

# **Sexual harassment in the workplace**

**TUC response to GEO technical  
consultation**

# Introduction

The Trades Union Congress (TUC) is the voice of Britain at work. We represent more than 5.5 million working people in 48 unions across the economy. We campaign for more and better jobs and a better working life for everyone, and we support trade unions to grow and thrive.

Unions play a vital role in ensuring that rights under the Equality Act are respected and upheld by way of collective bargaining, raising awareness of rights amongst employers and employees, assisting in resolution of disputes, providing support to members in pursuing claims to the employment tribunal, as well as adopting strategic litigation to clarify legal issues and establish norms to be followed in the workplace

The #ThisIsNotWorking alliance is a coalition led by the TUC and is comprised of over 30 trade unions, women's rights organisations, NGOs and business-led membership organisations.

As an alliance we are calling for a new, easily enforceable legal duty that would require employers to take all reasonable steps to protect workers from sexual harassment and victimisation. The #ThisIsNotWorking alliance petition, launched on 26 June 2019, garnered over 10,000 signatures in its first 48 hours and calls on government to introduce a new preventative duty on sexual harassment.<sup>1</sup>

Existing government and employer responses to workplace sexual harassment are inadequate and fail to protect workers from sexual harassment. We echo the Women and Equalities Select Committee call for legislative change as "Employers must have greater and clearer responsibilities for protecting workers from sexual harassment."<sup>2</sup>

The TUC welcomes the opportunity to respond to the GEO consultation on proposals to tackle workplace sexual harassment, strengthening protection for all workers and providing clarity for employers.

In 2016, TUC published its ground-breaking research on sexual harassment UK workplaces. The following year, the global #MeToo movement, started by activist Tarana Burke in 2006, saw thousands of voices raised, uncovering the extent and impact of sexual harassment at work<sup>3</sup>. Since then further research by the TUC and others has added to the overwhelming evidence that sexual harassment is rife across Britain and the Western world. Too many employers were, and are, failing to provide safe workplaces and tackle the systemic discrimination that is blighting worker's lives. Action is needed and the action taken needs

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<sup>1</sup> Megaphone (2019) <https://www.megaphone.org.uk/petitions/uk-gov-act-to-prevent-sexual-harassment-at-work>

<sup>2</sup> Paragraph 31 <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf>

<sup>3</sup> TUC (2016) Still Just A Bit of Banter; NYTimes (2017) The Woman Who Created #MeToo movement <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html>; TUC (2018) Not Part of the Job; TUC (2019) Sexual harassment of LGBT people in the workplace; Unison (2019) [It's Never Ok: Usdaw \(2018\) Discrimination: Sexual harassment at work survey](#)

to match the scale of the problem. Half measures will not suffice, the government must signal its commitment to tackling this issue through fundamentally shifting the onus of responsibility for dealing with it from isolated individuals to employers.

## Sexual harassment in the workplace

Sexual harassment is a threat to equal opportunities in the workplace and is unacceptable and incompatible with decent work. Sexual harassment contributes to the gender pay gap and to labour market inequalities experienced by women and workers with protected characteristics.

While unions and women's organisations are in no doubt that sexual harassment remains as widespread a problem as ever, the government does not collect data on the prevalence of workplace sexual harassment and the impact of sexual harassment on those who experience it. We welcome the recent government commitment to collect this data and urge the government to make this an annual exercise.

In the absence of government data, trade unions and women's organisations have conducted research to assess the extent of workplace sexual harassment, shining a light on an issue which has been too often overlooked and underestimated.

TUC research has revealed the persistent and widespread scale of workplace sexual harassment. Over 1 in 2 women and nearly 7 out of 10 LGBT workers are sexually harassed in the workplace<sup>4</sup>. Half of those women who had experienced sexual harassment said that they had been subjected to unwelcome sexual jokes in the workplace more than six times in their lives.

The types of sexual harassment reported to the TUC range from inappropriate and offensive comments or 'jokes' of a sexual nature to unwanted touching, sexual assault and rape. Thirty-two per cent of women have been subject to unwelcome jokes of a sexual nature and more than one in ten women reported experiencing unwanted sexual touching or attempts to kiss them in the workplace<sup>5</sup>. One in eight LGBT women reported being seriously sexually assaulted or raped at work<sup>6</sup>.

A recent survey by Unison found nearly one in ten NHS staff had been sexually harassed in the last year<sup>7</sup>. Nearly a quarter said they had been sexually assaulted while at work. Respondents reported being the victim of criminal offences including rape, up-skirting, indecent exposure or inappropriate touching.

A survey of retail staff by Usdaw found nine out of ten young women had experienced workplace sexual harassment in the last twelve months<sup>8</sup>.

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<sup>4</sup> TUC (2016) Still Just A Bit of Banter: TUC (2019) Sexual harassment of LGBT people in the workplace

<sup>5</sup> TUC (2016) Still Just A Bit of Banter

<sup>6</sup> TUC (2019) Sexual harassment of LGBT people in the workplace

<sup>7</sup> UNISON (2019) [It's Never Ok](#)

<sup>8</sup> Usdaw (2018) Discrimination: Sexual harassment at work survey

International studies suggest as many as eight in ten women experience workplace sexual harassment in their lifetime<sup>9</sup>. Sexual harassment is a form of sex discrimination, as recognised within the Equality Act 2006, and is a form of violence against women and girls reflecting and reinforcing existing power dynamics in society. The sexual harassment and sexual assault of women at work sits within a wider, systemic experience of violence against women and girls at home, in education and in public and digital spaces.

Sexual harassment appears to be more likely in situations where there is a substantial power difference between men and women. As is the case in other types of violence against women, sexual harassment is inextricably linked with power. The evidence shows sexual harassment is more likely to occur in workplaces where there are substantial power differences between women and men<sup>10</sup>. Perpetrators may be abusing a position of power by harassing someone they see as less powerful or may feel powerless and use sexual harassment as a means to disempower the target of their harassment and thus increase their own power and status in the workplace.

Nearly one in five women reported that their harasser was either a direct manager or someone else with direct authority over them<sup>11</sup>. This creates significant barriers for women trying to report their harassment, as the starting point for many complaints procedures is an individuals' manager. This should be an important consideration when designing safe reporting mechanisms.

The prevalence of sexual harassment in our workplaces contributes to persistent gender pay gaps. Toxic workplace environments create significant barriers to women remaining and progressing at work and can deter women from particular roles or workplaces. Fifteen per cent of women who experienced sexual harassment reported feeling less confident at work as a result. Seven per cent of women said they wanted to leave their job<sup>12</sup>.

Sexual harassment is also situated within and intersects with broader patterns of discrimination and harassment experienced by workers. Sexual harassment is more prevalent for younger women, women with disabilities, those from BME backgrounds or from the LGBT community, migrant workers and those in precarious forms of work such as zero hours contracts and agency work because of labour market inequalities<sup>13</sup>.

There is evidence that BME and migrant women's experience of sexual harassment is often bound up with racial harassment and/or their immigration status<sup>14</sup>. TUC research found that

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<sup>9</sup> Feldblum and Lipnic (2016) EEOC Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum and Victoria A. Lipnic.

<sup>10</sup> Hunt, C et al (2015) Reviewing sexual harassment in the workplace – an intervention model

<sup>11</sup> TUC (2016) Still Just A Bit of Banter

<sup>12</sup> TUC (2016) Still Just A Bit of Banter

<sup>13</sup> TUC (2019) Sexual harassment of LGBT people in the workplace; TUC (2016) Still Just A Bit of Banter; LAWS (2019) UnHeard Workforce: Experiences of Latin American migrant women in cleaning, hospitality and domestic work; Grainger H, Fitzner F (2006), Fair Treatment at Work Survey 2005. Department for Trade and Industry Employment Relations Research Series No. 63;

<sup>14</sup> LAWS (2019) UnHeard Workforce: Experiences of Latin American migrant women in cleaning, hospitality and domestic work

54 per cent of LGBT BME women reported unwanted touching compared to around one third of white LGBT women.

In TUC's research with LGBT workers, many of the incidents of sexual harassment appeared to be linked to the sexualisation of LGBT identities and the misconception that these identities solely focus on sexual activity<sup>15</sup>. People influenced by these stereotypes see being lesbian, gay, bisexual or trans as an invitation to make sexualised comments or ask inappropriate questions about an LGBT person's sex life, particularly if an individual is 'out'.

Many lesbian and bisexual women reporting experiencing verbal sexual harassment from men at work, which included threats of unwanted sexual activity aimed at 'turning them straight.' These threats link to a specific form of targeted sexual violence experienced by lesbian and bisexual women where sexual assault and rape are used as a way of punishing and 'curing' them of their sexual orientation. This is also known as 'corrective rape'<sup>16</sup>.

Research suggests that disabled women experience sexual harassment and gender-based violence at disproportionately higher rates and in different forms than non-disabled women, owing to discrimination and stigma based on both gender and disability<sup>17</sup>. In TUC's research with LGBT workers, disabled women reported significantly higher levels of sexual harassment than both disabled men and non-disabled men and women across most areas.

There are other factors heightening the risk workers may experience in relation to sexual harassment. Young workers are more likely to experience all forms of violence and harassment in the workplace. They are more likely to be underemployed, working on low hours, employed on part-time or insecure contracts such as temporary, agency or zero-hours contracts and are likely to have had shorter tenure and be in more junior roles; all of which may be factors in sexual harassment. According to the TUC's research, sixty-three per cent of women aged 18–24 had experienced some form of sexual harassment compared to an average of fifty-two per cent amongst women of all ages<sup>18</sup>.

Young workers are also overrepresented in public-facing jobs, and according to the Labour Force Survey are more likely to be working in caring, sales and elementary occupations than older workers<sup>19</sup>. Therefore, they are more likely to be the victim of harassment, abuse or violence committed by a customer, client, patient, member of the public or a business contact (a "third-party") than any other age group. A TUC report found 70% of young workers had been subjected to third-party harassment on at least three occasions<sup>20</sup>.

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<sup>15</sup> TUC (2019) Sexual harassment of LGBT people in the workplace

<sup>16</sup> TUC (2019) Sexual Harassment of LGBT people in the Workplace. Available at [https://www.tuc.org.uk/sites/default/files/LGBT\\_Sexual\\_Harassment\\_Report\\_0.pdf](https://www.tuc.org.uk/sites/default/files/LGBT_Sexual_Harassment_Report_0.pdf)

<sup>17</sup> Plummer, S; Findlay, P (2012) Women with disabilities' experience with physical and sexual abuse: review of the literature and implications for the field: UNFPA (2010) Addressing Violence Against Women and Girls in Sexual and Reproductive Services: a review of knowledge assets: Ortoleva, S; Lewis, H (2012) Forgotten Sisters — a Report on Violence Against Women and Disabilities: an overview of its nature, scope, causes and consequences

<sup>18</sup> TUC (2016) Still Just A Bit of Banter

<sup>19</sup> Labour Force Survey, September – December 2017 (ONS)

<sup>20</sup> TUC (2018) Not Part Of The Job

Sexual harassment and assault at work has serious implications for workers and for employers, creating a degrading, intimidating or hostile working environment. It can have a damaging impact on the working life of the person experiencing it, causing her to avoid the perpetrator at work, causing her to leave her job, or in cases of victimisation, leading to her demotion or dismissal.

Research by the TUC and our affiliates has shown the substantial professional, financial and psychological impact sexual harassment has on workers. Victims of sexual harassment may experience a range of negative consequences including physical and mental health problems such as anxiety and stress-related insomnia, career interruptions and lower earnings. 15% of women who experienced sexual harassment reported that they felt less confident at work and seven per cent said they wanted to leave their job as a result of harassment<sup>21</sup>.

The Women and Equalities Select Committee report identified the profound impact sexual harassment has on women: "Sexual harassment can have a devastating impact on those who are subjected to it. Mental and physical health often suffer, leading to anxiety, poor sleep, depression, loss of appetite, headaches, exhaustion or nausea. Victims feel humiliation, mistrust, anger, fear and sadness."<sup>22</sup>

## Case for changing the law

Whilst employers currently have a duty of care towards employees, it is clear from the scale of sexual harassment set out above, that the current protections are not effective in focusing employers' efforts on prevention. The prevalence of workplace sexual harassment uncovered by the TUC and our affiliates demonstrates the extent to which the current legislative framework is failing to provide a safe working environment free from sexual harassment and assault for a significant proportion of the UK workforce.

The current protections under the Equality Act 2010 relating to sexual harassment require an act of harassment to have taken place before an individual can bring a legal claim in an employment tribunal. In addition, although a duty of care exists, the Equality and Human Rights Commission cannot currently take enforcement action for failure to take preventative steps.

There is currently no statutory duty on employers to take steps to prevent harassment or victimisation in the workplace. If a person brings a legal claim in an employment tribunal, the employer can defend the claim by saying that it took reasonable steps to prevent the harassment from occurring.

In our view, the operation of these legal provisions, without an additional and positive statutory preventative duty, has negatively shaped employers' perception of how to manage sexual harassment and who has responsibility for this

The current legal framework has influenced an approach in which employers view sexual harassment as an individual matter rather than a workplace issue, where action is focused on responding to complaints rather than preventing them. As a result, employers often

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<sup>21</sup> TUC (2016) Still Just A Bit of Banter

<sup>22</sup> Women and Equalities Select Committee (2018) Sexual harassment in the workplace

adopt a defensive stance responding to reports of sexual harassment with organisational indifference or even outright hostility, compounding the trauma faced by victims of workplace sexual harassment. Research by the TUC and EHRC has highlighted the experience of those experiencing sexual harassment at work where employers appeared to be well aware of the fact that sexual harassment was taking place but in the absence of formal complaints, no action was taken.

Respondents to TUC research on sexual harassment told us, "Managers didn't seem to care. A lot of them laugh it off because they see it as a joke. Within two years, I've lost count of how many times I've been harassed..." and "At each point the harassment was visible and was witnessed by numerous people, colleagues, staff members, and nothing was ever done. I felt isolated as if I was somehow in the wrong."

A system where action is prompted by complaints is fundamentally flawed as the overwhelming majority of those who experience sexual harassment, four-fifths of women and sixty-six per cent of LGBT workers, do not feel able to report it<sup>23</sup>.

Victims of sexual harassment face significant barriers to reporting. These include fear of victimisation, fear of not being believed, fear of damaging their career or relationships with colleagues. One-quarter of LGBT workers said they didn't feel able to report the harassment as they didn't want to 'out' themselves in a homophobic workplace<sup>24</sup>.

For those in insecure work, there are additional barriers stemming from the sense of vulnerability associated with the erosion of job security and a fear of taking action against a colleague or an employer because of possible ramifications in terms of pay and shifts<sup>25</sup>.

Of the minority who did report the unwanted sexual behaviour to their employer, very few saw a positive outcome. Nearly three quarters reported that there was no change and sixteen per cent reported that they were treated worse as a result<sup>26</sup>.

The TUC and the #ThisIsNotWorking alliance feel that it is imperative for the government to introduce a new preventative duty shifting the focus from individuals seeking redress after sexual harassment has occurred to prevention and removing the burden from individuals.

Firstly, this would allow for enforcement action to be taken if an employer fails to take preventive steps. This is not possible under the current legislative framework. The threat of enforcement action would incentivise compliance, shifting employers' focus from engaging with individuals seeking redress after sexual harassment has occurred to preventing it from happening.

Secondly, it would set clearly defined standards of behaviour for employers, an area where we know many employers think the existing duty of care provisions fall short, and send a clear signal to employers about the active role they are expected to play in creating safe

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<sup>23</sup> TUC (2016) Still Just A Bit of Banter

<sup>24</sup> TUC (2019) Sexual harassment of LGBT people in the workplace

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<sup>26</sup> TUC (2016) Still Just A Bit of Banter

workplaces where workers are protected from harm. As part of our work with the #ThisIsNotWorking alliance, employers have told us this is a move they would welcome.

The recent comprehensive inquiry into workplace sexual harassment by the Women and Equalities Select Committee identified the limitations of the existing duty of care, citing an: "epidemic of inaction and poor practice" amongst employers that "demonstrates that employers are currently not taking this issue seriously, and that they are not adequately incentivised to take action on sexual harassment in the workplace."<sup>27</sup>

In contrast, a new preventative duty would drive systemic cultural change at an organisational level ensuring employers take responsibility for prioritising the prevention of workplace sexual harassment.

Maintaining the status quo is not an adequate option if we wish to truly tackle sexual harassment. A proactive legislative framework is key to ensuring the health and safety of all workers, and a new preventative duty on sexual harassment is a proportional response to an issue of this scale, creating the widespread systematic cultural change needed to combat workplace sexual harassment. Without significantly altering the status quo we will not address the very real barriers that exist in relation to reporting, reducing the prevalence of sexual harassment.

## **1. If a preventative duty were introduced, do you agree with our proposed approach?**

**Yes, the TUC strongly agrees with the introduction of a new preventative duty.**

The TUC strongly agrees with the government's proposal to implement a new preventative duty that will require employers to take all reasonable steps to prevent sexual harassment in the workplace. It is an opportunity for the government to strengthen workers' rights, provide much needed clarity for employers and create the wide-spread, systemic cultural change we need to rid our workplaces of sexual harassment, which has the potential to blight working lives and damage the mental and physical health of workers.

The new duty should capture and strengthen existing obligations in relation to the reasonable steps defence currently contained within section 109.4 of the Equality Act. S. 109 sets out the principle of vicarious liability where an act of discrimination is committed in the course of employment, and provides for a potential defence for an employer where they can show they have taken reasonable steps to prevent the act of discrimination (including an act of harassment).

The new preventative duty should strengthen the obligation in relation to the reasonable steps defence by focusing explicitly and solely on sexual harassment. At present, the reasonable steps defence as set out in S. 109 of the Equality Act does not make specific reference to sexual harassment and guidance tends to outline only generic workplace

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<sup>27</sup> Para 24 - <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf>



equality and anti-harassment steps. This is insufficient to focus employers' attention on sexual harassment.

As the government propose, existing primary legislation – the Equality Act 2010 – should be amended to make provision for this new preventative duty.

All workers should be protected from sexual harassment and victimisation regardless of employment status - whether they have a contract of employment or similar contract for services. Therefore, the TUC recommends the government expand the scope of the preventative duty to include workers currently not covered by provisions within the Equality Act 2010. This includes but is not limited to the genuinely self-employed, freelancers or those employed on a short-term basis such as musicians, actors or comedians, and volunteers and interns.

The TUC recommend establishing a system of joint and several liability throughout supply chains for this duty so that organisations who use strategies to transfer their obligations to other parties, can still be found liable for any breaches of the core employment rights of the people who do work for them. This is an issue that particularly affects migrant workers and those with those with irregular or insecure employment status. This would bring the following benefits:

- Joint and several liability ensures that in phoenixing cases, where company directors put companies into insolvency to avoid their employment obligations, workers would still have a course of action to enforce their rights.
- Widening liability would ensure contractors are more diligent in choosing their subcontractors.
- Widening liability would strongly incentivise the lead contractor to risk assess, monitor and tackle potential breaches of employment standards in their supply chains.
- Joint and several liability may also have the benefit of incentivising the creation of more secure, permanent employment as fewer contractors are willing to take the risk of working with subcontractors who might create liabilities for them.
- Full joint and several liability provisions would ensure the enforcement process is transparent and that workers are fully informed of any action taken to remedy breaches of employment standards.

The TUC agrees with the government's proposal for the new duty to be underpinned by a new Equality and Human Right Commission (EHRC) statutory Code of Practice. The Code of Practice should outline all reasonable steps that an employer should take to prevent sexual harassment. This should include:

- Establishing robust framework and policies for combatting sexual harassment based on a zero-tolerance approach.
- These policies and induction processes should make clear the expected standards of behaviour for employees, managers and third parties (where applicable) in relation to sexual harassment.

- Policies should be implemented and followed consistently, to give confidence to victims and ensure all involved are treated fairly and with due process.
- All staff, including those at board level, should receive contextualised sexual harassment training that is intersectional and from a trauma-informed perspective. To be repeated on a regular basis<sup>28</sup>
- There should be a clear process communicated to all staff about how to safely raise a complaint regarding sexual harassment and to whom so that everyone in the organisation understands how to raise any concerns about themselves or others and feels safe to do so. This should make clear the steps that will be taken in the event of a concern being raised.
- Reporting mechanisms should consider multiple reporting options for workers that do not only rely on a line manager with independent or third-party options for reporting. This should include anonymous or confidential methods such as telephone helplines, online reporting tools or signposting to trade unions and third-sector sexual harassment specialist services.
- Line managers should be trained and confident in implementing the organisation's sexual harassment policy and competent in dealing with any disclosures or complaints. This competency should be assessed as part of an annual performance review.
- Annual anonymous staff surveys that contextualise sexual harassment for the workplace and different groups of workers such as those with protected characteristics.

The steps should be defined, reviewed and enforced by the EHRC working closely with trade unions, relevant sectoral regulators and inspectorates such as the HSE, the Bar Standards Board and FCA as well as civil society organisations and academics. Best practice on the action needed by employers' is constantly evolving. The EHRC should allow sufficient time for an appropriate breadth of consultation on the statutory Code of Practice so they can draw on the many established and evidence-based methods of preventing sexual harassment and promoting change to policies and practice on this issue.

All organisations in the scope of the regulatory framework will need to be able to show to EHRC that they are fulfilling their duty of care to workers in accordance with the Code of Practice.

The remit of the EHRC should be expanded to ensure they have the resources and means to take enforcement action against employers. The EHRC should be given a suite of powers to take effective enforcement action against companies that have breached their statutory duty including powers to issue substantial fines and to publish the names of these organisations. Financial penalties and reputational risk act as an effective deterrent ensuring employers prioritise prevention as evidenced by other regulatory action.

Financial penalties should mirror sanctions in health and safety legislation, where failure to fulfil preventative duties that similarly ensure protection from risk of harm, physical or emotional lead to enforcement action. The financial loss should be proportional amount to

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<sup>28</sup> Evidence shows regular and repeated 'dosage' of anti-sexual harassment training is key

the organisation's size and breach of the duty but sufficiently high to incentivise compliance.

In the case of any suspected breach, we would recommend the EHRC investigation process work as follows:

- i) A website and free telephone service be created and administered by the EHRC to allow people and organisations, including trade unions, to call and report safely, and anonymously, suspected breaches of the new duty.
- ii) In a similar model to that used by the Health and Safety Executive, suspected breaches should be assessed and triaged by the EHRC. Criteria for assessing breaches of the duty could include the number of complaints about a workplace received, size of organisation and proportional risk to individuals.
- iii) An investigation notice should be issued in which companies will have a specified number of days to respond and demonstrate how they are fulfilling their duties in relation to the duty.
- iv) If an employer is found to have failed to comply with their statutory duties, an automatic financial penalty will be issued and the employers' name should be published. This replicates existing regulatory models and powers such as the Health and Safety Executive which operates within a preventative framework.
- v) The EHRC should work with the employer to ensure compliance drawing up an action plan for systemic change with the involvement of workers, trade unions, relevant sectoral regulatory bodies such as the HSE, the Bar Standards Board and FCA to ensure there is systematic cultural change.
- vi) Financial penalties should be paid directly to the EHRC, ring-fenced to fund further enforcement action and for sexual harassment related work.

The EHRC must have its core funding increased to carry out these new duties and take enforcement action. In addition, the TUC recommends that the EHRC is given extra programme funding to carry out an extensive monitoring exercise in the first two years of the new duty to assess compliance and effectiveness after the new regulations come into force.

In making this recommendation, we echo the Women and Equalities Select Committee calls for the EHRC to be bolder in enforcing the Equality Act and pursuing an ambitious programme of targeted action against those that are suspected of failing to fulfil their duties.

We also support the call for the government to make a fundamental shift in the way that enforcement of the Equality Act is thought about and applied. It must act on its own obligations to embed compliance and enforcement of the Equality Act and to ensure its own institutions and organisation such as the Health and Safety Executive are complying with their duties under the Public Sector Equality Duty.

## 2. Would a new duty to prevent harassment prompt employers to prioritise prevention?

Yes, the TUC strongly agrees that a new duty to prevent harassment would ensure employers prioritise preventative action.

The function of the new preventative duty is to drive systemic cultural change at an organisational level ensuring employers take responsibility for prioritising the prevention of workplace sexual harassment.

The preventative duty differs from existing legislation as it would not require an incident of harassment to occur for a breach of the duty to be investigated and enforcement action taken. Instead, failure to take one or more of the preventative steps laid out in the accompanying Code of Practice would constitute a breach of the Equality Act 2010, meaning the regulator, EHRC, could take action against employers. As a result, employers' focus would be shifted from the systems of managing redress to proactive prevention.

In the absence of an active duty and without strong incentives to take responsibility for preventing sexual harassment, the burden will remain with individuals to prevent and manage their harassment. Maintaining the status quo will result in a continuation of an individualised often adversarial approach, with managers and HR departments in a defensive role, and fail to achieve the systemic workplace cultural change needed to tackle an issue of this scale.

The recent comprehensive inquiry into workplace sexual harassment by the Women and Equalities Select Committee identified the need for stronger incentives through a new preventative duty, citing an: "epidemic of inaction and poor practice" amongst employers that "demonstrates that employers are currently not taking this issue seriously, and that they are not adequately incentivised to take action on sexual harassment in the workplace."<sup>29</sup>

Evidence from our affiliates and from the EHRC demonstrates the inadequate and inconsistent approach taken by employers and the insufficient nature of our current law in this regard. EHRC's research found that employers' policies relating to sexual harassment were often contained within a wider diversity and inclusion policy that made minimal mention of sexual harassment. One of the ways new employees learn the expected standard of behaviour and norms for a workplace is during an induction. However, the EHRC's research found only two in five employers included expected standards of behaviour and ways to report instances where behaviour falls below this standard in their induction.<sup>30</sup>

As identified by the Women and Equalities Select Committee: "Mandatory requirements, sanctions for breaches and proactive enforcement reflect the importance of an issue, its impact on society and how seriously employers are expected to take it."<sup>31</sup>

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<sup>29</sup> Para 24 - <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf>

<sup>30</sup> EHRC (2018) Turning the tables on sexual harassment

<sup>31</sup> Para 26 - <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf>

By implementing the preventative duty, the government would set clear social norms or rules that are explicit and specific in determining employers' role in establishing a zero-tolerance approach to sexual harassment in the workplace.

### **3. Do you agree that dual enforcement by EHRC and individuals would be appropriate?**

**Yes, the TUC agrees that where possible dual enforcement would be appropriate.**

The TUC supports the government's aim for an overarching regime which encourages both individual and EHRC enforcement. This would help ensure the duty achieves the critical mass needed to act as a sufficient incentive to comply.

Enforcement action can be taken by the EHRC, in the process laid out in our answer to questions 1 and 2.

Individuals could enforce the duty through an Employment Tribunal process in which failure to take preventative steps as set out in the statutory Code of Practice could lead to the imposition of a sex discrimination claim or influence an award uplift for any ongoing individual Employment Tribunal claim.

The TUC recommends other relevant bodies including trade unions, women's organisations, industry-wide and sectoral regulators and inspectorates such as the HSE and the FCA, and NGOs should have the ability to report any suspected breach of the duty anonymously to the EHRC, in addition to individuals, thus shouldering some of the significant burden that individuals experience in relation to enforcing their rights, as identified by Women and Equalities Select Committee: "While individuals must still have the right to challenge discrimination in the courts, the system of enforcement should ensure this is only rarely needed."

Essential to the success of dual enforcement is individuals' knowledge of their rights and employers' legal duties towards them. The government and EHRC should work with trade unions, voluntary organisations and other relevant bodies to ensure workers are fully aware of the new mandatory duty, safe reporting mechanisms and how to enforce their rights.

First-hand workplace experience gives trade unions a comprehensive understanding of how to tackle sexual harassment and means they are often able to observe patterns of bullying and harassment that may be taking place across an organisation. Trade unions should be a key strategic partner in the enforcement of the new preventative duty and in developing the appropriate Code of Practice, training, workplace policies and safe reporting mechanisms for staff. Trade unions are uniquely well placed to work with employers to develop appropriate guidance and policies and to support the EHRC with ensuring employer compliance.

#### **4. If individuals can bring a claim on the basis of breach of the duty should the compensatory model mirror the existing TUPE provisions and allow for up to 13 weeks' gross pay in compensation?**

We anticipate that in most cases, a breach of the duty would form part of a wider sex discrimination claim. In these instances, we believe there should be an uplift to tribunal awards where an employer had failed to follow the statutory code of practice, with additional financial penalties where there are repeat infringements. The TUC recommend this be a minimum of 25 per cent with no cap, as would be the case for the main claim.

#### **5. Are there any alternatives or supporting requirements that would be effective in incentivising employers to put measures in place to prevent sexual harassment?**

Yes, the TUC recommends the government take the following action:

- i) Promoting collective bargaining as the primary vehicle for raising workplace standards and ensuring compliance with the new preventative duty.
- ii) Boosting the effectiveness of enforcement activity, by making sure that all relevant agencies and regulators are sufficiently resourced.
- iii) Reinstating the power for employment tribunals to make recommendations where employers are found liable for cases of sex discrimination and sexual harassment brought under the Equality Act 2006. Sexual harassment is often symptomatic of a workplace culture of bullying and harassment, and where an employment tribunal finds this to be the case, a chair should be able to make specific recommendations to remedy this and influence workplace cultural change.

#### **6. Do you agree that employer liability for third-party harassment should be triggered without the need for an incident?**

Yes, the TUC agrees that employer liability for third-party harassment should be triggered without the need for an incident.

Under the new preventative duty, individuals and the EHRC can take enforcement action against an employer for failing to take all reasonable steps to protect workers from sexual harassment regardless of whether that is from a colleague or a third-party such as a customer, client or patient. This protection does not require an incident of sexual harassment to occur.

The TUC strongly recommends that in addition to implementing the new preventative duty, the government reinstate a refined and strengthened section 40 of the Equality Act 2010 that does not require a prior incident to have occurred for an individual to bring a claim against their employer.

## **7. Do you agree that the defence of having taken ‘all reasonable steps’ to prevent sexual harassment should apply to cases of third-party harassment?**

**Yes, the defence of having taken ‘all reasonable steps’ to prevent sexual harassment should apply to cases of third-party harassment.**

The TUC strongly agrees that employers should be responsible for preventing all forms of sexual harassment, whether that be from a colleague, manager or third party such as a client, customer or patient.

Should the government introduce the new preventative mandatory duty, employers should be required to take all reasonable steps to prevent harassment including that from third parties such as clients, customers and patients.

As set above, we strongly recommend a strengthened section 40 be reintroduced without the three-strikes rule. Alongside its re-introduction, the TUC recommend the defence of having taken ‘all reasonable steps’ to prevent sexual harassment should apply to cases of third-party harassment, for consistency with other forms of sexual harassment.

## **8. Do you agree that sexual harassment should be treated the same as other unlawful behaviours under the Equality Act, when considering protections for volunteers and interns?**

**Yes, the TUC agrees all workers should be protected from sexual harassment and victimisation regardless of their employment status.**

Regardless of whether individuals have a contract of employment, similar contract for service or a relationship that mirrors other employment relationships in their regularity and consistency such as volunteers and interns, everyone should be protected from sexual harassment in the workplace.

As set out in our answer to question 1, we believe there is scope within the new preventative duty to expand protection to an even greater number of workers, particularly those currently excluded from provisions within the Equality Act. Please see our explanation on para 35 and 36.

**9. Do you know of any interns that do not meet the statutory criteria for workplace protections of the Equality Act?**

No, the TUC does not.

**10. Would you foresee any negative consequences to expanding the Equality Act's workplace protections to cover all volunteers e.g. for charity employers, volunteer-led organisations or businesses?**

No, the TUC only sees the positive benefits of reduced sexual harassment for all workers, voluntary or in paid employment.

**11. If the Equality Act's workplace protections are expanded to cover volunteers, should all volunteers be included?**

Yes, everyone has the right to work free from the threat of violence and harassment, regardless of whether they are in paid employment or working on a voluntary basis.

We disagree with the government that there would be a 'chilling effect' on the voluntary sector should protection be expanded for volunteers. On the contrary it is vital that protection for volunteers is enhanced to avoid a chilling effect on those wishing to volunteer but feeling unsafe to do so

Volunteering is a well-recognised route into work. Failure to legislate and protect women and girls, particularly those who are disproportionately affected by sexual harassment such as women with disabilities, from BME backgrounds or who identify as LGBT, puts additional barriers to paid employment in the way of women who already face discrimination and inequality in the workplace.

**12. Is a three-month time limit sufficient for bringing an Equality Act claim to an employment tribunal?**

No. The TUC believes the three-month time limit is insufficient for bringing an Equality Act claim to an employment tribunal.



The time limit for filing claims with an employment tribunal in relation to the Equality Act are shorter than for many other legal proceedings. This shorter time limit does not serve the interests of those who have been sexually harassed. Instead a short-time limit impedes access to justice, silences victims and inhibits change, and is therefore of benefit to perpetrators of sexual harassment.

Many prospective claimants will not be ready to bring a claim soon after a workplace incident which has caused them considerable stress and harm. The current three-month time limit for many employment tribunal claims is an unreasonable time period for people to consult with legal representatives, trade unions and sort out their finances to facilitate a claim. Claimants may also be unaware of the three-month time limit and thus only find out they are unable to make a claim after they have been timed out of doing so.

Many prospective claimants may try and take time to resolve issues in the workplace and feel it is too early to bring a claim within the three-month time period. Our affiliates tell us that in many cases a three-month time limit is prohibitive to resolving disputes in the workplace.

We also share the concerns of the Women and Equalities Select Committee in relation to accessibility and affordability of the Employment Tribunal system: "We are concerned by the lack of affordable legal advice available for employment discrimination cases...We are concerned that the tribunal system may have become too onerous for litigants in person with complex discrimination claims.. it is clear that many people either do not know of, or do not have access to, support in navigating an increasingly complex tribunal system."

### **13. Are there grounds for establishing a different time limit for particular types of claim under the Equality Act, such as sexual harassment or pregnancy and maternity discrimination?**

**Yes. Three-month time limits have a disproportionate impact on women – for example those who are considering bringing discrimination claims relating to pregnancy and maternity.**

Evidence given to a recent Women and Equalities Select Committee<sup>32</sup> demonstrates that the three-month time limit does not give claimants enough time to prepare. Witnesses suggested that time limits are particularly unjust for new and expectant mothers, given the physical and emotional pressures on them at this time.

"I didn't know about [employment tribunals] and I would never have been able to contemplate pursuing this within the short timeframe. I was in no way able to write down let alone speak about what had happened so immediately afterwards."

Written evidence from a member of the public<sup>132</sup>

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<sup>32</sup> Paragraph 86 - <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf>

Delayed reporting is a common and entirely understandable reaction to a traumatic incident such as sexual harassment or sexual assault. Potential claimants are frequently suffering from emotional, psychological and physical trauma and this can prevent individuals from pursuing a claim in good time.

Establishing time-limits should stem from an evidence-based, trauma-informed approach that provide individuals adequate time to process what has occurred, to seek legal advice and consider their options.

#### **14. If time limits are extended for Equality Act claims under the jurisdiction of the employment tribunal, what should the new limit be?**

The TUC recommend the standard time limits for bringing an employment tribunal claim should be harmonised.

A minimum six-month time limit should apply to all employment tribunal claims thereby giving parties further time to complete all stages of internal workplace procedures before an application must be made to an employment tribunal.

Our affiliated unions tell us that it is their experience that discretion to extend time limits is rarely used in Employment Tribunal cases. Therefore, the TUC make a strong recommendation that Employment Tribunal chairs use their discretion to extend time limits in all cases where they consider it is just and equitable in the circumstances bearing in mind individual responses to trauma, barriers to justice and power imbalances between individuals and organisations involved in litigation disputes.

#### **15. Are there any further interventions the government should consider to address the problem of workplace sexual harassment?**

Sexual harassment in the workplace remains persistent, but it is not an intractable problem. Action by employers, backed up by stronger legal protections for workers, better access to justice, and strong unions, are all part of the solution.

The EHRC's research found that where victims of sexual harassment had reported the problem to a trade union representative, they had a more positive outcome<sup>33</sup>. Trade unions are a vital workplace safeguard and have a long history challenging sexual harassment and victimisation in the workplace. We play a vital role in making sure that employment rights are respected and upheld, by:

- i) negotiating improved terms and conditions for working people and putting in place mechanisms to remedy breaches of these terms and conditions where necessary
- ii) raising employers' awareness of their employment responsibilities, including when new employment rights are introduced

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<sup>33</sup> EHRC (2018) Turning the tables on sexual harassment

- iii) resolving employment disputes using grievance and disciplinary procedures and the right to be accompanied
- iv) where merited, supporting members to take cases to employment tribunal
- v) supporting strategic cases which clarify legal duties and set the norms to be followed by employers in similar workplaces and sectors.

Trade unions listen and respond to workers' concerns, provide a mechanism for collective voice and to advise and inform individuals of their rights. When members share with their trade union representatives reports of discrimination and harassment, trade unions acquire important insights into individual workplace cultures and can identify workplaces manifesting a pattern of discrimination and harassment. In this manner, trade unions are uniquely placed to work with employers in order to eliminate sexual harassment and to do so on a collective basis.

Dealing with sexual harassment is a core part of many union rep courses and some unions offer specific training courses on sexual harassment. One example of a union training course for reps covers the following topics:

- legislation covering harassment
- sexual harassment survey
- harassing and sexually harassing behaviour, impact, and barriers
- policies and procedures for dealing with harassment
- handling harassment cases
- challenging harassment in the workplace
- involving members
- organising around equality.

We echo the concerns of the Woman and Equalities Select Committee and others that the imbalance of power between employers and workers led to the unlawful and disreputable use of non-disclosure agreements in cases of sexual harassment. Too often NDAs are used to silence those who report incidences of sexual harassment and protect perpetrators and organisations. The TUC therefore recommend that confidentiality clauses are only used in exceptional circumstances such as to protect individuals who wish to remain anonymous.

Corporate governance structures have ultimate responsibility for ensuring workers have a safe working environment, establishing the cultural norms and standards of behaviour expected for all of those in a workplace.

Assessing the risk of sexual harassment relates to key elements of board-level governance from organisational culture, retention and promotion of staff, risk management, and crisis management. However, a 2017 survey found 77% of boards had not discussed sexually

inappropriate behaviour and/or sexism in the workplace.<sup>34</sup> The most common reasons given for this failure was that boards did not perceive there to be a sexual harassment problem or that they did not consider sexual harassment a board-level responsibility.

Under the new preventative duty, boards should integrate inquiry into workplace culture and risk of sexual harassment into an integral part of their overall risk management oversight function. This can include taking steps such as questioning Directors/CEOs on:

- i) sexual harassment policies and procedures relating to discrimination and sexual harassment: how they are implemented in the organisation; what do safe reporting practices look like at the organisation; how is the welfare of accusers maintained and how are they treated; when and how are the board informed of an incident and any subsequent investigation
- ii) how information relating to discrimination and sexual harassment is collected and analysed at an organisational level so that any patterns of repeat incidents by an individual, within a department or team, are identified
- iii) conduct board reviews on the incidence of complaints, claims and settlements on a regular basis
- iv) how expected standards of behaviour are established with new and existing staff; how are these maintained and promoted; what are staff perceptions of the workplace culture – how is this information gathered and how accurate is it?

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<sup>34</sup> Harvard Law Forum (2018) Corporate Governance Update: Board, Sexual harassment and gender diversity <https://corpgov.law.harvard.edu/2018/01/26/corporate-governance-update-boards-sexual-harassment-and-gender-diversity/>