TACKLING SEXUAL HARASSMENT IN THE WORKPLACE

CBI EVIDENCE TO THE WOMEN & EQUALITIES SELECT COMMITTEE

The CBI welcomes the opportunity to contribute to the Committee's inquiry on sexual harassment in the workplace, to explain why businesses believe that creating safe and inclusive workplaces is vital, and to identify steps that businesses and government should take to tackle sexual harassment at work.

The CBI is the UK's leading business organisation, speaking on behalf of 190,000 businesses that together employ around a third of the UK's private sector workforce. Its mission is to help businesses create a more prosperous society.

Sexual harassment in any form is illegal but remains a problem that too many people continue to be exposed to. No part of society is immune from the risk of sexual harassment, and this risk extends into the workplace. The CBI supports further action by business and government – including additional regulation where appropriate and when necessary – to tackle this problem.

CBI members understand the importance of creating safe and inclusive workplaces in which challenging unacceptable behaviour is the norm, and where all allegations of sexual harassment are appropriately investigated. This will require government and business to collaborate to ensure that laws and company procedures are clearly defined, that both employers and workers are aware of their rights and responsibilities, and that the law is effectively enforced.

Clear laws and company policies are needed to challenge sexual harassment in the workplace

The CBI believes that employers have a duty of care for the health, safety and wellbeing of their workers. Businesses widely interpret this duty to include instances of sexual harassment and have company policies which seek to prevent it. Yet examples like the President's Club Dinner, and evidence that sexual harassment is often not challenged or reported, demonstrate that it is a problem that persists.

Businesses must take the lead in tackling sexual harassment at work…

Businesses recognise that they have a responsibility to create workplaces that minimise the potential for sexual harassment. While most businesses will already have a policy covering sexual harassment at work, recent revelations will have been a prompt to check that these policies are fit for purpose. While having appropriate company policies is the very least that can be expected of employers, this is an important starting point. At a minimum, company policies should establish a process for raising concerns and challenging unacceptable behaviour. Where possible, facilitating a process for anonymised disclosure can help. They should also commit to investigating all sexual harassment allegations. While employers know that they have a duty of care to both victim and the alleged perpetrator during their investigations, it is essential that victims are given the confidence to speak up.

The guidance produced by Acas and the EHRC are often those first consulted by businesses wanting to understand what constitutes good practice. Examples of good practices mentioned by CBI members include discussing policies when inducting new staff, regularly monitoring awareness about and the effectiveness of these policies through staff surveys; and establishing a sexual harassment hotline to enable anonymous disclosure.

How workers experience policies in action is more important than what is written in a document, and this makes culture and training essential. At the heart of challenging a culture that permits sexual harassment in the workplace lies leadership and a willingness to talk about it proactively and with sensitivity. Leadership establishes priorities within a business and public leadership can also drive change throughout business networks. As managers may often be the first point of contact for a victim, they should be equipped with relevant tools and training to respond to sexual harassment allegations.

At the same time, actions needed to stamp out sexual harassment at work are part of a broader effort – the move towards greater diversity in business and more inclusive workplaces. As the CBI has outlined in its report "Time for Action" the business case for inclusive workplaces is solid. Inclusive workplaces empower everyone to perform at their best which also leads to better business results. As well as being the right thing to do, diversity increases employee satisfaction, productivity and ability to innovate. It can help the UK to close its productivity gap.

…and government has important roles to play too, both as regulator and as facilitator of good practice

The CBI's members believe that their duty of care to protect workers against sexual harassment includes instances when the perpetrator is a client, customer or other third party. This belief is why the CBI did not take a position when section 40 of the Equality Act was repealed. That repeal has created doubt – not least in the mind of victims – about whether employers have a legal duty in instances of sexual harassment at work by a third party is damaging. The CBI believes that putting this duty beyond doubt by reintroducing section 40 would make a positive contribution to tackling sexual harassment at work. Alongside this, government should produce new guidance to help employers and employees understand this duty.

Government also has an important role to play in improving understanding of the extent and nature of sexual harassment at work through improved data collection. Currently, general statistics on the volume of cases going to the employment tribunal are available. But, there is no data specifically on sexual harassment as they are part of the wider statistics on sex discrimination. Separating out sexual harassment claims would help the measurement of the problem. The CBI also believes that the government could assist the vast majority of employers who want to tackle sexual harassment by making them aware of the types of situations in which sexual harassment at work has occurred. This could be done through reporting at regular intervals on the lessons to be learnt from sexual harassment cases.

Greater awareness of rights and responsibilities will help to create workplace cultures in which challenging unacceptable behaviour is the norm

The fact that sexual harassment is underreported shows that people who have experienced or witnessed it are either unaware of the law or lack confidence in its enforcement. This poses challenges for government and for businesses. They have a shared interest in raising awareness about employment rights and company policies relating to sexual harassment, and both need to act to address this reporting deficit.

While the public and political spotlight on sexual harassment has gone a long way in raising awareness about rights at work, this remains an area for improvement. Businesses have found Acas' guidance on the different forms that sexual harassment can take very helpful in informing their prevention strategies. Government should consider what more it can do to help raise awareness about the forms that sexual harassment can take, with the intention of giving victims the confidence to challenge unacceptable behaviour.

Recommendations:

1. All businesses should have a policy for staff raising concerns about sexual harassment at work that is easily accessible and consider introducing a process for anonymous disclosure. Policies should also include a commitment to investigate every alleged instance of sexual harassment so that staff can make a complaint with the confidence that it will be properly dealt with.
2. To improve understanding about the extent and nature of sexual harassment at work, government should collect data on the number of sexual harassment claims to employment tribunal and publish a report every 3 years evaluating cases and identifying lessons to be learnt about where sexual harassment can occur and how it can be prevented.
3. Government should reintroduce section 40 of the Equality Act and provide businesses with guidance on how to tackle sexual harassment at work by third parties. While businesses believe that they already have a duty of care to staff, section 40 could put this beyond doubt in the mind of businesses and victims.
4. Government should consider ways to improve workers' awareness of their rights in relation to sexual harassment at work, and the different forms that it can take.

Improved enforcement measures must support better outcomes for victims and for businesses

While complaints against individuals should always be taken seriously by companies, and the law rigorously followed, for more minor incidents workplace resolution is often possible and favoured by the complainant. Where it has not been possible to resolve a dispute in the workplace, Employment Tribunals are an essential backstop to ensure that employment rights are upheld. The CBI has long-held the view that Employment Tribunals are in need of reform to return them to their original vision.[1] It is simply not the case any longer that they could reasonably be considered "easily accessible, speedy, informal and inexpensive".[2]

A code of practice on the use of non-disclosure agreements in the settlement of workplace disputes is needed to prevent their misuse

Non-disclosure agreements (NDAs) perform important functions both in the protection of intellectual property and other commercially sensitive information, and as part of a mutually acceptable settlement of a workplace dispute. The CBI strongly opposes banning NDAs, but evidence of their misuse and misunderstandings about their limitations are deeply concerning. A statutory code of practice should be developed to ensure that workers make an informed choice to sign these agreements and that they do so in full knowledge of the NDA's limitations. While these limitations are already established in law, a lack of awareness and enforcement has allowed these clauses to be misused.

It is already a requirement that before entering into such an agreement, a worker must first receive independent legal advice. The CBI also believes that as a matter of good practice, workers should be given a copy of the agreement to retain for future reference. Examples that have come to light about the misuse of NDAs have often included one or both of these requirements being breached.

[1] The right balance: delivering effective employment tribunals, CBI, 2013; Work that works for all, CBI, 2017
[2] Royal commission on trade unions and employers' associations 1965-1968, Report of the Donovan Commission, (reprinted 1975), Cmnd 3623

It is also already the law that an NDA cannot prevent a person from discussing or initiating enforcement proceedings in relation to future breaches of their employment rights. Neither can it prevent a person from making a public interest disclosure as a whistleblower. It is currently a developing good practice in the NHS and in some private sector employers to explicitly state that any confidentiality clause does not interfere with a person's right to protection as a whistleblower. The CBI is aware that law firms have begun amending their template NDAs to make this clear, but it should be included in the code of practice to make it standard practice rather than good practice.

Government should take steps to support the effective resolution of cases in the workplace whenever possible

While some instances of sexual harassment will warrant criminal proceedings, other instances are best resolved in the workplace. If it is not possible to resolve these cases in the workplace then it is important that employment tribunals are an effective backstop.

The first problem to be resolved is that employment tribunal rules can force a claimant to choose between seeking to resolve their issue in the workplace and their ability to access the employment tribunal as a backstop. Time limits within which a worker must submit a sexual harassment claim to tribunal are a sensible step to protect the interests of workers and businesses. But the rule does not serve the interests of either party if the progress towards an amicable resolution is disrupted by a claim being submitted to tribunal earlier than either party would have wanted. Flexibility to pause this time limit while both parties complete a workplace grievance process – like the rules ensuring that participating in Acas Early Conciliation never causes your right to bring a claim to tribunal to expire – should be an option that exists.

Wider reform of employment tribunals is also needed to support the resolution of cases within the workplace, and the swifter resolution of those cases that do require an employment tribunal. The CBI has become increasingly concerned in recent years that the Employment Tribunal is less effectively meeting the needs of its users – business and workers – as they have become more legalistic and more like other courts. While the legal bills of both parties have risen, justice has become slower and less accessible. The strongest example of the wrong policy objective leading to a bad outcome is the previous fee charging regime. The CBI did not support the design of the previous fees regime. We did not support either the policy objective of shifting the cost of the system onto its users, or the impact that fees of that level had on access to justice. But we still believe that a proportionate fee system in Employment Tribunals should be introduced to encourage claimants to make use of alternative dispute resolution and to discourage weak claims, speeding up justice for those with a strong case.

The statutory questionnaires process was removed following evidence of its misuse and it should not be reintroduced

Businesses welcomed the removal of the statutory questionnaire procedure in section 138 of the Equality Act in 2013. Rather than assisting workers with a real or reasonable cause for complaint, many employers were confronted with lengthy and unfocused questionnaires submitted as what many saw as a "fishing exercise", with only a theoretical right to refuse to respond to those lacking a focus. On other occasions it was used by vexatious claimants – and their representatives – as a tactic to try to make defending the company against a weak claim more expensive than settling it. For these reasons the CBI is concerned by calls from some stakeholders for the procedure's reintroduction.

Despite the removal of that procedure, workers who believe that they have been discriminated against still have the right to make a protected request for information under the Equality Act 2010. CBI members do not believe that this right is exercised often. Rather than reintroduce a misused procedure, the CBI believes that the government should assess why the existing mechanism is rarely used, with a view to ensuring that it is fit for purpose.

Recommendations:

5. A new statutory code of practice is needed to ensure that non-disclosure agreements are used appropriately. This code should ensure that workers are supported in making an informed choice about whether signing an agreement is in their interests, and give them confidence that it does not prevent them from blowing the whistle or raising a grievance about future misconduct.
6. Government should end the situation in which an employee is forced prematurely to pursue a grievance in the workplace or lose their chance to go to tribunal. Pausing the time limit within which a claim must be submitted for the duration of a company's grievance process would ensure that disputes are resolved within the workplace whenever possible.
7. Rather than reintroduce the statutory questionnaire procedure that was removed following evidence that it was ineffective and misused, government should review the existing right to make a protected request for information.