Because students do not have easy access to data enabling comparative evaluation of WIL experiences, they may be unaware if they are considering or undertaking a sub-standard opportunity, whether because of inadequate supervision, inappropriate placement resources, or some other issue.

B Employment-Related Benefits and Protections

The second issue is that students are not only excluded from entitlements to many employment-related benefits, such as pay and leave, but are also unable to access protections against mistreatment, including the federal prohibitions of sexual harassment and discrimination. While there is little research on the topic, the negative impact on learning outcomes from discrimination or harassment while engaging with WIL seems obvious.¹⁴⁹ As discussed above, tertiary education providers are bound to engage with students in a non-discriminatory manner¹⁵⁰ and ensure students are not subject to sexual harassment from staff or other students.¹⁵¹ While principles of vicarious liability may allow students who are subject to discrimination or harassment while on WIL placement to bring a claim against the educational provider, this is more complicated and logistically challenging than making a claim against the person or organisation directly responsible. There are also possible factual obstacles, including the extent to which the educational provider has any real control in the workplace concerned. This inevitably limits the federal protections from discrimination and harassment offered to students seeking to gain experience and develop their skills in an unfamiliar environment. This problem is compounded by what will usually be a distinct power imbalance between students engaging in WIL and the workplace host.¹⁵² Even if excluding WIL students from legislation providing employment benefits may be considered to be defensible in some respects — on the basis, for example, that they may already be receiving government-funded support¹⁵³ while they are undertaking WIL or that they are the primary beneficiary of their work experience and are receiving a valuable educational opportunity (although, as

149 The 2017 Australian Human Rights Commission report into sexual harassment and assault in Australian universities considered anecdotal evidence of the effect of assault and harassment on students' studies: Australian Human Rights Commission, above n 54. However, more work remains to be done in this area.

150 See, eg, *Sex Discrimination Act 1984* (Cth) s 21; *Age Discrimination Act 2004* (Cth) s 26; *Racial Discrimination Act 1975* (Cth) s 13; *Disability Discrimination Act 1992* (Cth) s 22.

151 *Sex Discrimination Act 1984* (Cth) s 28F.

152 For example, in *GLS v PLP* [2013] VCAT 221 (13 March 2013), discussed above nn 106–107, the lawyer accused of sexual harassment not only had power in relation to quality of the work experience and future references for the student, he was also required to sign off on her practical experience and as such was effectively acting as a gatekeeper for her to gain access to the legal profession.

153 Such as Youth Allowance, Austudy or ABSTUDY. See Department of Human Services (Cth), *Payments for Students and Trainees* (4 July 2018) <<https://www.humanservices.gov.au/individuals/subjects/payments-students-and-trainees>>.

discussed above, the extent to which this is uniformly the case is unclear in the current regulatory environment) — the extension of the exclusion to protections against discrimination and harassment is less easily justified.

In addition, it is worth considering whether the law should look beyond the vocational placement exception, and determine whether employment rights and benefits should extend to students based on criteria such as the length of their placement or the nature of the work they are doing. If a student is undertaking a significant placement — for example, for more than four weeks full-time, and/or undertaking work that is also of benefit to the host organisation — is there a policy argument for considering them to be also a worker rather than just a learner? Perhaps we should recognise that

no-one should suffer the indignity of harassment or discrimination at work; everyone should be able to take breaks from work, recognising that they are not a machine but a human person; and a workplace should be where productive work is undertaken for the benefit of another, it should be paid for, whether or not it also forms part of a (formal or informal) learning experience.¹⁵⁴

C Other Jurisdictions

Other jurisdictions have taken a different regulatory approach to that in Australia. In the United Kingdom, a voluntary code of practice developed by the Quality Assurance Agency for Higher Education sets out a series of guidelines for best practice which universities are expected to adopt when developing WIL.¹⁵⁵ This code is more detailed than the Australian ‘Provider Course Accreditation and Qualification Standards’ and more explicit in the information required to be provided to students. It contains eight general principles for implementing high quality work-based learning. These include:¹⁵⁶

- Learning outcomes are clearly identified and relevant to the overall program of study;
- The learning opportunities provided are appropriate;
- Students are provided with ‘appropriate ... information, support and guidance prior to, throughout and following their work-based and placement learning’;
- Institutions have, use and regularly review ‘policies and procedures for securing, monitoring, administering and reviewing work-based and placement learning’.

154 Anne Hewitt et al, ‘At the Intersection of Education and Work: Young People, Equality and Regulation of the Labour Market’ in John Howe, Anna Chapman and Ingrid Landau (eds), *The Evolving Project of Labour Law: Foundations, Development and Future Research Directions* (Federation Press, 2017) 102, 115. See also Owens and Stewart, ‘Regulating for Decent Work Experience’, above n 138.

155 Quality Assurance Agency for Higher Education, *Code of Practice for the Assurance of Academic Quality and Standards in Higher Education — Section 9: Work-Based and Placement Learning — September 2007* (2nd ed, 2007).

156 *Ibid* 22–4.

Development of a charter or code of this kind in Australia has the potential to contribute to an important regulatory function: setting the standards regarding WIL. Depending on how it was drafted, and the obligations extended to universities — for example, expectations of publication of information regarding management of WIL opportunities — it could also contribute to enforcement of the articulated standards,¹⁵⁷ and help to create a broader normative expectation regarding WIL which could positively influence host behaviour.¹⁵⁸

In other jurisdictions, state direction has engaged both universities and employers as regulatory actors in managing WIL. For example, in 2011, France introduced a range of measures to regulate internships, ensure their educational validity, and protect interns from being exploited.¹⁵⁹ The only internships now legal in France are those undertaken under a tripartite agreement between intern, host, and an educational institution.¹⁶⁰ In order to ensure educational outcomes and avoid the exploitation of students, each internship contract must specify both the educational objectives of the internship and its conditions. For example, the internship agreement must state the activities the intern will undertake and specify the skills they will develop.¹⁶¹ In addition, the intern must be supervised by both the educational institution with which they are enrolled and by the organisation with which they are placed.¹⁶² In order to ensure effective supervision, there are strict limitations imposed on the numbers of interns that supervisors can oversee.¹⁶³

The French laws also attempt to address issues of equity of access to work placements. For example, placements over six months in duration have been prohibited,¹⁶⁴ and for any placement exceeding two months the student is entitled to compensation (although this is expressly stated not to be a salary).¹⁶⁵ In addition, students are granted a range of other workplace protections, including limits on daily and weekly working hours,¹⁶⁶ protections against harassment,¹⁶⁷

157 As to the general role that labour regulation can apply in this regard, see Stewart et al, above n 81, 25–6.

158 Ibid 35.

159 *Loi n° 2011-893 du 28 juillet 2011* [Law No 2011-893 of 28 July 2011] (France) JO, 29 July 2011, 12 914 (*‘Cherpion Law’*); *Loi n° 2014-788 du 10 juillet 2014* [Law No 2014-788 of 10 July 2014] (France) JO, 11 July 2014, 11 491 (*‘Fioraso Law’*).

160 *Code de l’éducation* [Code of Education] (France) art L124-1.

161 Ibid arts D124-4(4), L124-2(2).

162 Ibid arts L124-2(3), L124-9.

163 A tutor within the host organisation cannot supervise more than three interns at one time, while a teacher within the educational institution cannot supervise more than 16 interns at one time: ibid arts R124-13, D124-3.

164 Ibid art L124-5.

165 Ibid art L124-6.

166 Ibid art L124-14.

167 According to *Code de l’éducation* [Code of Education] (France) art L124-12, interns are entitled to the rights and protections of art L1152-1 (protection against moral harassment) and art L1153-1 (protection against sexual harassment) of the *Code du Travail* [Labour Code] (France), under the same conditions as employees.

occupational work and safety protections,¹⁶⁸ and compensation for work-related injury.¹⁶⁹

Argentina, Brazil and Romania have also sought to regulate the content and quality of tertiary WIL experiences in various ways. In each, as in France, there is a requirement for educational internships to be undertaken pursuant to formal agreements, which must stipulate the learning objectives of the placement.¹⁷⁰ In addition, the laws in each jurisdiction also make provision setting minimum standards for the supervision of interns by the host organisation and educational institution.¹⁷¹ In Argentina and Brazil, internship arrangements are not covered by labour laws, and there are arguably fewer protections extended to student interns than in France. However if the provisions of the internship agreement are breached in either jurisdiction, then the relationship between student and host automatically defaults to an employment contract.¹⁷² In contrast, Romanian internship agreements do not need to be employment contracts; however, there

168 *Code de l'éducation* [Code of Education] (France) art L124-14.

169 *Code de la sécurité sociale* [Social Security Code] (France) art L412-8.

170 In Argentina, a tripartite agreement is required between students, host and educational institution: see *Creación del Sistema de Pasantías Educativas en el Marco del Sistema Educativo Nacional* [Creation of the System of Educational Internships in the Framework of the National Education System] (Argentina) *Ley No 26 427* [Law No 26 427], arts 5, 6, 9. In Romania, an agreement is required between the educational institution and host organisation: see *Lege nr 258 din 19 iulie 2007 privind practica elevilor și studenților* [Law No 258 of 19 July 2007 on Student and Student Practice] (Romania) art 4; *Ordin nr 3.955 din 9 mai 2008 privind aprobarea Cadrului general de organizare a stagiilor de practică în cadrul programelor de studii universitare de licență și de masterat și a Convenției-cadru privind efectuarea stagiului de practică în cadrul programelor de studii universitare de licență sau masterat* [Order No 3.955 of 9 May 2008 on the Approval of the General Framework for the Organisation of Internships in Undergraduate and Masters Degree Programs and the Framework Convention on the Conduct of Internships in Undergraduate or Masters Degree Programs] (Romania), Ministry Of Education and Research ('*Ordin nr 3.955 din 9 mai 2008*'). In Brazil, the host organisation and educational institution must enter an agreement, with a separate agreement entered into with the student: see *Lei do Estágio N. 11 788, de 25 de Setembro de 2008* [Law No 11.788 of 25 September 2008] (Brazil) arts 3, 7.

171 In Argentina, see *Creación del Sistema de Pasantías Educativas en el Marco del Sistema Educativo Nacional* [Creation of the System of Educational Internships in the Framework of the National Education System] (Argentina) *Ley No 26 427* [Law No 26 427], arts 17–18. In Romania, see *Ordin nr 3.955 din 9 mai 2008* [Order No 3.955 of 9 May 2008] (Romania) annex 2, arts 6(1), 7, 10. In Brazil, see *Lei do Estágio N. 11.788, de 25 de Setembro de 2008* [Law No 11.788 of 25 September 2008] (Brazil) arts 3, 7.

172 In Brazil, see *Lei do Estágio N. 11 788, de 25 de Setembro de 2008* [Law No 11.788 of 25 September 2008] (Brazil) art 3. There are also restrictions on the number of interns that any organisation can have, while 10 per cent of its internships must be reserved for people with disabilities: at art 17. See also *Creación del Sistema de Pasantías Educativas en el Marco del Sistema Educativo Nacional* [Creation of the System of Educational Internships in the Framework of the National Education System] (Argentina) *Ley No 26 427* [Law No 26 427], arts 12, 19.

are incentives to encourage host organisations to enter into employment contracts with interns, and bring them under the protections of labour law.¹⁷³

Through these innovations, these jurisdictions have attempted to create threshold standards to ensure that WIL delivers quality educational outcomes and that students engaging in it are protected.¹⁷⁴ In particular, the French system illustrates a coherent approach to the regulation of WIL, in which both the ‘learning’ and ‘work’ characteristics of placements have been addressed. While this has not been done by extending the coverage of labour laws to students engaged in WIL, but through separate regulatory instruments, the result is notable for being cohesive and systematic. This regime has clearly identified the regulatory goals it is prioritising and the actors which have responsibility for them. In each jurisdiction the role of employers in ensuring students engage in quality WIL is also made explicit. In this way the range of regulatory actors is logically extended to include a key partner in every WIL experience, recognising that while host organisations must comply with the demands imposed upon them by institutional regulators, they also have a major role as regulators themselves.

It is worth considering if such a regulatory approach could be adopted in Australia. One issue is the capacity of the Commonwealth to regulate with regard to tertiary education. While education is not enumerated in s 51 of the *Constitution*, the Commonwealth already has a range of legislative powers at its disposal which it uses to regulate the sector, including the power to make laws for ‘constitutional corporations’,¹⁷⁵ which currently supports the *TEQSA Act* and the *Fair Work Act*. This could support a range of nationwide regulations. There is, however, a risk that the addition of another layer of federal regulation might increase the cost and administrative burden associated with WIL for hosts and universities and deter both from participating in WIL programs. This, in turn, could limit WIL opportunities for students. However, given reports regarding the stakeholder benefits of WIL, including for employers, well-crafted regulation should be able to mitigate the risk that employers withdraw from WIL programs while also improving protections for students engaged in WIL.¹⁷⁶ There may also be incentives for employers to participate in such a system. For example, when

173 Internship partners have the option of hiring a student for the period of their internship on a fixed-term employment contract, in exchange for a negotiated rate of pay: *Lege nr 258 din 19 iulie 2007 privind practica elevilor și studenților* [Law No 258 of 19 July 2007 on Student and Student Practice] (Romania) art 21. Incentives are provided to encourage such employment contracts. In particular, art 4(1) in annex 2 of *Ordin nr 3.955 din 9 mai 2008* [Order No 3.955 of 9 May 2008] states that if the internship is under an employment contract, then the internship partner can benefit from *Lege nr 72 din 26 martie 2007 privind stimularea încadrării în muncă a elevilor și studenților* [Law No 72 of 26 March 2007 on the Stimulation of the Employment of Pupils and Students] (Romania). Article 1 of that Law provides that employers who hire students during holidays and undertake to pay them not less than the minimum wage can receive, for each student, a monthly subsidy.

174 The virtues of the French approach, compared to those in place in Estonia and Finland, are considered in Annika Rosin ‘Precariousness of Trainees Working in the Framework of a Traineeship Agreement’ (2016) 32 *International Journal of Comparative Labour Law and Industrial Relations* 131.

175 See *Australian Constitution* s 51(xx), which gives the Commonwealth power to legislate with respect to ‘foreign corporations, and trading and financial corporations formed within the limits of the Commonwealth’.

176 Coll et al, above n 29, 27–31.

all participants are required to provide equivalent supervision to WIL students, there is no competitive disadvantage for employers who are dedicating resources to crafting and supervising high quality WIL placements. The evidence from the EU that participation in a high quality WIL placement increases learning and employment outcomes also suggests employers would, in the long term, reap the rewards of these students who are being equipped with improved workplace relevant skills.¹⁷⁷ The development of a more consistent framework for the regulation of WIL through agreements could also potentially assist universities to manage the contract risks associated with WIL, some of which have been identified by Cameron, including the unintended creation of an employment relationship.¹⁷⁸

VII CONCLUSION

The scale and diversity of WIL in the tertiary education sector is clear and its potential to be of value to students is evident. However, it is also apparent that WIL participants are a vulnerable group; they are typically going to an unfamiliar workplace, and are often driven by their need to complete a course, to develop their employability skills, and to gain workplace contacts and/or experience to facilitate their transition to paid work.¹⁷⁹ In addition, participating in a WIL pedagogy does not automatically ensure students achieve specific learning outcomes. Unless WIL is integrated into a well-designed course with legitimate objectives, clearly linked to assessment and offered with appropriate academic oversight and supervision, it can be a recipe for exploitation, exclusion, and dissatisfaction.

This is problematic, as the existing regulation of WIL in Australia is complicated and not transparent. It involves a range of regulatory actors employing varied mechanisms to achieve different regulatory objectives. However, the more complicated the regulatory scheme, the more likely things will be missed. This article has identified and discussed the potential gaps in the existing regulation.

To the extent that labour laws apply to students engaged in WIL, they regulate the aspects of workplace activity more remote from learning.¹⁸⁰ And, while students engaged in unpaid 'vocational placements' are largely excluded from workplace laws, the legislative regimes in this area do not require any assurance that their placement is appropriate to accomplish any learning. Given their vulnerability, the exclusion of students engaged in unpaid WIL from the coverage of many

177 TNS Political & Social, above n 34.

178 Craig Cameron, 'The Contract Risks to Universities of Work-Integrated Learning Programs' (2017) 45 *Australian Business Law Review* 405.

179 The importance of internships as both learning opportunities and an opportunity for networking and career building are examined in Maria Laura Toraldo, Mark Smith and Gazi Islam, 'Navigating Pragmatic Ambiguity: Career Identity in an Emerging Work Category' (Paper presented at the 31st European Group for Organizational Studies Colloquium, Greece, July 2–4 2015).

180 Although not completely divorced from it; for example, as discussed above, working in an unsafe environment is likely to be detrimental to learning.

of the protections against harassment and discrimination in the workplace is particularly problematic. At the same time, TEQSA imposes only a very light touch educational regulation on self-accrediting universities, and the workplace regulations do not ensure educational outcomes before excluding students. As a consequence, the responsibility for ensuring WIL delivers positive learning experiences and is not merely exploitative work lies with universities themselves. Students' experience is largely dependent on the processes implemented by the specific university offering the WIL program in which they are participating. However, as Cameron has also noted, universities face a potential conflict in regulating WIL; they are often dependent on maintaining a good relationship with the particular employers on whom they rely to participate in their WIL programs.¹⁸¹ Even when such a conflict is well managed, the extent, manner and effectiveness of the regulation imposed by each institution on itself is not transparent.

This regulatory 'gap' is potentially problematic. Given the growth in WIL and the potential risks to students engaged with it, including those discussed above, it is time for a serious national discussion. We need to decide how we want to regulate WIL, including how the intersection of different regulatory objectives can best be accommodated and so which regulatory objectives we wish to prioritise, and which regulatory actors should be involved and the nature of their roles. In short, a coherent regulatory approach needs to be instituted both at the level of overarching framework and in more detail at its varying levels.

We strongly advocate that the regulatory regime should recognise and respond to the dual vulnerability of students engaged with WIL. That vulnerability is within the workplace — potentially exposed to discrimination, harassment, and exploitation — and as learners at risk of engaging in a potentially costly WIL placement with little value to their learning. There are a range of ways that this could be achieved. The French reforms, discussed above, are one model. However, while the French model has the advantage of ensuring integrated regulation of both the 'work' and 'learning' aspects of WIL, less extensive measures could make a difference in the Australian context. For example: increasing transparency regarding the mechanisms which ensure students engaged with WIL achieve appropriate learning outcomes, either by universities themselves or through the national regulator, TEQSA; amending the 'vocational placement' exception to the *Fair Work Act* to require that placements achieve learning outcomes and do not become opportunities for exploitation; and expressly extending discrimination and harassment protections to students engaged in WIL. These are all measures that would respond to these vulnerabilities.

Individual universities are undeniably well placed to evaluate the effectiveness of WIL programs within their educational context and for their students. If the manner in which this was done was more transparent it could increase competition between institutions as to the delivery of quality WIL experiences and minimise issues of information asymmetry, allowing more students to access high quality

181 Cameron, 'The Vulnerable Worker?', above n 22, 140.

WIL. This would help ensure that students engaging in WIL achieved positive learning outcomes, and would simultaneously minimise the risks of student exploitation and reduce (although not eliminate) concerns about equity and access. For example, a transparent process of screening workplaces would, *inter alia*, identify those workplaces that had proper systems to ensure non-discriminatory treatment of students on WIL placement. Similarly, publication of information regarding supervision standards in different WIL opportunities would both assist students to choose an appropriate experience which minimised their risk of exploitation and maximised the learning outcomes they could achieve, and create opportunities for the development of benchmark supervision standards. This could be achieved by institutions releasing standardised information about their WIL offerings. Alternatively, to facilitate inter-institutional comparison, TEQSA could provide comparative data. Another approach would be for the sector to develop and adhere to a best practice guide regarding WIL, as has been done in the United Kingdom. A charter or code of this kind in Australia could improve transparency, and assist in development of threshold standards for high quality WIL.

Amending the ‘vocational placement’ exception within the *Fair Work Act* to require specific learning outcomes be achieved during a placement would ensure that exception does not apply to individuals who should not be categorised as ‘learners’. This would potentially extend additional protections offered to others within the workplace. In addition, the reliable extension of legislative protections, such as the prohibitions against discrimination and harassment, to students engaged in WIL would be consistent with ‘the protective function of labour law’.¹⁸² The concept of dignity can also potentially justify the extension of protections offered by the law (whether conventionally understood as labour law or anti-discrimination law) to those at work, whether as students or more traditional workers.¹⁸³ Expanding employment benefits and protections to students engaged in WIL would potentially reduce the chances of them being exposed to discrimination, harassment, or exploitation which could negatively affect their learning.

Many stakeholders would benefit from these reforms. Poor quality WIL placements would be less common, and students more likely to have satisfactory WIL experiences with rich learning outcomes. As a consequence industry and government could reap the rewards of better educated ‘work-ready’ graduates. And universities would enjoy the reputational advantages associated with excellent education. These are regulatory objectives worth considering.

182 Ibid 136.

183 For further discussion of this argument, see Hewitt et al, above n 154.