



# **JobWatch**

## **Response to ACTU Submission, requested by the Honourable Senator O'Neill**

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**Level 10, 21 Victoria St  
Melbourne VIC 3000**

**(03) 9662 9458**

**[www.jobwatch.org.au](http://www.jobwatch.org.au)**

# Introduction

1. Honourable Senator O’Neal has requested that Job Watch Inc (**JobWatch**) take on notice and provide a more fulsome response on its views on the submission prepared by the Australian Council of Trade Unions (**ACTU**).<sup>1</sup> In their submissions, the ACTU highlighted that a number of recommendations made by the Sex Discrimination Commissioner, Kate Jenkins (**Commissioner**) in her *Respect@Work: Sexual Harassment National Inquiry Report (2020)* (**Report**) to the Federal Government (**Government**) were not adequately addressed in the *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (**the Bill**).<sup>2</sup>
2. The Honourable Senator highlighted that of the 55 recommendations made by the Commissioner, 40 were agreed to by the Government while five had been agreed to only in principle, one agreed to in part, nine only noted and a number of key recommendations rejected.<sup>3</sup> The Honourable Senator requested that JobWatch express a view on the ACTU’s submissions wherein they identified that recommendations 28, 16c, 17, 18, 19, 23, 25 and 15 made by the Commissioner were not covered in the Bill.<sup>4</sup>

## Response to Recommendation 28

3. Recommendation 28 of the Report provides that “*the Fair Work system be reviewed to ensure and clarify that sexual harassment, using the definition in the Sex Discrimination Act, is expressly prohibited.*”<sup>5</sup>
4. In their submission, the ACTU acknowledges the Government’s adoption of recommendation 29, they highlight the fact that under the General Protections provisions of the *Fair Work Act 2009* (FW Act) and in particular section 351, sexual harassment is not clearly defined and as such does not provide a clear ground on which an employee can pursue a claim under the provisions.<sup>6</sup> They go on to further highlight the narrow interpretation of the section that has been adopted by the courts and the problematic nature of requiring employees to prove an employer’s intent in making claims under the section.<sup>7</sup> The ACTU proceeds to also support the request made by the Fair Work Commission for a short delay to the introduction of the stop sexual harassment process to allow them to train their staff and develop relevant procedures and educational material.<sup>8</sup> The ACTU also identifies that the proposed “stop

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<sup>1</sup> Honourable Senator O’Neill, *Senate Education and Employment Committee Public Hearing Transcript of 19 July 2021*, page 31

<sup>2</sup> ACTU submission to the Senate Education and Employment Committee inquiry into the *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (**ACTU Submission**), pages 1-3 and 6-7.

<sup>3</sup> Above n1

<sup>4</sup> Ibid

<sup>5</sup> Sex Discrimination Commissioner Kate Jenkins, *Respect@Work: Sexual Harassment National Inquiry Report (2020)* (**Report**), page 46

<sup>6</sup> ACTU Submission, page 8

<sup>7</sup> Ibid

<sup>8</sup> Ibid, page 9

harassment” regime is problematic as it requires an applicant to prove that there is an *ongoing* risk of harm.<sup>9</sup>

5. JobWatch wholly agrees with both the Commissioner’s recommendation 28 and the submissions made by the ACTU in relation to the deficiencies in the Bill in view of the recommendation. The anecdotal evidence gathered by JobWatch through its TIS and case work supports the submissions made by the ACTU, and suggests that most workers covered under the FW Act find that the Fair Work Commission is the most accessible forum for them to pursue claims. Incorporating the definition of sexual harassment found in the *Sex Discrimination Act 1984 (SD Act)* will provide for significant clarity for both claimants and the courts for pursuing claims and interpreting the relevant legislative instruments.

## Response to recommendation 16c

6. Recommendation 16c of the Report provides the Government *“Amend the Sex Discrimination Act to ensure... (that) creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited”*.<sup>10</sup>
7. In their submission, the ACTU articulates the deficiencies of the Bill in view of this recommendation and proceeds to provide recommendations to amend the Bill to correct this deficiency.<sup>11</sup> The ACTU further echoes the views expressed by the Commissioner that sexual harassment is preventable and advocate for a preventative model of regulation.<sup>12</sup>
8. JobWatch broadly supports the Commissioner’s recommendation and the submissions made by the ACTU. JobWatch is however cognisant of the Fair Work Commission’s limitations with respect to making orders of compensation and making orders for the imposition of pecuniary penalties. In view of this, JobWatch refers to Recommendation 9 of our recommendations wherein we suggest that a dedicated and simplified mechanism to deal with sexual harassment is provided for in the federal courts.<sup>13</sup>

## Response to recommendation 17

9. Recommendation 17 of the Report provides the Government *“Amend the Sex Discrimination Act to introduce a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible. In determining whether a measure is reasonable and proportionate, the Act should prescribe the factors that must be considered including, but not limited to:”*<sup>14</sup>

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<sup>9</sup> Ibid, page 9

<sup>10</sup> Report, page 43

<sup>11</sup> ACTU Submission, page 10.

<sup>12</sup> Ibid, page 11

<sup>13</sup> Submissions by Job Watch Inc in response to the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (**JobWatch Submission**), page 9, paragraph 46.

<sup>14</sup> Report, page 44.

- a. *the size of the person's business or operations*
- b. *the nature and circumstances of the person's business or operations*
- c. *the person's resources*
- d. *the person's business and operational priorities*
- e. *the practicability and the cost of the measures*
- f. *all other relevant facts and circumstances.*

10. In their submissions, the ACTU strongly supports the Commissioner's recommendation and responds to the limitations of the current WH&S regime.<sup>15</sup>

11. JobWatch wholly agrees with the Commissioner's recommendation and the submissions made by the ACTU. JobWatch further refers to and repeats the recommendations 10 -11 made in our submissions to the Committee.<sup>16</sup>

## Response to recommendations 18 and 19

12. Recommendations 18 and 19 of the Report,<sup>17</sup> as paraphrased by the ACTU, provides that the Government:

- a. *Amend the SD Act to give the Sex Discrimination Commissioner the power to undertake systemic investigations (e.g 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.*<sup>18</sup>

13. JobWatch broadly supports the Commissioner's recommendation and the submissions made by the ACTU. JobWatch however echoes the Commissioner's comments that a multi-faceted whole of community response is required.<sup>19</sup> In view of this, we recommend that there be increased coordination between the Commissioner and various state and territory workplace health and safety regulators to ensure cohesion. JobWatch reiterates the recommendations made in our submissions regarding a multi-faceted approach.<sup>20</sup>

## Response to recommendation 23

14. Recommendation 23 of the Report provides that the Government "*(a)mend the Australian Human Rights Commission Act to allow unions and other representative groups to bring representative claims to court, consistent with the existing provisions in the Australian*

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<sup>15</sup> ACTU Submissions, pages 17-18

<sup>16</sup> JobWatch Submissions, pages 9-11

<sup>17</sup> Report, page 44

<sup>18</sup> ACTU Submissions, page 2

<sup>19</sup> Report, page 12

<sup>20</sup> JobWatch Submissions, pages 8-9

*Human Rights Commission Act that allow unions and other representative groups to bring a representative complaint to the Commission.*<sup>21</sup>

15. In their submissions, the ACTU states that the Government has rejected this recommendation and critiques the reasoning provided.<sup>22</sup>
16. JobWatch broadly agrees with the Commissioner's recommendation and the submissions made by the ACTU. As stated in our submission, JobWatch highlights the difficulties that victims of sexual harassment have in making claims.<sup>23</sup> This difficulty is brought about by a number of reasons including the psychiatric toll of suffering such an event and the onus that rests on victims to prove their claims under the current system. It is acknowledged that workplace health and safety regulators may have capacity to prosecute offending employers and while there may be avenues available through traditional personal injury or workers' compensation schemes, these mechanisms are presently insufficient. Workplace health and safety regulators often have limited resources and pursuing claims through other means may be costly, more so if the claim is unsuccessful. As such, the ability of representative bodies to pursue claims on behalf of victims may present a viable alternative for victims that provides them with more support as they don't have to face the daunting task of pursuing a claim on their own.

## Response to recommendation 25

17. Recommendation 23 of the Report provides that the Government "*(a) mend the Australian Human Rights Commission Act to insert a cost protection provision consistent with section 570 of the Fair Work Act 2009 (Cth)*"<sup>24</sup>
18. In their submissions and in support of the Commissioner's recommendation, the ACTU highlight that the risk of costs act as a significant disincentive on people making claims of sexual harassment.<sup>25</sup>
19. JobWatch wholly agrees with Commissioner's recommendation and broadly agrees with the submissions of the ACTU. In addition, JobWatch repeats and reiterates our submissions on the adoption of a reverse onus of proof for sexual harassment claims as well as the adoption of a rebuttable presumption of vicarious liability on employers.<sup>26</sup>

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<sup>21</sup> Report, page 45

<sup>22</sup> ACTU Submissions, page 23

<sup>23</sup> JobWatch Submissions, page 5-6

<sup>24</sup> Report, Page 25

<sup>25</sup> ACTU Submission, page 22.

<sup>26</sup> JobWatch Submissions, page 11.

## Conclusion

20. JobWatch thanks the Honourable Senator for the opportunity to make further comment on the Bill and the submissions made. We welcome the opportunity to answer further questions and provide further case studies on the issues raised.