Written submission from the Equality and Human Rights

Executive Summary

The Equality and Human Rights Commission (the Commission) is a statutory body established under the Equality Act 2006. It operates independently to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights. The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. It encourages compliance with the Human Rights Act 1998 and is accredited at UN level as an ‘A status’ National Human Rights Institution in recognition of its independence, powers and performance.

We welcome the opportunity to provide a submission to the Women & Equalities Committee’s sexual harassment in the workplace inquiry. It is very timely as the Commission has recently gathered evidence from employers and individuals on this issue and will shortly publish our findings and recommendations for change.

Recent high-profile testimonies have shown pervasive sexual harassment in contexts and highlighted the real barriers that many people experience in reporting it. Employers are responsible for ensuring that employees do not face harassment in their workplace. They should take reasonable steps to protect their employees and will be legally liable for harassment by their staff if they fail to do so. We wanted to discover how sexual harassment is dealt with by employers, and to draw on the insights of individuals who have experienced sexual harassment at work. Our aim was to learn what had happened when individuals reported cases of sexual harassment and what they felt should be done to improve practice.

Between December 2017 and February 2018, we gathered evidence from around 1,000 individuals and employers. We uncovered the shocking and stark reality of individuals whose careers and mental and physical health have been damaged by corrosive cultures which silence individuals and normalise harassment. We also found a lack of consistent, effective action on the part of too many employers.

Based on this evidence, we developed recommendations aimed at eliminating sexual harassment in every British workplace, through

- transforming workplace cultures
- promoting transparency and
- strengthening protections.

The Commission believes that action is required in all three areas to achieve the changes needed to shift from the current situation where individuals risk their jobs and health to report and put the onus on employers to effectively prevent and resolve harassment.

EHRC Evidence Collection: Individuals

1. In order to develop an evidence-based understanding of the experiences of individuals related to sexual harassment at work, we asked for evidence from individuals who had experienced, witnessed or supported others with sexual harassment at work. Our aim was to learn what had happened when individuals...
reported cases of sexual harassment and, drawing on their lived experience, what they felt could be done to improve practice.

2. We gathered evidence between December 2017 and February 2018 through an online survey and received a total of 750 responses. The aim was not to describe the scale of the problem, but to gather qualitative information and draw on a wide range of experience to support practical solutions and potential improvements.

3. Three-quarters of people who responded had experienced sexual harassment at work; the rest had witnessed harassment or supported others.

4. Nearly all of the people who had been sexually harassed were women. Male respondents were more likely to state that they had supported a colleague or witnessed harassment, or that they had not experienced sexual harassment at work. While sexual harassment can be perpetrated by both men and women, we know that women are most often the targets. Harassment in the workplace reflects power imbalances based on gender and is part of a spectrum of disrespect and inequality that women face in everyday life.

5. The most common perpetrator of harassment was a senior colleague. However, just under a quarter reported being harassed by customers, clients or service users.

**Harassment by customers, clients or service users**

6. Respondents reported that sexual harassment by customers, clients or service users was dealt with particularly poorly. Many of these submissions were from individuals working in the hospitality industry, although other industry sectors were also represented.

7. A common theme was a lack of management support, with sexual harassment and assault apparently being viewed by some employers as a ‘normal’ part of the job. A number of those experiencing sexual harassment by customers felt that they had no option but to put up with this if they wanted to continue in their job.

8. Experiences of individuals harassed by customers included the following:
   ‘We’ve been told nothing can be done for harassment with customers except if we see someone who stalks you, [then] we are allowed to hide out back.’
   ‘I worked in a bar and one of the customers pinned me up against the wall and tried to put his hands in my underwear – in a packed bar, in full view of everyone.’
   ‘I was repeatedly harassed by a male customer, I was told to just deal with it – and had to continue serving him daily.’

**Power Imbalance**

9. Another common theme in responses was the existence of a power imbalance between the perpetrator of the sexual harassment and the person being harassed. Many individuals believed that senior colleagues, due to their position of influence within organisations, were not challenged by HR departments or other colleagues,
with some describing these individuals as ‘untouchable’. Fears of victimisation as a result of reporting were particularly acute where the alleged perpetrator held decision-making power over the individual who had been harassed.

**Reporting sexual harassment at work**

10. Around half of respondents hadn’t reported their experience of harassment to anyone in the workplace. Barriers to reporting included:
   - the view that raising the issue was useless as the organisation did not take the issue seriously
   - a belief that alleged perpetrators, particularly senior staff, would be protected
   - fear of victimisation, and
   - a lack of appropriate reporting procedures.

11. Inexperienced, unsupportive managers were also seen as barriers to reporting harassment. In many cases, sexual harassment was viewed as a problem that the individual – rather than the employer – had to deal with. Some people were advised against reporting incidents by managers or HR. One respondent said: ‘I was advised against reporting an incident as it would “damage my brand”.’

12. A number of male respondents who reported being sexually harassed at work by both men and women said that they faced particular barriers in reporting their experiences. A few felt that their experiences wouldn’t be taken seriously because they were men. One individual, who described repeated experiences of sexual harassment, highlighted the male-dominated culture of his workplace and ‘stigma’ attached to being sexually harassed by another man as barriers to reporting, stating: ‘My experience was in a very macho environment and reporting it was unimaginable to me’.

13. In around half of the cases where individuals did report the incident, respondents said that employers took no action as a result. Many other respondents described instances where their employers’ response to a report of sexual harassment was to try to minimise their complaint or silence them. One person said: ‘I was called in to a meeting with the accused and his boss, and told it was a misunderstanding.’

14. A common theme among individuals who reported sexual harassment was a feeling that their employer did not take them seriously, dismissing the reported case as merely ‘a bit of fun’ or ‘laughing it off as boys being boys’.

15. A number of female respondents described being blamed for ‘encouraging’ the sexual harassment and were told that their clothes or actions must have been the cause. One individual stated: ‘I was told it was my own fault for wearing tight clothing. I was actually dressed in a black suit and white shirt.’

16. In many cases where employers did take action as a result of an individual reporting sexual harassment, the response was a negative one. Some respondents described being threatened that their career could be damaged if they pursued their complaint, or said they had been disciplined or lost their job as a direct consequence of reporting. In a number of responses, people said they were blamed for the
harassment taking place or felt punished by being moved to another department or role when the alleged perpetrator was left in their existing role.

17. Negative responses described by respondents included:
‘A partner who was close to the perpetrator said the firm would ensure my career was destroyed if I told anyone else about the incidents.’

‘I lost my job, my reputation and my health.’

‘The victim endured horrendous cross-examination and was never believed. The perpetrator remained on as a highly paid employee while the victim effectively had to leave an otherwise great career.’

Individuals’ recommendations for change
18. We asked people, based on their experiences, what employers should be doing to help prevent sexual harassment occurring at work.

19. A number of individuals highlighted the impact of negative workplace cultures in normalising sexual harassment and inhibiting reporting. In these workplaces, sexual harassment was accepted as part of workplace culture and anyone complaining about it was viewed negatively and often ostracised. Many people highlighted the need to change these cultures as a precursor to making progress on preventing sexual harassment.

20. One respondent stated that her priority was ‘changing the “laddish” workplace culture’. She gave an example from her workplace: ‘A head chef and his colleagues would flirt and touch new waiting staff, and talk in a highly sexualised manner – they thought this was funny.’

21. Other popular suggestions included:

Changing workplace culture:
- a mandatory anti-harassment policy
- improved training for line managers and staff
- anonymous reporting tools
- unbiased handling of complaints and protection for complainants, and
- procedures to protect people reporting sexual harassment from victimisation.

Promoting transparency:
- Clear policies and processes communicated through induction and training
- Greater protection for individuals working with customers and clients
- An end to settlements that require confidentiality or force victims of harassment to resign.

Strengthening protection:
- Lengthening the time limit for tribunal claims

22. We reflected individuals’ suggestions in our recommendations for change.
Simultaneously we wrote to a range of employers to gather evidence on:

- the systems, processes and safeguards in place to prevent workplace sexual harassment
- any steps taken to ensure that all employees feel able to report instances of sexual harassment
- specific steps taken to ensure that people who report sexual harassment are not victimised
- plans to take further steps to prevent and respond to sexual harassment at work in the near future, and
- examples of good practice.

We also shared our guidance on sexual harassment and the law, asking employers to delegate responsibility for ensuring a shared understanding and effective implementation of this guidance to a senior HR representative.

We selected large employers across a wide range of sectors (for example, business, government, public and third sectors, and academia), while we also focused on sectors where evidence suggests sexual harassment is more likely to occur, such as those that use younger workers, agency staff, and imbalanced employment power structures such as internships. We received responses from 234 employers. They revealed a picture of inconsistent practice, elements of which highlighted why the experiences described by individuals continue to occur. From the evidence provided, we found only a small minority of employers using effective approaches to prevent and address sexual harassment at work.

Most employers told us that they had a policy which dealt with sexual harassment and some shared their documentation with us. Harassment was often covered by a wider policy – for example, a diversity and inclusion policy. Several of the documents we saw made minimal reference to sexual harassment.

Around two-thirds of the employers that responded trained line managers on harassment. This fell to around half in relation to training offered to staff other than line managers. Our guidance highlights that including information on sexual harassment in induction is an effective way of ensuring that all new staff are clear about the behaviours expected in the workplace and how to report instances where behaviour falls below this standard. However, only around two out of five employers included such information in their induction processes.

Fewer than a third of the employers who provided us with evidence evaluated the effectiveness of their harassment policy through methods such as regular staff surveys. Some employers recognised that this was an area they needed to improve on.

Given the number of individuals who reported being harassed by customers, clients or service users, and the severity of the issues raised, we were disappointed to learn that only around one-quarter of employers who responded provided information for customers or service users on appropriate behaviour towards staff.
30. Some employers, however, described positive practice in relation to policies and training. These included:

- Clear policies outlining the steps to follow if someone is being harassed
- Codes of conduct stating expected standards of behaviour and the responsibilities of managers
- Using harassment scenarios in induction and training
- Ensuring policies are communicated on an ongoing basis, for example, through anti-harassment weeks, training or posters
- Regularly monitoring the effectiveness of policies through staff surveys

31. We asked employers whether they had taken steps to ensure that all employees – including agency staff and younger workers – felt able to report sexual harassment. Most employers simply cited the fact that they had a general grievance policy, although some recognised the shortcomings of this approach.

32. A small number of employers described examples of more proactive approaches. Most commonly, this was the use of anonymous tools for reporting harassment, such as telephone lines run by a third party or anonymous online reporting tools. However, only two responses included reference to supporting agency workers to report sexual harassment.

33. Around one in six of the employers who provided evidence had either not taken any steps to prevent victimisation or were unsure whether any such steps had been taken. Although most employers told us that they had taken action, in the majority of cases this appeared to be limited to having a policy or other form of documentation which made reference to victimisation. Only a small number of the employers who responded provided details of specific initiatives to prevent the victimisation of people who complain about harassment.

34. It was clear from our findings that existing obligations and guidance for employers are not enough to protect workers from sexual harassment or to protect victims. We are making the following recommendations to bring about:

- A change in workplace culture, with employers taking more responsibility for preventing harassment
- Greater transparency about incidents of harassment and the policies in place to prevent them
- New laws to strengthen protection for harassment victims

Our recommendations for change

35. We drew on the evidence base described above to develop recommendations for change. It is clear from our findings that existing obligations and guidance for employers are not enough to protect workers from sexual harassment or to protect victims. We developed the following recommendations to bring about:

- A change in workplace culture, with employers taking more responsibility for preventing harassment.
- Greater transparency about incidents of harassment and the policies in place to prevent them.
- New laws to strengthen protection for harassment victims.
1 Changing culture

1.1 Mandatory duty
The UK Government should:
- introduce a mandatory duty on employers to take reasonable steps to protect workers from harassment and victimisation in the workplace.
- Breach of the mandatory duty should constitute an unlawful act for the purposes of the Equality Act 2006, which would be enforceable by the EHRC.

1.2 Statutory code of practice
The UK Government should:
- introduce a statutory code of practice on sexual harassment and harassment at work, specifying the steps that employers should take to prevent and respond to sexual harassment, and which can be considered in evidence when determining whether the mandatory duty has been breached, and
- give employment tribunals the power to apply an uplift to compensation in harassment claims of up to 25 per cent, at their discretion, for breach of mandatory elements of the statutory code.

1.3 Training
- ACAS should develop targeted sexual harassment training for managers, staff and workplace sexual harassment ‘champions’.

1.4. Reporting mechanisms
- The UK Government should, drawing on learning from established online reporting mechanisms, develop an online portal which addresses the barriers identified in this report and facilitates the reporting of sexual harassment at work.

2 Promoting transparency
To achieve the necessary change in culture, greater transparency is required so that it is clear what the exact scale and nature of workplace sexual harassment is across Great Britain, and whether attempts to prevent and respond to it are succeeding.

2.1 Data collection
The UK Government should:
- collect data from individuals across England, Scotland and Wales, every three years to determine the prevalence and nature of sexual harassment at work,
- report the findings from its data collection, broken down by protected characteristics, including an evaluation of measures taken to tackle the problem since previous reports, and
- publish an action plan following each report, stating how it will address enduring areas of discrimination and disadvantage.

2.2 Publication of policy
Employers should:
- publish their sexual harassment policy and the steps being taken to implement and evaluate it in an easily accessible part of their external website, and
• ensure that their sexual harassment policy explicitly addresses their obligations under the Equality Act 2010 in respect of workers supplied to them by third parties, is shared with organisations supplying staff and services and that workers supplied are aware of the policy and how to report instances of sexual harassment.

2.3 Non-disclosure agreements and confidentiality clauses
• The UK Government should introduce legislation making any contractual clause which prevents disclosure of future acts of discrimination, harassment or victimisation void.
• ensure that all guidance on the use of settlement agreements in the public sector is updated to state that clauses should not be used to prevent disclosures of acts of sexual harassment.
• The statutory code of practice on sexual harassment and harassment should subject to consultation on the code, set out:
  o The circumstances in which confidentiality clauses preventing disclosure of past acts of harassment will be void, and
  o Best practice in relation to the use of confidentiality clauses in settlement agreements including that the employer should, for example:
    ▪ Pay for the employee to receive independent legal advice on the terms of the agreement, including the reasonable costs of agreeing changes to the terms;
    ▪ Give the employee a reasonable amount of time to consider the terms of a settlement agreement before it will become effective;
    ▪ Allow the employee to be accompanied by a trade union representative or colleague when discussing the terms of a settlement agreement;
    ▪ Only use confidentiality clauses at the employee’s request, save in exceptional circumstances; and
    ▪ Annexe a statement to the settlement agreement explaining why confidentiality clauses have been included and what their effect is.
• In Scotland, the Law Society of Scotland and the Faculty of Advocates and, in England and Wales, the Solicitors Regulation Authority and Bar Standards Board should issue guidance regarding solicitors’ advocates and barristers’ professional obligations when drafting and advising on confidentiality clauses.

3 Strengthening protection

3.1 Limitation periods
• The limitation period for harassment claims in an employment tribunal should be amended to six months from the latest of the date of:
  o the act of harassment,
  o the last in a series of incidents of harassment, or
  o the exhaustion of any internal complaints procedure.
• In claims brought out of time, once the claimant has established the reason for delay, the burden of proof should shift to the respondent to establish why time should not be extended.

3.2 Interim relief
• introduce interim relief provisions for harassment and victimisation claims, similar to section 128 to 132 of the Employment Rights Act 1996, but with a deadline of one
month from the act of harassment, or the last in a series of acts of harassment, to make an application.

3.3 Restoring lost protections

- restore the power, under section 124 of the Equality Act 2010, of employment tribunals to make recommendations aimed at reducing the adverse effects of discrimination on the wider workforce.
- make new regulations, re-introducing an amended statutory questionnaire procedure in discrimination and harassment claims, following consultation on how best to ensure that the procedure is effective and proportionate.
- reinstate section 40 Equality Act 2010 and amend it to remove the requirement for the employer to know that the employee has been subjected to two or more instances of harassment before they become liable.

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