

Sexual harassment in the workplace

Submission to the Women and Equalities Select Committee

Chartered Institute of Personnel and Development (CIPD)

March 2018

Background

The CIPD is the professional body for HR and people development. The not-for-profit organisation champions better work and working lives and has been setting the benchmark for excellence in people and organisation development for more than 100 years. It has over 145,000 members across the world, provides thought leadership through independent research on the world of work, and offers professional training and accreditation for those working in HR and learning and development.

Our membership base is wide, with 60% of our members working in private sector services and manufacturing, 33% working in the public sector and 7% in the not-for-profit sector. In addition, 76% of the FTSE 100 companies have CIPD members at director level.

Public policy at the CIPD draws on our extensive research and thought leadership, practical advice and guidance, along with the experience and expertise of our diverse membership, to inform and shape debate, government policy and legislation for the benefit of employees and employers, to improve best practice in the workplace, to promote high standards of work and to represent the interests of our members at the highest level.

1. Executive Summary

- 1.1. Victims of sexual harassment are more likely to be women, in part, at least, due to power imbalances which are perpetuated by having more men than women in leadership and management positions. However, viewing sexual harassment as a women-only issue risks discouraging male victims from reporting complaints. A broad perspective is required to acknowledge that the victim, and the alleged perpetrator, could be of either sex.
- 1.2. The impact of sexual harassment is likely to be felt differently for different groups. Sexual harassment allegations should be examined through multiple lenses which acknowledge the intersectionality of individuals and their multiple identities. It is important, therefore, to rely on the victim's interpretation of the perpetrator's actions.
- 1.3. In the workplace, prevention is better than the cure. Employers should:
 - Engage with employees to raise awareness of the company's zero-tolerance toward unacceptable behaviour;
 - Monitor gender diversity at all levels of the organization and at all stages of the employee life cycle;
 - Ensure that senior leaders and managers role model and champion the correct behaviours; and
 - Train line managers to manage people effectively and build relationships based on mutual trust.
- 1.4. Once a complaint has been made, employers must investigate and act swiftly, sending out a clear message that it will not be tolerated. Processes should be followed consistently and reliably. HR has a key role to play in ensuring that all complaints are taken seriously and investigated in line with the law and the organisation's procedures. Further, all employees should have access to advice and counselling from either someone in the organisation with appropriate training, or an outside sponsored service.
- 1.5. To ensure that sexual harassment is a high priority issue for employers, Government should narrow the gap between legislation and workplace practice by partnering with organisations like the CIPD, Acas and EHRC to make advice and guidance consistent and accessible.
- 1.6. As small and micro businesses don't have sophisticated HR capabilities, Government should invest £13m a year to roll out the CIPD's People Skills programme to all 38 Local Enterprise Partnerships in England to provide small businesses with free, locally-delivered, transactional HR support. Evaluations show that this basic support improves employee-manager relationships and productivity.

- 1.7. Government should conduct a review into Section 40 of the Equality Act (2010) in order to assess what measures can better protect workers from third party harassment. The review should also consider the pros and cons of the re-introduction of the Statutory Discrimination Questionnaires as a means of shining a light on discriminatory behavior in the workplace.
- 1.8. To prevent the inappropriate use of confidentiality agreements and other abuse of the law, Government should support a *Know your rights* campaign in partnership with bodies like the CIPD, Acas and the Citizens Advice Bureau, trade unions, and professional bodies to ensure that the UK workforce are aware of their rights at work.

Our response

2. Who experiences sexual harassment in the workplace, who perpetrates it, and what is the impact on different groups?

- 2.1. A TUC¹ survey from 2016 shows that nearly two in three young women have experienced sexual harassment at work. A BBC/ComRes survey also reports that 40% of women have experienced some form of sexual harassment in the workplace and that younger women aged 18-34 are most at risk of sexual harassment – 43% have experienced it.
- 2.2. Victims of sexual harassment are more likely to be women, in part, at least, due to power imbalances which are perpetuated by having more men than women in leadership and management positions. The ComRes survey also found that more women (30%) than men (12%) were targeted by a senior manager, and the lack of diversity in senior roles significantly contributes to this. Younger or more junior workers are at risk because they may be unaware of what “normal” is in the workplace.
- 2.3. Although the data shows that sexual harassment is disproportionately experienced by women, we must not ignore the fact that it is experienced by men, too. Policymakers and employers need to ensure that sexual harassment is not communicated as a women-only issue as it could deter men who experience it from reporting complaints. A broad perspective is required to acknowledge that the alleged perpetrator, and the victim, could be of either sex.
- 2.4. Some types of employment and working patterns share common characteristics which may put people at risk of experiencing sexual harassment. Types of work characterised by late nights and alcohol consumption, common in the hospitality sector, put employees at additional risk. The ComRes survey² found that amongst those who rely on flexible working patterns³, 42% have faced sexual harassment at work, however it is unclear whether this is because of the nature of their working arrangements or because these type of employment practices are more common in sectors where sexual harassment is more common, such as hospitality.
- 2.5. When considering issues like sexual harassment, it is important to acknowledge intersectionality and examine cases and workplace behaviours through multiple lenses.

¹ <https://www.tuc.org.uk/sites/default/files/SexualHarassmentreport2016.pdf>

² <http://www.comresglobal.com/polls/bbc-sexual-harassment-in-the-work-place-2017/>

³ The ComRes survey defined flexible working patterns as including those who are freelance workers, those who work on zero-hours contracts, and those who work in the gig economy

The impact of sexual harassment is likely to be felt differently for different groups. It is important, when examining sexual harassment cases, to rely on the victim's judgement in the first instance. The same behaviours may be interpreted differently by people depending on their characteristics and the characteristics of the perpetrator. For example, a young woman with a low status in the workplace may interpret inappropriate comments or touching from an older, more senior man in the company differently than a senior man may receive the same behaviour from a younger woman. This difference is closely tied to the power imbalance discussed in paragraph 2.2.

3. What are the actions that the Government and employers should be taking to change workplace cultures to prevent sexual harassment, give people more confidence to report sexual harassment, and make this issue a higher priority for employers?

Employers

- 3.1. To prevent instances of sexual harassment at work, employers must aim to build an inclusive workplace culture. A workplace environment which values difference, is free from hostility and based on tolerance will enable people to contribute more effectively and achieve higher levels of job satisfaction. While it is important for employers to put in place robust processes to deal with any complaints, prevention will always be better than cure. Employers need to understand the workplace factors contributing to complaints of harassment, and take action to directly address the contributory aspects of workplace structures and cultures.
- 3.2. There are a number of actions that employers can take to ensure that all employees are treated with respect and dignity. First, employers must engage with employees on these issues and raise awareness of the company's zero-tolerance policy for unacceptable behaviours.
- 3.3. Employers must ensure that the whole workforce, including permanent and directly employed, as well as those working on atypical contracts, is aware of, and understands what acceptable behaviour looks like, what harassment looks like, that the organisation has a zero-tolerance approach to sexual harassment, how to find the organisation's policy on sexual harassment, and know how to raise a complaint, and to whom.
- 3.4. HR has a vital role to play here. They must set behavioural expectations through policies, including communicating a zero tolerance approach to sexual harassment. However,

policies alone won't bring about change; they need to be brought alive by the behaviour of everyone in the organisation and HR need to ensure workplace cultures are an inclusive and safe space for everyone.

- 3.5. Inductions for new staff are a good time to do this and set expectations of behaviour from the start. But these messages must be reinforced regularly. Anti-harassment training can also be helpful, but without the right culture in place employees may struggle to practice the right behaviours. By engaging with employees, employers can also get feedback, for example through staff surveys, on issues such as gender equality.
- 3.6. Second, employers should monitor gender diversity at all levels and at all points of the employee life-cycle, including recruitment, succession planning and progression into middle and senior management roles. Greater gender diversity at levels of the organisation will help address any power imbalances between genders that can create the conditions for sexual harassment.
- 3.7. Third, senior leaders and line managers need to role model and champion the right behaviours so that people feel secure and can get on with their work without worry or fear of recrimination should they raise any concerns. Senior leaders need to be seen to take swift and robust action where needed, and deal appropriately with any criticism that could be focused on issues relating to leadership and trust.
- 3.8. Line managers need training in how to manage people so they can build working relationships based on mutual trust and confidence. If people don't trust their manager, they are not likely to feel confident to raise issues which are sensitive or make them feel vulnerable. Line managers are key to preventing issues from escalating when 'banter' crosses the line but only one party realises it. If problems concerning improper behaviour are not picked up on or addressed early they can become habitual or more extreme.

Processes

- 3.9. Employers should establish a robust framework and policies to counter any potential harassment or discrimination against employees and workers of all contract types, including unconscious bias. These policies need to cover every aspect of employment including recruitment and selection, training, and promotion. In addition, the organisation's procedures should protect both the individual raising the issue and the individual against whom an allegation has been made.

- 3.10. Organisations should ensure their disciplinary and grievance procedures are well communicated to staff and include information on how to raise a complaint and to whom. Senior management and the HR department should work to raise awareness of the company's policies on bullying, harassment, and specifically a zero-tolerance policy on sexual harassment. Line managers should be trained so they are confident in implementing policies, dealing with any concerns and complaints, and able to have open and sensitive conversations and manage conflict.
- 3.11. Once a complaint has been made, employers must investigate and act swiftly on any evidence of discriminatory behaviour or harassment, sending out a clear message that it will not be tolerated. HR has a vital role to play here, ensuring that all complaints are taken seriously and investigate in line with the law and the organisation's procedures. Processes should be followed consistently and reliably in order to give victims the confidence that their cases will be taken seriously and to ensure that anyone accused is treated fairly.
- 3.12. Depending on their nature, some complaints may be dealt with internally and informally. In lower level cases, it may be sufficient for the person experiencing the harassment to raise the issue with the perpetrator, pointing out the unacceptable behaviour. But if an employee finds this difficult or embarrassing, procedures should enable support from a colleague, an appropriate manager or someone from HR. If informal approaches don't work, formal procedures should be triggered if the harassment is serious or persists, or if the individual prefers this approach.
- 3.13. All employees should have access to advice and counselling from either someone in the organisation with appropriate training or an outside sponsored service. This should be offered both to the victim and to the perpetrator.

Government

- 3.14. In order to ensure that this issue is consistently high on the agenda for employers, employers should be aware of both the moral case and the business case for eradicating sexual harassment and creating an inclusive workplace. Guidance for employers and communications advocating action need to reflect both of these drivers.
- 3.15. The moral case is that everyone should be able to come to work and be treated fairly and with respect. Any form of discrimination or harassment is morally unacceptable in society and at work. We need to act now to ensure the next generation aren't faced with

unacceptable behaviour that is ignored or, worse still, seen as part and parcel of certain employment arrangements or advancement.

- 3.16. The business case for eradicating sexual harassment is clear, wide-ranging and convincing. The impact that a poor organisational culture and rumours of sexual harassment allegations that have not been dealt with properly is severe: employees are more likely to be depressed and anxious, dissatisfied with work, have a low opinion of their managers and senior managers, and want to leave their organisation.
- 3.17. In terms of reputation, organisations also risk damage to their public image, particularly when they attract media attention. This can affect relationships with current and future employees, as well as their customers. This has particular implications on how organisations attract and retain female talent, for the female labour market and for women's economic independence. In turn, this could contribute to widening the gender pay gap and poor female representation at the top of organisations.
- 3.18. To ensure that employers keep this issue a priority for their organisation, the Government should work with organisations like the CIPD, Acas, and EHRC to make advice and guidance consistent and accessible. It could go some way to narrow the gap between legislation and workplace practice, making clear to employers what constitutes harassment and how they can practically develop their workplace processes and culture, helping to focus their minds on the problem.
- 3.19. The Government must be mindful of small- and micro-businesses that don't have the sophisticated HR capabilities that large businesses will, and work out how to engage with them on this agenda. We know that small businesses are a hard to reach demographic, but they are critical that given around two thirds of private sector employees work in SMEs. Recent CIPD work with SMEs has shown that these businesses typically lack even basic people management guidance and support. Funded by JP Morgan, we ran pilots of an SME support programme called People Skills in 2012 in Hackney, Stoke-on-Trent, and Glasgow, providing 2 days of free, locally-delivered, basic, transactional HR support to small businesses. The evaluation shows that small businesses struggle with basic HR skills and even basic support improves employee-manager relationships and productivity. As a result, we recommended that the government invest £13m/year to the 38 LEPs in England to roll out the scheme.

How the CIPD supports the HR profession on harassment

3.20. CIPD has a number of resources available for members, ranging from factsheets to guides and toolkits, including:

- 24/7 access to unlimited free calls to the Employment Law Helpline for advice on UK and Irish employment law,
- Access to the CIPD [sexual harassment guide](#), [harassment and bullying factsheet](#),
- CIPD Community discussion [forums](#),
- Discounted access to HR Inform, a practical online tool designed to embed good HR practice and to help organisations stay legally compliant.

4. How can workers be better protected from sexual harassment by clients, customers, and other third parties?

4.1. Section 40 of the Equality Act 2010 provided protection to employees from harassment by third parties who may be customers, service users or contractors. If harassment had previously occurred on two occasions and the employer was aware of it, but failed to take reasonable steps to prevent it from happening again – known as the “three-strikes rule” – then the employer could be held liable. The harassment did not need to be by the same third party or be of the same nature. This law was repealed in 2013.

4.2. The Sex Discrimination Law Review by the Fawcett Society has called for strengthening the laws on sexual harassment at work to protect women from harassment by third parties who may be customers, service users or contractors, with an amendment so that it requires only a single prior incident of harassment. In principle, we agree that employers should hold some level of responsibility for the conduct of third parties toward their staff. But, given the criticisms of the effectiveness of previous third party harassment provisions, we would not necessarily support the reintroduction of the provision as it stood, especially as it was not deemed particularly effective. A review of the law in this area would be beneficial. A key question to consider is how much protection would re-introducing this provision give victims of harassment, and how much would it encourage employers to protect their employees from third party harassment.

5. What is the effectiveness and accessibility of employment tribunals and other legal means of redress? What can be done to improve those processes?

- 5.1. The CIPD believes that the abolishment of tribunal fees should encourage more employees to use the employment tribunal system if they feel they have been subject to sexual harassment. Easier access to justice should mean that some employees will no longer be discouraged from pursuing claims because of the financial burden. While there is not yet data on this, it is likely that some employees may have previously signed settlement (non-disclosure) agreements rather than accrue costs with a tribunal.
- 5.2. There is considerable merit in exploring giving employment tribunals the power to make recommendations in relation to employers' practices affecting the wider workforce. Ultimately we want to see change in terms of better workplace practices and such recommendations focused on people practices and the organisation culture could be helpful to strengthen the implementation of law in the workplace.
- 5.3. This power would provide an effective means of encouraging employers to improve their broader people management and employment practices to prevent and manage incidents of sexual harassment across the workplace more effectively.
- 5.4. Often issues such as sexual harassment or bullying stems from behaviour such as inappropriate humour or so-called 'banter', which goes unchallenged because of poor management, and later becomes accepted and prone to escalation. The best way to tackle issues like sexual harassment or bullying is to nip issues in the bud by ensuring that anyone responsible for managing people has effective training or guidance. This is the type of recommendation that employment tribunals could make which would help address problems in workplaces where incidents of sexual harassment are much more widespread and systemic than a one off incident involving one toxic or ignorant individual.

6. What are the advantages and disadvantages of using non-disclosure agreements in sexual harassment cases? How can inappropriate use of such agreements be tackled?

- 6.1. There are pros and cons to the use of settlement or non-disclosure agreements (NDAs) in sexual harassment cases. On the negative side, there is a danger that such agreements can be used to protect, typically, senior managers from being taken to court for improper behaviour, e.g. discrimination, harassment or bullying. However they can also protect the

victims of such behaviour who may want to remain anonymous rather than face the stress of the case being heard in court, while providing them with financial compensation.

6.2. There are legal safeguards to ensure the appropriate use of settlement agreements. In order to be legally binding the following conditions must be met:

- The agreement must be in writing;
- The agreement must relate to a particular complaint or proceedings;
- The employee must have received advice from a relevant independent adviser, such as a lawyer or a certified and authorised member of a trade union;
- The independent adviser must have a current contract of insurance or professional indemnity covering the risk of a claim by the employee in respect of loss arising from the advice;
- The agreement must identify the adviser; and
- The agreement must state that the applicable statutory conditions regulating the settlement agreement have been met.

6.3. Employees should also be given a reasonable amount of time to consider the proposed conditions of the agreement. The Acas Code of Practice on settlement agreements specifies a minimum of 10 calendar days unless the parties agree otherwise.

6.4. Even if they have signed a confidentiality agreement, workers may be legally entitled to make a protected disclosure under whistleblowing law if they meet certain criteria:

- They must reasonably believe that both the information they disclose and any allegation contained in it are substantially true;
- They cannot be acting for personal gain;
- They have to have already blown the whistle to their employer or a prescribed person – usually a regulatory body – unless the wrongdoing is exceptionally serious or they reasonably believe that their employer will subject them to ‘detriment’ or conceal or destroy evidence if they do so; and
- The making of the disclosure must be reasonable in all circumstances.

6.5. However while it is clear that although there may be protections in place letting staff disclose harassment after signing a confidentiality agreement, many employees will be unaware of this and therefore reluctant to speak up. Ignorance of the law could mean employees neglect to challenge non-disclosure agreements, even when they may be within their rights to do so, allowing harassment to continue.

- 6.6. It is clear that the laws surrounding confidentiality agreements should be better communicated; achieving this would be a significant step forward. As a result, the CIPD recommends that Government could support a Know your rights campaign, in conjunction with bodies like the Citizens Advice Bureau and Acas, employer and professional bodies, and trade unions.
- 6.7. Another way of discouraging the inappropriate use of NDAs could be to require larger employers (250+ employees) to report on the number of non-disclosure agreements signed annually. Frequent use of such agreements would prompt questions to be asked of management of why people were regularly leaving the business via such arrangements on a regular basis and could encourage business leaders to think twice before using them.