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1. RE-FRAMING SEXUAL HARASSMENT AS AN ORGANIZATIONAL PROBLEM NOT AN INDIVIDUAL MISFORTUNE

There is an urgent need in both law and practice fundamentally to reframe how we approach sexual harassment. The central weakness of the current, widespread tendency to see this as an issue between individuals is that we have put almost the entire burden of dealing with harassing behaviour on those who are subject to it. Yet we know from evidence and analysis that relying on individual complaint and litigation means, at best, that laws prohibiting sexual harassment will achieve less than they might, and at worst, that nothing much will change.\(^1\) In truth, aspects of the UK’s highly individualized legal framework are functioning to enable and sustain sexually harassing conduct, as has been well illustrated by recent revelations about some settlement and confidentiality agreements.

This calls for a basic shift in how we think about, discuss and regulate bad behaviour at work (and beyond), in which responsibility to prevent, challenge and provide redress for sexual harassment is squarely placed on organizations, backed up by broader-based participation in implementation and enforcement, including by government institutions. On this approach, individual claims would continue to enable victims to seek redress, but the societal response would no longer stand or fall on whether targets speak up and on what they manage to achieve when they do.

2. HOW THE EVIDENCE SUPPORTS THIS APPROACH

The UK has produced a wealth of research and data about negative behaviour at work, how individuals respond and how their efforts in practice turn out. Typically individual responses encompass a minority doing nothing, a very large proportion who do something, a small proportion who consult lawyers, an even smaller group who litigate and a tiny group who end up at a contested hearing.\(^2\) While not much evidence has been gathered and analysed specifically about sexual harassment,\(^3\) exceptions exist, like the government-commissioned *Fair Treatment at Work Survey*\(^4\) and qualitative elements in Fevre et al’s large scale study of ill treatment at work.\(^5\) There is also potential to drill further into more general evidence and to draw on qualitative and international research to help make sense of this phenomenon.\(^6\)

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\(^1\) See generally L Barmes, *Bullying and Behavioural Conflict at Work: The Duality of Individual Rights* (OUP, 2016).

\(^2\) See for an overview and analysis of the different data sources and their findings ibid, chapter 2.

\(^3\) See for example (and considered ibid): first, research into bullying from the UK and elsewhere based on the ‘Negative Acts Questionnaire’, the use and development of which is described in S Einarsen, H Hoel & G Notelaers, ‘Measuring exposure to bullying and harassment at work; validity, factor structure and psychometric properties of the Negative Acts Questionnaire – Revised (2009)’ 23 Work & Stress 24; secondly, research into how individuals respond to ‘justiciable problems’ at work, pioneered in H. Genn with National Centre for Social Research *Paths to Justice, What People Do and Think About Going to Law?* (Hart Publishing 1999) and extensively repeated since, in the UK and elsewhere; thirdly, successive *Surveys of Employment Tribunal Applications*, the most recent of which is C Harding, S Ghezelayagh, A Busby, and N Coleman, *Findings from the Survey of Employment Tribunal Applications 2013* (BIS, Research Series No 177, June 2014).

Nonetheless, several important points can already be drawn from the evidence about negative behaviour at work, how people respond and what ultimately happens:

- Extensive, repeated survey evidence has demonstrated that, in the eyes of many working people, unacceptable conduct at work is commonplace, some proportion of which involves sexual harassment.7

- Extensive, repeated socio-legal research has shown that a notable minority take no action in response to non-trivial employment problems, while around half of the considerable majority who try to do something do not achieve satisfactory outcomes. The net effect is that a large proportion of workplace problems are currently going unaddressed.8 Again, it can be extrapolated that this pattern holds true for sexual harassment, although likely with a greater proportion who take no action at all.9

- Qualitative evidence about the experiences of the small minority who litigate show them to face a damaging, alienating ordeal. Reading and digesting this evidence is an important way to hear the voices of those on whom the burden of addressing negative conduct at work, including sexual harassment, is largely being placed.10 In addition to the serious damage that complaining and litigating are seen to do (even where claimants win), there is notable deprecation of the language of money taking over from that of justice and recurrent expressions of dismay at settlement practice.11 Strikingly, this evidence is consistent with recent testimonies by individuals who have complained about sexual harassment.

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7 See Barrmes (n 1), 53-55 on negative behaviour generally. See on sexual harassment Fevre et al (n 4), 2-3, chs 5, 6 & 9, 209-211 & 214. It is arguably notable that only 1 per cent of this sample reported sexual harassment. There are however challenges with the use of self-report studies to measure the incidence of bad workplace behaviour, perhaps especially regarding sexual harassment and discriminatory conduct. See Barrmes (n 1), 12-16 & 33, the references cited in n 6 about recognition of sexual harassment, R Fevre, H Grainger, and R Brewer, ‘Discrimination and Unfair Treatment in the Workplace’ (2011) 49 BJIR 207 about beliefs in instrumental rationality arguably reducing the reporting of discrimination & A Pollert and A Charwood, ‘The Vulnerable Worker in Britain and Problems at Work’ (2009) 23 Work, Employment and Society 343, 346, commenting on cognitive testing for their study that ’the threshold for registering workplace experiences as ‘problems’ can be high, especially at the lower end of the labour market’.

8 Barrmes (n 1), 28-37, 53-54 & 227-236.

9 See Fevre et al (n 4), 136: “[R]espondents with problems that involved sexual harassment were less likely to attempt to put the problem in writing, go to a formal meeting or discuss the problem with their employer (55 per versus 74 per cent with other problems).”

10 This also makes the EHRC’s recent survey an important source of evidence for the WEC’s inquiry.

• That evidence and testimony highlight the significance of settlement practice in individualizing the problem of sexual harassment and thereby rendering our current legal framework ineffective to tackle this problem. Many of the relatively small number of situations in which someone litigates will end in settlement, while a large shadow of complaints are settled before litigation is begun. Settlement agreements typically give a complainant money in return for abandoning their claim, at the same time almost certainly preventing enquiry into the wider implications that an individual’s story might have, including by imposing confidentiality obligations. Indeed, preventing recognition of wider problems that are in the background to an individual complaint may well be what organizations seek to achieve through such agreements.¹²

If anyone reading this is in any doubt about how pervasive these patterns are, I urge them to put themselves in the shoes of a person who has experienced sexual harassment at work – or to ask a family member, friend or colleague to describe their perspective. Indeed, many readers and their families, friends and colleagues will be part of the iceberg of individuals who have been subjected to workplace harassment, both sexual and of other kinds, and found themselves unable, realistically, to complain or, if they did speak up, to secure an effective solution. What would (or did) you (or your family member etc) do about what happened? What options would (or did) you (or they) realistically have? How would you (or they) expect a complaint actually to turn out? I am willing to bet that readers’ answers resonate with the propositions above.

The power of noticing the proportion who face harassment at work and either put up with it or find their complaints reach no satisfactory outcome (and at times inflict significant damage), is that this puts the spotlight on our need for law, and surrounding practice, to require action irrespective of whether or not individuals come forward to complain and litigate. The reality is that if society carries on putting pretty much all our enforcement eggs into the individual complaint and litigation basket, despite what is known about how this actually works, we are knowingly providing the means for sexual harassment to carry on much as it currently does. That makes it intensely frustrating for even the current discussion and debate about sexual harassment at work (and elsewhere) so often to collapse into analysing the behaviour, reactions and probity of individuals who allege this, rather than concentrating on what is being done by organizations in which harassment is said to have occurred and on those who are alleged to have engaged in it. Of course fairness needs to be there all the way through and that means also for alleged harassers. But if we keep our current

¹² See ibid, 205-207, 210-212 & 220-221 and specifically at 221 on my qualitative interview study: ‘A repeated theme... was of unpleasant behaviour being intrinsic to high workplace attainment.... There were also accounts of routine practices in hierarchical workplaces of using settlement to 'buy off' complaints that, against the odds, were made: “My experience of that case, and of other cases in the financial sector, is that there’s a big part of private industry, well paid private industry in the City, that just buys their way out of problems. It probably applies to City law firms as well. In those environments, if they have a square peg in a round hole they pay an awful lot of money to get rid of the square peg. They see it as a cost of business. There is absolutely no chance of those employers changing the way they do things. That is the way they are going to do business and payouts are a cost of ensuring that.” SL3 (solicitor, employee side)” This might, of course, lead to someone whose individual labour and equality rights were breached receiving money, but the importance of this observation is that it shows how settlement practice... can systematically be designed to allow problematic organizational practices to continue.’
laser focus on the individual dimension of sexual harassment, we will be ensuring that nothing fundamentally changes.

3. PRINCIPLES THAT SHOULD GUIDE REFORM AND INNOVATION: LEGAL CLARITY, POSITIVE OBLIGATIONS AND PARTICIPATION

Society has a generational chance to devise legal and practical interventions that ensure organizations effectively tackle sexual harassment both where there is individual complaint or litigation and where there is not. The potential beneficiaries of succeeding in this, moreover, go far beyond the actual and potential victims of sexual harassment, encompassing employers, bystanders, witnesses, customers, clients and society as a whole. All of these would benefit from the consequent reduction in the varied harms that sexual harassment inflicts and the increase in harmonious, positive, high trust workplace environments that would result.

Several creative and valuable ideas are being put forward that would support systemic change of the kind I advocate, for example in the oral evidence to the WEC (see Claire Murray’s call for a regulatory approach analogous to that to data protection and money laundering) and no doubt in the forthcoming EHRC report. I extrapolate from the arguments above and my earlier work that key governing principles in reframing law and practice to refocus responsibility on organizations ought to be:

1. Substantive rules, norms and values contained in laws prohibiting sexual harassment need to be much more clearly disseminated to and within workplaces. The goal should be to make the behavioural standards set by law crystal clear to everyone they cover and also easy for anyone affected (whether management, HR, victims, bystanders or third parties) to draw on in preventing, challenging and providing redress for sexual harassment.\(^{13}\)

2. Positive legal obligations should be placed on organizations both to ensure that behavioural standards prescribed by law are observed and to guide them in dealing with problems which arise regarding these, particularly to ensure that organizational responses (including procedurally) remain rooted in the norms of fairness, justice and egalitarianism that underpin the law.\(^{14}\)

It is in this context that there ought to be reform of the general law on confidentiality obligations at work, and the specific rules on settlement. This is a seriously under-researched area, such that more knowledge of current practice and its effects would assist in crafting change.\(^{15}\) Still, it is already clear that legal and practice measures are needed to ensure confidentiality agreements only protect legitimate interests and, most importantly, that their use to hide wrongdoing is strictly controlled. This should at least encompass additional legal limits on the circumstances in which confidentiality agreements can lawfully be made (with a blanket prohibition on silencing

\(^{13}\) ibid, 259-261.

\(^{14}\) ibid, 261-262.

\(^{15}\) I am at the start, with colleagues (Saphieh Ashtiany and Kate Malleson), of a research project in this area.
reports of future wrongdoing) and a review of lawyers’ professional and ethical obligations in relation to them.

(3) The two measures above, as well as the over-arching goal of shifting the legal and practical focus towards organizations, will have more chance of succeeding the more that implementation and enforcement of workplace standards is opened up, involving more participants from within and beyond workplaces, encompassing individual colleagues, bystanders, employee groups, trade unions, NGOs, enforcement institutions, lawyers and others. This would lessen the burden on individuals who decide to complain and litigate, including by providing them with access to expertise and experience. But as importantly, it would widen implementation efforts within organizations and enforcement activity beyond them, reinforcing that workplace issues like sexual harassment are organizational problems and that society as a whole has an important role to play in ensuring they are effectively addressed.¹⁶

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¹⁶ ibid, 262-264.