

Dear Panel,

**Re: Australian Universities Accord Interim Report**

I'm making this submission of my own accord, to share some relevant findings from my doctoral research on how and why University employers act to regulate workplace sexual harassment complaint, and what kind of regulation is needed to make durable change. I share these comments in the hope that the Panel will find them useful in considering how the Accord can support and require Universities to be exemplary employers and contribute to broader social equity for women in the workforce in particular. I seek to provide further evidence to support discussions on matters that the Interim Report briefly considers, including:

- Workforce and workplace structures and safety in Universities around staff sexual harassment policies, practices and regulation;
- What needs to change to support University employers to engage in best practice, in line with the recommendations of the Respect@Work report.

I note that while the Interim report considers the special duty of care that Universities have toward students, there is a dearth of information on how University employers are equipped to meet their now-explicit duty as persons conducting a business or undertaking (PCBUs) under work, health and safety laws and new codes of practice, to ensure that staff and other workplace participants are protected from workplace sexual harassment, a recognized psychosocial hazard for women in particular. My research suggests that employers across the national sector are ill-prepared to meet this increased regulatory burden and take steps to fulfil their responsibilities to take all reasonable steps to proactively prevent and address workplace sexual harassment.

**I encourage the Panel to recommend measures that:**

- Link TEQSA accreditation and/or government funding to fulsome implementation of work, health and safety control measures for psychosocial risk under relevant states work health and safety laws, with a particular emphasis on responses to workplace sexual harassment.
- Require University governing bodies, via executive, to receive meaningful qualitative reports on the way their institutions are addressing reports of workplace sexual harassment to support Council members and executive to discharge their statutory roles as PCBUs:
  - quantification of the prevalence of workplace sexual harassment;
  - measures to resolve both informal reports and formal complaints in a timely way;
  - actions taken to protect the health and safety of complainants in the workplace during and after reports, and as preventative measures.
- Create incentives for University employers to strengthen the workplace rights of complainants to timely due process and confidentiality, in a way that balances without diminishing the workplace rights of respondents.
- Incentivise University employers to address structural hazards to vulnerable staff, such as high levels of casualisation and contract work at apprenticeship (PhD) and early career levels that contribute to a culture that systematically suppresses workplace complaint.

I can be contacted via email to discuss any aspect of this submission.

Kind regards

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## **1. Background to my doctoral research**

This project was prompted by my professional experiences between 2016-2020 at UTS, where I project managed the Athena SWAN voluntary accreditation process for women in STEM and engaged strongly with the national sector accreditation process, and was a staff-elected UTS Council member from 2018-2020. While the sector was taking meaningful steps to begin culture change to meet its duty of care to students in response to the *Change the Course* report, there was no similar sector-wide focus on better regulating sexual harassment complaint and prevention for staff and other workplace participants, and little evidence to support interventions in this space.

I designed my doctoral research to fill this gap by interviewing 30 employer and union key informants working in complaints and prevention across the national sector's employers, to ask them what was going on in this space, whether it was effective, and what was influencing the shape of their operations. I was supported in recruiting these key informants by the sector unions (NTEU and CPSU) and by Sage Ltd, the accrediting body of the Australian Athena SWAN program for women in STEM. Participants, who held responsible positions, gave highly credible embedded observations, and had professional backgrounds in law, human resources, workplace relations, human rights and trade union activism and many years of sector experience. These perceptive embedded observations underpin my comments. I've also undertaken a systematic review of all the sector's enterprise bargaining agreements, which are a feature of the sector covering 97% of sector employers, and Athena SWAN accreditation documents covering 80% of the sector, to understand how regulation affects operations. This research was undertaken in the context of a rapidly changing regulatory environment, with legal and regulatory changes implementing and extending the *Respect@Work* Report recommendations, and interviews were structured to consider the sector's readiness to implement changes in this context. Interviews were conducted this year. This research is unpublished and forms part of my doctorate at UTS Law, with a forthcoming submission date.

## **2. Summary**

My evidence suggests that many employers in the sector require support to deal with complaints in a way that supports workplace justice effectively and supports complainant workplace health and safety:

- Sector approaches to addressing workplace sexual harassment have evolved in the context of under-regulation of prevention, complaint and complainant wellbeing, alongside strong industrial protections for respondents across the sector's EBAs.
- Many university employers are scrambling to meet the shortfall between existing capacity to address prevention and complaint, and new regulatory requirements imposed by work, health and safety and other workplace law reforms that require employers to proactively assess and address risk of workplace sexual harassment.
- This shortfall extends to:
  - Staff capacity and knowledge to receive and respond to complaints in a trauma-informed, transparent way
  - Capacity to manage complaints within reasonable timeframes that do not time-out external formal conciliation avenues
  - Shortfall in capacity of HR and organisational tools to record and report on the nature and resolution of complaints
  - Siloing between complaints and relevant prevention areas leading to a shortfall in evidence-based prevention practice.
- Bifurcation between the superior approaches taken to student complaints, which are more strongly regulated to promote the interests of students, and staff complaint processes which

are artificially conflated with disciplinary processes and consequently constrained by legalistic, confidential processes in the interests of the respondent.

- Many participants perceived that common features of the complaints process were themselves traumatic for complainants, reinforcing cultures of gendered power in academic settings where offenders are perceived as suffering no consequence to their career, and have the effect of chilling complaint in highly casualised and insecure work environments.

### **3. Most workplace sexual harassment is not formally reported.**

Key informants confirmed that most complaints of workplace sexual harassment were, in their professional experience, not reported “formally”. Instead they were:

- reported “informally” - in a way that did not proceed to a formal complaint, and was therefore not captured in organisational data reported up to the Council or senior executive, with few exceptions. These complaints included both those resolved informally, and those where the complainant simply chose not to proceed with a “formal” complaint of misconduct after an initial inquiry. Participants indicated that many more “informal” reports were made than “formally”.
- reported in a way that employers chose not to address, particularly in the case of anonymous complaints where – with no named complainant – there was a perception among some employers that a formal process to address the complaint could not proceed.
- not reported at all.

The perception from key informants was that unreported incidents were far greater than reported matters. This cannot be formally quantified as we do not know the prevalence of workplace sexual harassment in the University sector, because there has never been a whole of workforce prevalence survey conducted. While most Universities historically conduct staff surveys using third party providers that pose some relevant questions around perceptions of the University’s commitment to address harassment and discrimination to employees who choose to participate, the results of these surveys have not been made public beyond scattered references in voluntary regulation scheme documentation. My review of employer commitments and disclosures under the voluntary Athena SWAN scheme shows that only two Universities chose to disclose staff complaints numbers, which were exceptionally low in comparison to AHRC prevalence data for education sector employers (including but not limited to Universities), which has placed experience at around 40%. The NTEU has also undertaken self-selecting surveys of members that indicate substantially higher rates of experience than formal complaint.

### **4. Formal workplace regulation has not protected complainants.**

Barriers to complaint are in my view linked to the unique, common regulatory structure of the sector’s workplaces, which encourage an unhelpful but widespread artificial conflation of sexual harassment complaint processes with formal respondent disciplinary processes, in the process sidelining complainant wellbeing in favour of respondents’ workplace rights.

At University workplaces, complainants have not historically had equivalent statutory workplace rights to respondents. A review of the whole sector’s enterprise agreements shows that almost all contain strong protections for employees accused of serious misconduct. These protections rightly and properly include due process, confidentiality, union representation and very often contain sector-idiosyncratic processes whereby respondents can have decisions about their employment proceeding from findings of misconduct reviewed by the Vice Chancellor or their delegate, or by a committee of peers, in the case of dispute. These are strong protections for staff designed to protect those accused of a broad range of academic and other misconduct and the advantage of including

them in the EBA is that they become statutory workplace rights, enforceable by the Fair Work Commission, the external umpire. These provisions also apply in the case of serious misconduct in the form of workplace sexual harassment.

By contrast, processes for complainants – more likely to be women and in relatively junior roles – are dealt with in employer policies in such a way that disputes over adherence to processes and treatment of complainants were not referable to the Fair Work Commission. This has historically reduced employer regulatory risk in its treatment of complainants, while the presence of formal workplace rights for respondents, combined with the overlay of defamation law and privacy requirements creates a reasonably high degree of risk around employers taking action against the employment of respondents. My research participants told me that:

- In this context, complaints that “go formal” trigger misconduct proceedings, during which strong protections are put in place around the respondent’s workplace rights to confidentiality and due process, often perceived to be at the expense of the wellbeing of complainants.
- External investigators, often with a legal background, are employed to investigate complaints and provide recommendations on whether sexual harassment occurred on the balance of probabilities. Investigations are intrusive, drawn out, “quasi-legal” processes that participants commented can take many months, with detrimental effects on the complainant’s health and on the broader workplace culture.
- Employers rely heavily on the skillsets of HR professionals to assess and manage complaints; these staff skillsets are largely currently in workplace relations and legal areas, and not in trauma-informed approaches to complainant support, prevention or response.
- Many participants perceived that a constrained funding environment had affected HR capacity to support staff complainants appropriately. Participants spoke about the need for education among HR staff to better engage with new regulatory standards.
- Outcomes of complaints remain confidential, leading to the widespread workplace perception that the employer has not addressed very serious behaviour. Participants indicated that at their institutions, complainants will not usually receive information about the consequences of their complaint for the perpetrator/respondent, other than whether or not it was upheld as constituting sexual harassment on the balance of probabilities.
- Union representatives commented that their involvement on behalf of a complainant usually began when a complainant had moved through a lengthy and convoluted complaints process and was highly distressed by what seemed like a lack of action in the outcome. This perception often led to complainants suffering psychosocial harm and leaving their employment.

## **5. There are practical functional barriers to complaint.**

Key informants commonly spoke about how this regulatory imbalance has manifested in functional barriers to complaint:

- Inadequate HR reporting portals and tools that have not, historically, been able to record and generate data on workplace sexual harassment complaints or differentiate them from other employee complaints. There is evidence that this is changing at some employers.
- Reporting portals that are legalistic and difficult to navigate for people in the aftermath of a traumatic event, which participants perceived as deterring the lodging of complaints in some circumstances.
- High turnover and gaps in capacity in HR departments, particularly since COVID redundancies swept the sector in response to funding constraints.

- With some exceptions, approaches that take the lowest regulatory requirement as standard, rather than seeking to meet in staff processes the higher standards of care for complainants that are in place for student complainants.
- Complexity and lack of coordination in addressing complaints where staff members were also students, due the stronger regulatory duty of care for students – for instance, students are able to know the outcome of their complaint, but staff are commonly not.

**6. Complainants are reluctant to both report and make formal complaints, because they do not trust their complaints will be dealt with appropriately.**

Key informants talked about the reasons that people did not make formal complaints in a highly credible way, informed by discussions they regularly conducted in the course of their work with would-be complainants in varying circumstances. Reasons that arose regularly included:

- A perception that making a complaint would affect a complainant’s career negatively, particularly in vulnerable cohorts like doctoral students and early career researchers where very high levels of casualization and job insecurity and competition for very few, highly specialised jobs as an ingrained feature of the academic apprenticeship system meant that senior academics had high levels of control over future employment opportunities.
- A perception among victims, rightly or wrongly, that nothing would be done if they complained. Participants commonly indicated that complainants may have heard stories of senior male perpetrators or respondents at their institutions who had either been perceived as going about their offending without consequence, or who had chosen to leave rather than submit to the disciplinary process and had not suffered damage to their careers. I am interested here in the *cultural perception* of this occurring and its perceived impact on rates of complaint; this is not a comment on individual matters or employer actions, of which I have no first-hand knowledge. Participants in HR units expressed frustration that complainants would not move forward with formal complaints in this environment.
- The complaints process itself was perceived as traumatic, drawn out and retraumatizing for complainants in many cases. Complainants were perceived as baulking at the evidentiary requirements and quasi-legal nature of making a formal complaint and triggering the highly regulated disciplinary process, and as a result failing to proceed to a formal complaint.
- Many key informants saw their role as “managing the expectations” of complainants that their complaints would achieve the outcomes they wanted. Complainants were perceived as wanting perpetrators exposed and publicly punished, outcomes that were not seen as feasible within the constraints described above.

**7. Best practice approaches in the current environment**

Participants described best practice, trauma-informed approaches oriented toward complainants as occurring in the student harassment space, which was often completely bifurcated from staff processes which were far less developed in their support of complainants. This bifurcation follows the recent history of regulatory interventions into the student space by TEQSA and the Australian Human Rights Commission following the 2017 *Change the Course* report, which created greater scrutiny on student processes but did not address staff processes. Participants saw the *Respect@Work* reforms as an opportunity to extend this better practice into the workplace harassment space for all workplace participants, if organisational leadership were willing to place emphasis on compliance with stronger workplace health and safety focuses on psychosocial risk.

In the meantime, some innovative enterprises had set up alternative first response and contact systems for staff complaints, and conduct reviews of their policy and practice. These review processes and contact officers were, importantly, set up outside of HR operational areas and had

direct lines of report to executive staff areas, often with the assistance or oversight of committees with a range of organisational representatives. Participants with knowledge of these review and response functions spoke of the critical role of executive in creating organisational change, echoing the opinions of HR practitioners and union officials that change in Universities occurs as a result of executive involvement and prioritisation.

## **8 . Concluding comments**

I provide this material to assist Panel discussions on how to ensure that Universities are exemplary employers. I have included some summary recommendations at the top of this submission arising from my research evidence, that speak to key points:

- Responsiveness of staff in operations to external regulatory risk
- The key role of university executive and governance in driving change
- The need to address workforce structure as a key risk to psychosocial health and safety
- My considered position that workplace rights for complainants to timely due process and functional protection of health and safety must be formalised and not left to voluntary compliance.