



**National Tertiary Education Union (NTEU)**

**Submission to the Senate Education and Employment Legislation  
Committee**

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

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## Introduction

The National Tertiary Education Union (NTEU) represents the professional and industrial interests of over 30,000 people working in Australian tertiary education and research sectors. We welcome the opportunity to provide a submission to the [Senate Education and Employment Legislation Committee](#) inquiry into the [Sex Discrimination and Fair Work \(Respect at Work\) Amendment Bill 2021](#).

The NTEU supports the submission made by the Australian Council of Trade Unions (ACTU) which, while recognising that the proposed legislation is an attempt to address the very serious problems of sexual harassment and gender-based discrimination in the workplace, falls considerably short of achieving the recommendations set out in the Sex Discrimination Commissioner's [Respect@Work Report](#) (published on 5 March 2020).

While recognising the positive measures, the ACTU's submission nonetheless accurately details the shortcomings of the Government's response to the Respect@Work Report recommendations, which was originally set out in the Government's ["Roadmap for Respect"](#) document.

The NTEU holds the view that these shortcomings largely stem from the Government's "Roadmap for Respect" which, while it was claimed by the Government that it had "agreed" to all 55 recommendations of the Respect@Work Report, were actually qualified by the phrase "either in full, in part, in principle or noted" for many recommendations.

In fact, closer analysis found that, of the 55 recommendations: 40 were agreed; 5 were agreed in principle; 1 was agreed in part; and 9 were simply 'noted'. Importantly, a number of key recommendations were in fact rejected, or likely to be rejected.

As such, the proposed Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, which is the Government's legislative response drawing from its "Roadmap for Respect" document, falls considerably short of introducing effective measures that would address many of the problems identified by the Respect@Work Report.

The NTEU has long argued that sexism, sexual harassment and assault, gender-based discrimination and gendered violence have had a persistent, although largely undeclared presence on university campuses throughout the country. Until recently, there had been a reluctance by university managements to acknowledge the issue of sexual harassment and assault on campuses and serious complaints were seen as being in the jurisdiction of law enforcement.

While the NTEU has pursued industrial remedies as well as publicly campaigned to draw attention to the impact of sexism, sexual harassment and assault on university campuses, we

believe the solution to these long running problems must also be found through legislative changes. We had been hopeful that the Government's recent interest in these issues would see the necessary changes made, with the Respect@Work Report providing a blueprint for these changes. However, the proposed Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 addresses very few of the Recommendations made by the Respect@Work Report.

The NTEU supports the ACTU's recommendations for a series of amendments to the Bill to close identified gaps, including a new Fair Work Act prohibition and complaints process.

We also wish to address the specific recommendations made in the Respect@Work Report that relate to the higher education sector, which the report found to have a higher rate of sexual harassment than reported for the general population.

## **Background**

The NTEU welcomed the announcement by Government in June 2018 of the National Inquiry into Sexual Harassment in Australian Workplaces. Led by the Sex Discrimination Commissioner, Kate Jenkins, the comprehensive Respect@Work report made 55 recommendations that, if enacted, would in many instances ameliorate the systematic issues that have allowed sexual harassment, gender discrimination and sexism to flourish in our workplaces.

These recommendations were based on a number of key findings from the National Inquiry into Sexual Harassment in Australian Workplaces, including that:

1. The current legal and regulatory system is 'simply no longer fit for purpose'. The Inquiry's Report found that new model is needed which will 'improve coordination, consistency and clarity' between the Fair Work Act 2009 (FW Act), Work Health and Safety (WHS) laws and the Sex Discrimination Act (SDA).
2. The legal and regulatory framework should 'encourage and support employers to take proactive and preventive measures to address sexual harassment, rather than relying on individual complaints', and
3. The FW Act does not expressly prohibit sexual harassment and 'does not clearly or specifically provide an enforceable right for victims of sexual harassment in the workplace.'

The NTEU, like many others that have vocally campaigned for legislative change, was hopeful that the Government, after having commissioned the Report, would follow through with its

stated intent to take sexual harassment in the workplace seriously and legislate for change that responded to the Key Findings. Furthermore, as disturbing as they were, the NTEU thought that the recent series of revelations of allegations of serious sexual assault, sexual harassment and sexism in Parliament itself would (in the very least) demonstrate that no workplace was immune to sexual harassment and assault, and thus reinforce the need to act urgently.

We are therefore greatly disappointed that, while the Government's response to the Respect@Work report has highlighted these serious issues in the workplace, it has not gone anywhere near what is required to address them.

The proposed Bill fails to address the fundamental premise that sexual harassment, gender discrimination and violence, and sexism in the workplaces affects the broader workforce and feeds into workplace culture. Indeed, a key problem is that the Government's proposed legislation still places centrally the idea of an individual as isolated complainant, without relating it to broader workplace health and safety, or workplace cultures and practices (despite claims by the Government otherwise). It also fails to place any obligations on employers to prevent sexual harassment in the workplace, particularly in relation to addressing the underlying causes that lead to such incidents.

While the proposed 'stop sexual harassment' process in the legislation is a positive step, it remains that the Fair Work Commission cannot award compensation or penalties under these provisions. Furthermore, workers who have already been forced out of a workplace due to sexual harassment cannot access this process.

Until these issues are addressed, any legislative reform is, at best, incomplete.

### **Legislative reform**

In keeping with the points noted above, the NTEU believes that legislative reform must adhere to the following principles, which are drawn from a number of core recommendations from the Respect@Work Report<sup>1</sup>:

1. **Stronger work health and safety laws** to make sure that **employers are obliged to** tackle the underlying causes of sexual harassment at work (Recommendation 35).

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<sup>1</sup> On 12 April 2021, the ACTU joined with a diverse group of organisations and individuals with extensive experience and expertise in women's rights and gender equity to call for the government to accept and implement all 55 of the Respect@Work Recommendations, with priority given to the following 'Safe Work 4 Women' reforms. These recommendations were the result of that collaboration.

2. **Better access to justice for workers in our workplace laws** by prohibiting sexual harassment in the Fair Work Act (Recommendation 28) and providing a quick, easy, new complaints process, and providing 10 days paid family and domestic leave as a national minimum employment standard.
3. **Stronger powers for the Sex Discrimination Commissioner** to make their own decisions to investigate industries and workplaces which are rife with sexual harassment, and **positive duties on employers** to take steps to eliminate sexual harassment (Recommendations 17, 18 and 19).
4. **Ratification of the 2019 ILO Convention** on the Elimination of Violence and Harassment at Work (Recommendation 15).

On point 1, we note that the Report made specific recommendations to put in place an effective mechanism for explicitly prohibiting workplace sexual harassment in the Fair Work Act. Despite the Government **accepting** Recommendation 29 from the Report to introduce a 'stop sexual harassment order' into the FW Act, it is **missing** from the proposed legislation.

Also in relation to the first point, the Government has failed to make employers responsible for taking reasonable steps to prevent sexual harassment and to put in place simplified complaints processes.

As a minimum, the NTEU believes that the following Recommendations from the Report must be included in any legislative framework:

- *Recommendation 28 – Amend the FW Act to expressly prohibit sexual harassment*
- *Recommendation 15 – Ratify the International Labour Organization's Convention on the Elimination of Violence and Harassment at Work 2019 (C.190)*
- *Recommendation 17 – Amend the Sex Discrimination Act to include a positive duty on employers to take reasonable measures to eliminate sex discrimination, sexual harassment and victimisation.*
- *Recommendation 23 – Amend the Australian Human Rights Commission Act to allow public interest actions to be brought to court by representative bodies such as unions.*
- *Recommendations 18 and 19 – Amend the Sex Discrimination Act to give the Sex Discrimination Commissioner the power to undertake systemic investigations (eg where there is a pattern of sexual harassment in a sector or workplace) and undertake compliance monitoring to ensure that industries, organisations or sectors are complying with a new positive duty.*

- *Recommendation 25 – Amend the Australian Human Rights Commission Act to ensure costs may only be ordered against a party if the proceedings are vexatious or unreasonable.*

The effect of the failure to make the necessary changes recommended by the Respect@Work Report is to continue to place the burden for dealing with sexual harassment, gender based bias and violence, and sexism in the workplace on individual workers, while exempting the employer from any responsibility to act. Put simply, it is left to the worker, who may be in a vulnerable situation (particularly if they are precariously employed) to undergo the complex and lengthy complaints processes, at their own cost and risk.

Furthermore, the proposed legislations fails to realise the underlying objective of the Respect@Work Report's Recommendations, which is to improve the systems that deal with complaints of sexual harassment, gender based bias and violence, and sexism in the workplace. The Recommendations made by the Report laid a pathway for the alignment and integration of related codes and legislative instruments, including anti-discrimination, workplace and WHS frameworks, with a view to create an approach that was both proactive and preventative. The failure of the proposed legislation to incorporate realise these changes is a missed opportunity by this Government.

**The NTEU strongly recommends that the proposed legislation be amended to address the absence of Recommendations noted above, with particular emphasis on the core Principles (Points 1-4 noted above).**

### **Higher Education Recommendations from the Respect@Work Report**

In addition, the Respect@Work Report made a number of Recommendations specific to the higher education sector, which the Human Rights Commission had previously found to have higher levels than average of sexual harassment in the workplace.<sup>2</sup> These were:

#### ***Sexual harassment prevention by universities and other tertiary education institutions***

*Recommendation 11: Building on work already underway in response to the recommendations in Change the Course, all tertiary and higher education providers deliver evidence-based*

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<sup>2</sup> In September 2018, the Australian Human Rights Commission (AHRC) released the report [Everyone's business: Fourth national survey on sexual harassment in Australian workplaces](#). It presented the findings of the Commission's national survey, which found that one in three people had experienced sexual harassment at work in the last five years. While the levels overall were an increase on the previous AHRC survey, this survey, for the first time, also focused on broad industry areas. Disappointingly, the education and training sector was found by the AHRC to be one area with higher than average levels of sexual harassment.

*information and training on sexual harassment for staff and students that addresses the drivers of gender-based violence and includes content on workplace rights.*

*Recommendation 12: Recognising that some smaller tertiary and higher education providers lack the necessary resources and expertise to deliver the information and training identified in Recommendation 11, the Australian Government should support those providers to do so, for example through the Tertiary Education Quality Standards Authority and the Australian Skills Quality Authority.<sup>3</sup>*

While the Report noted the high instances of sexual harassment and assault reported by tertiary education students (reported on in detail in the “Change the Course Report” in 2018), it noted that staff are also impacted:

*While there has been considerable focus within tertiary education institutions (particularly universities) on sexual harassment in an educational context (ie. how sexual harassment affects students within these institutions), it is also important that all tertiary and higher education institutions, as employers themselves, consider how to address sexual harassment experienced by their staff...*

*...The National Tertiary Education Union (NTEU) submission to the Commission provided examples of sexual harassment of university staff members. These included evaluation surveys of staff performance, completed anonymously by students, that were used to ‘troll’ and ‘sexually harass’ staff members. The Commission also heard about post-graduate students in casual or contracted employment as research assistants and tutors who were reluctant to report sexual harassment to avoid risks to their career prospects, contract renewal or hours of work. The NTEU told the Commission that although staff were ‘very well educated on university processes and policy ... there is a massive reluctance to formally report instances [of sexual harassment].<sup>4</sup>*

The NTEU believes that the Government needs to take a proactive approach in addressing this very serious issue on the higher education sector, which (at the very least) should require employers to be pre-emptive in their management of sexual harassment as a potential work, health and safety risk in the workplace. As we have already stated in this submission, it is disappointing that the proposed legislation fails in this regard.

In addition, however, we note (emphasis added) that the Inquiry found that:

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<sup>3</sup> Australian Human Rights Commission [Respect@Work: National Inquiry into Sexual Harassment in Australian workplaces 2020](#) Pg 49

<sup>4</sup> Ibid Pg 480

*Recognising that some tertiary and higher education providers are much smaller than universities, and may lack the resources or expertise to develop education programs without some support, the **Australian Government** should support those providers to deliver sexual harassment information and training, for example, through TEQSA and the Australian Skills Quality Authority.<sup>5</sup>*

While the Government has 'agreed' to the Recommendations by the Respect@Work Report that go to these issues (Recommendations 11 and 12), no funding has been committed to enact these Recommendations and the only agreement made to date is to 'engage' with educational institutions and states and territories. This is far from satisfactory, and gives the distinct impression that the Government is only paying lip service to these Recommendations in the report.

**The NTEU recommends that, in addition to the broader legislative reforms already recommended, the Government also undertakes a review of regulatory reforms (and in particular, in relation to the activities of TEQSA and the Australian Skills Quality Authority) with the view of meeting Recommendations 11 and 12 of the Respect@Work Report.**

**Furthermore, that funding to support these Recommendations be specifically targeted at higher education providers.**

### **Conclusion and Recommendations**

When the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 was announced by Attorney-General, Michaelia Cash, the Government claimed that the Bill's reforms were "essential for advancing both women's safety and economic security". It also declared that preventing and addressing sexual harassment requires "a nation-wide effort and whole-of-society support" and that the proposed legislation would be "an important part of this broad effort to ensure women are treated equally and protected from violence and harassment on the basis of sex".<sup>6</sup>

The NTEU contends that the proposed legislation falls far short of achieving these objectives. Instead, the old approach to sexual harassment in the workplace, whereby the individual complainant shoulders all risk and responsibility for addressing sexual harassment in the workplace remains largely as is. The employer is, at best, a bystander, with few if any

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<sup>5</sup> Ibid pg 481

<sup>6</sup> The Parliament of the Commonwealth of Australia [Sex Discrimination and Fair Work \(Respect At Work\) Amendment Bill 2021 Explanatory Memorandum 2021](#) Canberra, Australia.



obligations or responsibilities to put in place pre-emptive measures to address what is clearly a workplace risk. While the proposed 'stop sexual harassment' process is a positive step, the Fair Work Commission cannot award compensation or penalties under these provisions and workers who have already been forced out of a workplace due to sexual harassment cannot access this process. The proposed legislation also fails to improve on the alignment of the current anti-discrimination, workplace and WHS frameworks, or to integrate these systems into an approach to sexual harassment that is proactive and preventative.

It is telling that, in the explanatory memorandum for the proposed Bill, the changes to the Sexual Discrimination laws "... will not impose an increased burden on business." In short, this sums up this Bill – that the Government is hoping that, with a few minor amendments made by this legislation, the public's perception will be that it is addressing sexual harassment – but this is only a perception, not the reality. The fact is that this legislation will fail to enact any real change, particularly if it fails to place the obligation on employers to treat sexual harassment in their workplaces as an industrial issue.

Unless the Government takes these issues seriously and enacts all the Recommendations made by the Respect@Work report, it is highly likely that the appalling levels of sexual harassment in our workplaces will continue. There is an opportunity for Government to take this opportunity to make the necessary changes to create real reform, and the NTEU urges that the proposed legislation be amended accordingly.

*The NTEU is available to discuss the issues and recommendations made in this submission in further detail should that be required.*

#### **Recommendations:**

**The NTEU supports the submission made by the ACTU to this Inquiry and agrees that the proposed legislation should be amended to include the following Recommendations from the Respect@Work Report:**

- **Recommendation 28 – Amend the FW Act to expressly prohibit sexual harassment**
- **Recommendation 17 – Amend the Sex Discrimination Act to include a positive duty on employers to take reasonable measures to eliminate sex discrimination, sexual harassment and victimisation.**
- **Recommendations 18 and 19 – Amend the Sex Discrimination Act to give the Sex Discrimination Commissioner the power to undertake systemic investigations (eg where there is a pattern of sexual harassment in a sector**

or workplace) and undertake compliance monitoring to ensure that industries, organisations or sectors are complying with a new positive duty.

- Recommendation 23 – Amend the Australian Human Rights Commission Act to allow public interest actions to be brought to court by representative bodies such as unions.
- Recommendation 25 – Amend the Australian Human Rights Commission Act to ensure costs may only be ordered against a party if the proceedings are vexatious or unreasonable.

Furthermore, the NTEU believes that Recommendations 11 and 12 of the Respect@Work Report, which relate specifically to Higher Education Providers, must be enacted, through both additional direct funding and regulatory reform that requires employers to work with the tertiary education regulators on improving their systems for education, training, complainant support and reporting around sexual harassment, gender bias and violence, and sexism in the workplace.

To highlight the problematic nature of sexual harassment, we have attached to this Submission a summary of the findings of the NTEU's 2018 survey of staff working in public universities on their experiences of sexual harassment in the workplace.

*A more in depth analysis is available at:*

- [\*\*NTEU Survey on Sexual Harassment in the Workplace – Preliminary Findings\*\*](#)
- [\*\*National Tertiary Education Union Submission to National Inquiry into Sexual Harassment in the Workplace\*\*](#)

## **Attachment A**

### **Sexual Harassment in Universities – Short summary**

#### ***The findings of the NTEU's survey of members on sexual harassment, sexism and gender bias in universities***

The NTEU surveyed members in all universities national in 2018 to gather information on their experiences of sexual harassment, sexism and gender bias in their workplaces. The results of the NTEU survey supported our submission to the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces, which made a number of important recommendations on what changes are needed to address sexual harassment more effectively.

#### **The scale of the problem**

The NTEU survey found:

- one in five respondents had personally experienced sexual harassment in the workplace, with almost twice as many women (23.97%) as men (12.01%) reporting personal incidents.
- just under 40% (37.25%) of all respondents (men and women) indicated that they were aware of others who had been sexually harassed in their workplaces.
- The majority of respondents said that sexual harassment occurred occasionally (69.65%), while around 10% said it was either regular or constant.
- Many incidents occurred off campus (eg conferences, field trips, social events)
- Student evaluation surveys were identified as one other source of sexual harassment and sexism
- Respondent comments indicated some perpetrators go from one victim to the next in the workplace, or have multiple victims at the same time.

#### **In the last 12 months:**

##### *Forms of sexual harassment*

Almost twice as many women than men said they had experienced sexual harassment in the last 12 months - 118 women respondents (8.46% of all female respondents) and 34 men (4.42% of all male respondents) indicated that they had experienced inappropriate physical contact and 105 (7.54%) women and 27 men (3.50%) reported being subjected to unwelcome sexual gestures, comments, jokes or being stared or leered at.

- For both men and women the most common form of sexual harassment was sexually suggestive comments or jokes that made the person feel offended (women 36.69%, men 22.83%).
- Over a quarter of women also reported unwelcome touching, hugging, kissing or cornering (25.41%), while 16.17% experienced inappropriate physical contact.
- Women also reported on intrusive questions about their private life or physical appearance (27.13%),
- a number of comments revealed threats to personal safety or assaults (eg upskirting, drink spiking, attempted and actual sexual assault).

##### *Perpetrators of harassment*

- Harassers were usually colleagues/co-workers (women 40.15%, men 33.11%).
- Women reported the next most prevalent offenders as being non-supervisory management or senior staff (women 23.94%, compared to 15.23% for men), while men reported students (men 23.84%, compared to 15.96% for women).
- Just under half of men (46.62%) said their harassment was by a woman but over a quarter (27.70%) reported harassment by a man, and 8.78% said it was by both men and women.
- For women, the portion of male perpetrators was much higher at over three quarters (78.23%), and very few reported harassment by a woman (4.81%) or by both a man and woman (4.05%).

#### *Intersectional factors underpinning sexual harassment*

Both men and women who said they had been harassed in the last 12 months believed it was on the basis of gender, although the proportion of women was considerably higher (men 45.93%, women 68.57%).

- Male respondents cited sexual orientation as the next significant fact in their harassment (27.41%), followed by race or ethnicity (16.30%),
- For women this was reversed, with race and ethnicity the next highest indicator (16.29%) followed by sexual orientation (12.57%).

#### **Reporting**

The survey also identified considerable under-reporting of sexual harassment in the workplace, despite 90% of respondents stating that they were aware their university had complaints processes and policies in relation to sexual harassment.

Participants in the survey revealed considerable disincentives to making a complaint - of those respondents to the NTEU survey which said they had experienced sexual harassment but had not reported it, just under 38% said they did not trust the complaints process, with around 36% stating that they thought a complaint may impact negatively on their careers. Alarmingly, just over 18% said they thought they might lose their jobs if they did complain.

- Less than 5% of NTEU members have made a formal complaint regarding sexual harassment (3.25% men and 5.64% women).
- Informal complaints were also low – 4.43% men, 11.43% women
- Most NTEU members did not report sexual harassment because they thought that people would think they were over-reacting (44.04%) or it wasn't serious enough (36.77%).
- Many did not trust the complaint process (37.98%), thought nothing would be done (39.39%) or were concerned it might negatively impact on their career prospects (36.16%).
- 18.59% thought they might lose their job if they complained
- 39.67% of NTEU members said that when sexual harassment was reported, no action was taken to address the issue, and 37.60% were encouraged to drop the matter

- 34.55% of NTEU members reported they were labelled as a troublemaker, ostracized, victimised or ignored by colleagues as a result of their complaint
- 30.24% said there were negative consequences for them professionally
- more respondents reported that the person stopped their own behaviour (22.58%) than management taking some form of action against the respondent (21.20%)

Most reporting was done through the employer, with only 20% indicating they approached their union (17.27%) or an external body (2.58%). However, over 70% of NTEU members felt more confident in reporting sexual harassment to the Union, compared to 22% reporting to university management or 31% to HR.

### **Bystander behaviour**

- A significant number (33.17%) said that their experience of sexual harassment had been seen by another person/persons.
- Significantly more women (40.45%) indicated that the incident/s of sexual harassment they were subjected to were observed by others, compared to men (18.75%).

### **Addressing sexual harassment**

Clearly, the current approaches are failing, with the Australian Human Rights Commission reporting that sexual harassment in the workplace is widespread, pervasive and on the increase.<sup>7</sup>

The strong view of the NTEU is that the problem lies in the fact that our current laws focus almost completely upon the individual, rather than the employer, and that sexual harassment is not seen as an industrial issue. This needs to be changed, through reforms to:

- Fair Work Act and the Fair Work Commission
- Work, Health and Safety Regulations and Codes of Practice.
- Sex Discrimination Act 1984 (SDA)
- Workplace Gender Equality Agency

These reforms would make sexual harassment an industrial issue and ensure employers treat sexual harassment as a workplace risk, while also allowing for greater union involvement around prevention and the complaints process.

In addition, Australia must also sign on to the newly *formed ILO Convention on Violence and Harassment in the World of Work* which specifically lists sexual harassment as a workplace risk and aims to create a new global standard to combat violence and harassment in the workplace.

Numerous other factors have a bearing on workplace cultures that allow sexual harassment and sex/gender discrimination to grow and spread, including

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<sup>7</sup> AHRC *Sexual harassment in Australian workplaces widespread and pervasive* (Wednesday 12 September 2018) <https://www.humanrights.gov.au/news/media-releases/sexual-harassment-australian-workplaces-widespread-and-pervasive>

- insecure and under employment (which creates innate power inequities and inhibits reporting of incidents out of fear of losing one's job),
- low wage growth
- gender pay gap,
- under representation of women in leadership and senior positions,
- persistent career blockages and segregated workforces/feminised industries.

These cannot be dealt with through legislative reforms alone, but instead must be tackled through political commitment, community education and improvements to gender equality.