



NUJ submission to the Government Equalities Office consultation on sexual harassment in the workplace

August 2019

Introduction

1. The widespread problem of workplace sexual harassment is undisputed. A 2016 TUC surveyⁱ found that more than half (52 per cent) of women, and nearly two-thirds (63 per cent) of women aged 18-24 years old, said they had experienced sexual harassment at work. In most cases (88 per cent), the perpetrator of the sexual harassment was male and nearly one in five (17 per cent) women reported that it was their line manager or someone with direct authority over them. Four in five (79 per cent) of women who said they experienced sexual harassment at work did not tell their employer what was happening. Of this group, some thought reporting it would have a negative impact on their relationships at work (28 per cent) or on their career prospects (15 per cent), while others were too embarrassed to talk about it (20 per cent) or felt they would not be believed or taken seriously (24 per cent).
2. A Federation of Entertainment of Unions (FEU) survey of the media and creative industriesⁱⁱ found a third of women said discrimination and harassment was gender-related, as did half of those aged 16-30. This survey revealed that one in 10 of the respondents who worked in theatre, television and film witnessed sexuality-related harassment. A 2019 survey by FEU member, Bectuⁱⁱⁱ, found more than half of women and a quarter of men encountered sexual harassment at work, with 42 per cent saying they feared that if they complained it would have a negative effect on their career. Many of the members who spoke to the union's helpline or sought help did so on the condition of anonymity. The FEU freelance respondents reflected this, saying they did not raise complaints about unreasonable treatment at work to avoid jeopardising future commissions.
3. A 2019 TUC report^{iv} revealed that about seven in 10 LGBT workers experienced at least one type of sexual harassment at work (68 per cent) and almost one in eight LGBT women (12 per cent) reported being seriously sexually assaulted or raped at work. Two thirds of those who were harassed did not report it; and one in four of those who did not report the harassment said it was because they were afraid of "outing" themselves.
4. A 2018 survey by the International Federation of Journalists^v showed almost two-thirds (64 per cent) of women journalists had been subjected to online abuse. The online harassment took various forms, including death or rape threats, insults, the devaluation of work, sexist comments, being sent obscene images, cyberbullying,

cyberstalking and account impersonation. Among those who suffered online harassment, 47 per cent of women said they did not report the abuse. Employers with a duty of care for their staff and those working for them need to act when people are being sexually harassed online during their work.

5. Workplace sexual harassment is a global problem and the NUJ has welcomed the International Labour Organisation's Violence and Harassment Convention, 2019 (No. 190)^{vi}. It requires nations ratifying it to put in place laws to protect workers. The convention defined violence and harassment as "a range of unacceptable behaviours and practices" that "aim at, result in, or are likely to result in physical, psychological, sexual or economic harm". It covers physical abuse, verbal abuse, bullying and mobbing, sexual harassment, threats and stalking, among other matters, and includes work-related communications, including those sent using Information and communications technology.
6. The NUJ supports many of the recommendations made by the Women and Equalities select committee report, *Enforcing the Equality Act: the law and the role of the EHRC inquiry*.^{vii} After its year-long inquiry, the MPs' committee concluded that the individual approach to enforcement of equality law was no longer fit for purpose and that employers were not complying with the Act. "While individuals must still have the right to challenge discrimination in the courts, the system of enforcement should ensure that this is only rarely needed: this requires a fundamental shift in the way that enforcement of the Equality Act is thought about and applied," it reported. The committee's chair, Maria Miller, said: "Employers and service providers are not afraid to discriminate knowing that they are unlikely to be held to account."
7. The Equalities Act 2010 previously included a power for employment tribunals to make recommendations to benefit not just the claimant but also the wider workforce; this provision was removed in 2015. It would be beneficial in seeking a broader cultural change if the reinstatement of the wider application was considered.
8. The Government Equalities Office consultation paper for this inquiry fails to mention the vital role that unions can play in combating workplace sexual harassment and in helping to enforce the Act. Without the help and support of their union, many more people would not report incidents of sexual harassment and continue to suffer in silence. Unions can work with employers on policies to protect those at work and create a climate where culture change takes place.

Q1. If a preventative duty were introduced, do you agree with our proposed approach?

The NUJ agrees there should be a preventative duty on employers, giving them a statutory duty to implement measures to protect workers from harassment in the workplace. Clearly it is better to prevent sexual harassment rather than deal later with its often-devastating consequences. The much-documented prevalence of workplace sexual harassment (see above) shows that it is a major problem which is not being addressed by very many employers who do not comply with the Act.

The NUJ agrees that the Equality and Human Rights Commission (EHRC) should produce a statutory code of practice on sexual harassment and harassment at work which will clarify the law. The code should explain exactly what steps managements need to take to prevent sexual harassment – such as carrying out mandatory training for staff and managers and setting out clear policies. It should establish a “safe” and prompt reporting system and recognise the role of union reps.

The NUJ supports the recommendations of the Women and Equalities select committee which say: *“Breach of the duty should be an unlawful act, enforceable by the commission and carrying substantial financial penalties. The duty should be supported by a statutory code of practice on sexual harassment and harassment at work which sets out what employers need to do to meet the duty; and the government should introduce a specific duty under the Public Sector Equality Duty requiring relevant public employers to conduct risk assessments for sexual harassment in the workplace and to put in place an action plan to mitigate those risks. Action plans should set out how cases will be investigated and include guidance on penalties for perpetrators. We further recommend that these duties should extend to all unlawful harassment and victimisation covered by the Equality Act 2010, not just sexual harassment.”*

Unions can work with employers to draw up policies and collective house agreements which embed preventative measures against sexual harassment and devise robust, safe reporting mechanisms. The NUJ – part of the Federation of Entertainment Unions (Equity, Musicians’ Union, Bectu and Writers’ Guild of Great Britain) – has joined its fellow unions to campaign together after identifying the media and the creative industries as “hotspots” for bullying and sexual harassment. The FEU’s Creating without Conflict ^{viii} campaign agreed a code of conduct for the industry and guidance for reps to help members. As part of its consultation for this inquiry, the Government Equalities Office published a blog from Jennifer Smith, head of inclusion at British Film Institute, and her organisation’s initiative, Standing Up Guide, together with Bectu.

The FEU has held two events with employers to look at ways it can tackle the problem of bullying and sexual harassment in the industry. Its *From disbelief to dignity: FEU conference on sexual harassment*, brought together employer representatives and the unions to discuss a common approach to the problem and to gauge how the industry had responded to the #MeToo movement.

While arts and broadcasting organisations have been keen to engage with the FEU on these issues, the newspaper sector has failed to respond or get involved in any of these initiatives or conferences. The Creating without Conflict survey found that in newspapers 72.3 per cent of respondents indicated either line managers or editors were responsible for bullying or sexual harassment.

Putting in place preventative measures often requires a change in an organisation’s culture and unions can play a constructive role in educating the workforce and sharing good practice. The 2018 Bectu survey of harassment experienced by its members showed that fear of repercussion and a lack of trust in managers were major barriers to speaking out, with 43 per cent saying they would not trust managers to deal with an issue.

Q2. Would a new duty to prevent harassment prompt employers to prioritise prevention?

The introduction of gender pay gap reporting has, in some cases, led organisations, such as the BBC and ITN, to address the issues and set out policies and targets to narrow the gap. But many other employers appear to be unwilling to take any action. This would suggest that an element of compulsion is required to prompt employers to prioritise prevention. Likewise, it has taken legislation with financial and other penalties to ensure that health and safety measures are adhered to in the workplace. This indicates that, for a new duty to prevent harassment to be complied with, the Equality and Human Rights Commission (EHRC) needs greater powers to force compliance and there must be penalties for employers who do not comply. The EHRC has already been criticised by the Women and Equalities select committee for being slow to investigate equal pay at the BBC, despite widespread reporting of its figures. It said the commission must refocus its work and “be bolder in using its unique enforcement powers”. If the GEO is serious about preventing workplace sexual harassment, it must recommend that the EHRC be given more resources to take on its present – as well as any new – responsibilities.

The introduction of a requirement to publish or report on prevention and resolution policies publicly could help in holding an organisation to account by its employees and other agents and bodies. The government should introduce an awareness programme, in conjunction with employer organisations and the unions, to change workplace cultures which allow sexual harassment to go unchallenged.

The NUJ supports the recommendation of the Women and Equalities select committee recommendation that *“the EHRC publish data on its enforcement activity, including both formal and informal compliance work. This should include summaries of the facts of cases, along with information on the outcomes in a way that can act as case studies on what compliance looks like and act as a deterrent to discrimination”*.

Q3. Do you agree that dual-enforcement by the EHRC and individuals would be appropriate?

Yes. As mentioned earlier, the Equalities Act 2010 previously allowed employment tribunals to make recommendations to benefit not just the claimant but also the wider workforce. This provision was removed in 2015 but its reinstatement would encourage a broader cultural change. However, the NUJ supports the view of the Women and Equalities select committee that a “critical mass” of cases must inform employers and organisations about their legal duties and make adherence to existing equality law a priority for all organisations. There also needs to be a move away from relying so heavily on the current model of using individual litigation to create precedents. It would need to be clear as to whether the case could be taken on the basis that the act of harassment had taken place or whether it would be sufficient to allege a breach of the general duty by employers if the legislation, where altered to, included a proactive element for the employer to take ‘all reasonable steps’ to protect workers from harassment in the workplace.

Q4. 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?

Yes – provided that the calculations are clear and transparent. TUPE is notorious for its complexity, so any model agreed must be simple and easy to calculate by individuals and their advisers.

Q5. Are there any alternatives or supporting requirements that would be effective in incentivising employers to put measures in place to prevent sexual harassment? Please provide evidence to support your view.

The NUJ already plays a vital role in safeguarding employees from forms of discrimination and harassment; however, more should be done to facilitate the unions' important contribution. A duty to consult with the unions would be an effective way to establish prevention measures. Because culture change is almost always needed, a top-down approach will not be appropriate. Organisations which have poor records in dealing with sexual harassment will need to earn the trust of their employees if a genuine change of direction is to be adopted; the union can facilitate this. Without the support of a union rep, many employees are too frightened to take a case forward. The FEU survey found that 78 per cent of respondents who reported an incident of conflict were not happy with the outcome, while 45 per cent of those who were happy with the outcome had involved their union. Recent successes based on union involvement such as securing the abolition of employment tribunal fees, the recognition of BALPA by Ryanair, Uber, McDonalds and many more campaigns demonstrate the continued relevance of trade unionism and the necessity for unions to be at the heart of this issue in the workplace.

Q6. Do you agree that employer liability for third-party harassment should be triggered without the need for an incident?

Legal protections should be strengthened in this area. The NUJ agrees with the ECHR's recommendation that there should be a reinstatement of the third-party harassment provisions under the EA 2010 but amending this to remove the requirement for the employer to know that the employee has been subjected to two or more instances of harassment before they become liable. The Women and Equalities committee has agreed with this and has suggested a step further imposing a preventative duty on the employer. If this were to be implemented, clear guidance on what the preventative duty would require would be necessary.

Q7. Do you agree that the defence of having taken "all reasonable steps" to prevent harassment should apply to cases of third-party harassment?

Yes. The union agrees that provisions for third-party harassment should be in line with Section 109 of the Equality Act.

Q8. 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?

Q9. Do you know of any interns who do not meet the statutory criteria for workplace protections of the Equality Act?

Yes. Evidence shows that it is often the vulnerable and the young who are most likely to experience sexual harassment. Everybody should be free from sexual harassment in the workplace and be subject to the same protections as others employed there. Many interns in the media industry will come under section 39 of the Equality Act, as they usually have some form of contract and receive at least the National Minimum Wage. However, unpaid internships continue to flourish – a recent article in The Sunday Times about unpaid interns (*Only rich kids can afford to take unpaid internships. How elitist is that?* August 4, 2019 <https://www.thetimes.co.uk/article/only-rich-kids-can-afford-to-take-unpaid-internships-how-elitist-is-that-jxvdk36hq>) was followed by postings on social media from people saying they had worked for the newspaper's parent company, News UK, for nothing as an intern and former staff members at The Times also alleged the same. The Times declined to answer questions on the record for a BuzzFeed article on the subject (<https://www.buzzfeed.com/markdistefano/sunday-times-unpaid-work>).

Q10. 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?

[Yes; No; Don't Know]

Please explain your answer, drawing on any evidence you have.

Q11. If the Equality Act's workplace protections are expanded to cover volunteers, should all volunteers be included?

[Yes; No; Don't Know]

If 'no', which groups should be excluded and why?

Everyone in the workplace must be protected from sexual harassment.

Q12. Is a three-month time limit sufficient for bringing an Equality Act claim to an Employment Tribunal?

No. As the #MeToo movement has shown, it can be very difficult for women to report sexual harassment, particularly when the perpetrator is a person of power, yet the effects can last a lifetime. The NUJ also has evidence of employers delaying internal investigations into incidents, putting our members outside the time limit. The union supports the EHRC recommendation to extend the limit to six months from the incident or exhaustion of any internal complaints' procedure. There is a compelling case to extend three-month time limits applying to Equality Act employment tribunal cases as a whole.

Q13. 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; No]

Please explain your answer, drawing on any evidence you have.

Yes. The NUJ supports the lobby group Pregnant then Screwed campaign for the time limit to be extended. Having a baby is stressful and exhausting enough, without the added complication of making a sexual harassment claim. The group makes the valid point that starting a tribunal proceeding could have “a profoundly negative impact on bonding” with the baby/babies. The group cites research conducted by Gorvins Solicitors and YouGov which showed that 14 per cent of women who encountered pregnancy or maternity discrimination did not raise a claim owing to the time limit. The NUJ supports an extension of the time limit to six months (although 12 months would be ideal), with leave for a judge to grant a further extension.

Q14. If time limits are extended for Equality Act claims under the jurisdiction of the Employment Tribunal, what should the new limit be? [6 months; more than 6 months]

Yes. It would be more consistent and less confusing to extend Equality Act claims under the jurisdiction of the employment tribunal to at least six months.

Q15. Are there any further interventions the Government should consider to address the problem of workplace sexual harassment? Please provide evidence to support your proposal.

Yes. The unions have a huge role to play in creating workplaces where there is zero tolerance of sexual harassment and setting up preventative policies. Getting union recognition, as the NUJ has found, is a complicated and drawn-out process, often thwarted by hostile employers who refuse representation for their staff and those who work for them. The perpetrators of sexual harassment are often the managers and those in powerful positions in the workplace; unions can take up the cases of those too frightened to report incidents to the very management guilty of it. To be able to do this effectively there needs to be recognition for union reps who need time to take training and to deal with problems when they arise. Trained reps – in particular, equality reps – can deal with workplace sexual harassment, but need statutory rights and facility time to enable them to carry out their role effectively.

This consultation has asked about the use of confidentiality clauses or Non-disclosure Agreements (NDAs). Hollywood mogul Harvey Weinstein notoriously used NDAs attached to monetary settlements to prevent accusers speaking out about his alleged serial sexual harassment. NDAs are often used by companies to sweep sexually inappropriate behaviour by staff members under the carpet. They are used when the perpetrator is a powerful person or to limit damage to the company’s reputation. Zelda Perkins, one of Weinstein’s former assistants who broke her NDA and went public, said women settled claims because they felt they had no other option. Likewise, Fox News resorted to NDAs when it paid off numerous women who had been reportedly sexually harassed by the broadcaster’s founder,

Roger Ailes, and former TV host, Bill O'Reilly. NDAs clearly allow perpetrators to act with impunity, putting other women at risk.

The NUJ believes NDAs are highly inappropriate in these cases. The advantages of NDAs – such as the ability to settle protracted and costly litigation, protection for individuals wrongly accused, or victims who do not wish to be identified – do not outweigh the disadvantages of making such clauses unenforceable.

Employers have a duty of care to their employees. The Health and Safety Executive's stress management guidelines state that no one at work should be exposed to unacceptable behaviour (such as bullying, harassment and abuse), regardless of the source of that behaviour, when or where it occurred. The union's health and safety committee is campaigning for employers to acknowledge that they have an obligation under the Health and Safety at Work Act (H&SWA) 1974 to carry out "suitable and sufficient" assessments of risks which can be reasonably foreseen and then institute "reasonable precautions". For example, journalists, particularly female journalists, are often the targets of online trolls and employers must report this abuse to the police. This consultation recognises the role of health and safety legislation in relation to sexual harassment; the Health and Safety Executive must be encouraged to play a greater role in prevention of sexual harassment and punishment of companies which put their employees at risk.

Any relevant duty on employers and codes of conduct must also consider the rights of freelance and casual workers. All workers, regardless of employment status or type of contract, should be afforded the same protections as staff workers.

Changes to the Act are needed to make it more effective and fairer on victims of sexual harassment, but more important are measures to force culture change. Most sexual harassment perpetrators are men. Most sexual harassment perpetrators are line managers or in positions of power. If you look at the boards and leadership teams of media organisations, you will find that the BBC has 13 men and five women; Sky 11:2; ITN 6:1; Reach 8:3; Newsquest 15:4 and Penguin Random House UK 7:9. The NUJ believes there is likely to be less sexual harassment in workplaces where equality between the sexes is respected and fostered and women have a voice in company policy.

Still just a bit of banter? Sexual harassment in the workplace in 2016 (TUC report and survey) <https://www.tuc.org.uk/sites/default/files/SexualHarassmentreport2016.pdf>

Creating without Conflict report (2014) <https://www.nuj.org.uk/documents/creating-without-conflict-final-report/>

IFJ global survey shows massive impact of online abuse on women journalists (2018) <https://www.ifj.org/media-centre/news/detail/article/ifj-global-survey-shows-massive-impact-of-online-abuse-on-women-journalists.html>

Sexual harassment of LGBT people in the workplace (TUC report 2019) <https://www.tuc.org.uk/research-analysis/reports/sexual-harassment-lgbt-people-workplace>

Bectu survey of sexual harassment in creative workplaces (2019) <https://www.bectu.org.uk/news/2926>

Violence and Harassment Convention, 2019 (No. 190)

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190

Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission (2019)

<https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1470/1470.pdf>

From disbelief to dignity: FEU conference on sexual harassment (2019)

<https://www.nuj.org.uk/documents/from-disbelief-to-dignity-feu-conference-on-sexual-harassment/>

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