2\textsuperscript{nd} October 2019

\textbf{CWU Response to Government Equalities Office Consultation on Sexual Harassment in the Workplace}

\textbf{Introduction}

1. The Communication Workers Union (CWU) is the largest union in the communications sector in the UK, representing approximately 192,000 members in the postal, telecoms, financial services and related industries.

2. The CWU welcomes the opportunity to contribute to the Government Equalities Office consultation on sexual harassment in the workplace. Sexual harassment at work is a persistent and widespread problem, as evidenced by surveys and polls conducted by trade unions and women’s organisations. For example, TUC research has revealed that over 1 in 2 women and nearly 7 out of 10 LGBT workers are sexually harassed at work.\textsuperscript{1}

3. This issue must be urgently addressed with swift and effective action from government and employers to properly protect workers. In particular, the UK’s corporate governance framework requires a more robust approach in preventing sexual harassment at work, and there must be new laws to ensure employers are responsible and accountable for implementing, monitoring and reviewing policy.

4. The CWU supports the #ThisIsNotWorking alliance call 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\textsuperscript{th} June 2019 has garnered over 11,650 signatures calling on the Government to introduce a new preventative duty on sexual harassment.\textsuperscript{2}

\textsuperscript{1} TUC (2016), Still just a bit of banter; TUC (2019), sexual harassment of LGBT people in the workplace.

\textsuperscript{2} Megaphone, End sexual harassment at work, 2019, accessed at: https://www.megaphone.org.uk/petitions/uk-gov-act-to-prevent-sexual-harassment-at-work
5. There must also be effective enforcement of such a duty if we are to succeed in bringing about real change on this issue. The Equality and Human Rights Commission (EHRC) should be given new powers to take enforcement action against companies that breach the duty, and the EHRC's core funding should be increased to carry out this work effectively. The substantial cuts to the EHRC's funding and resources in recent years has created a major barrier to effective enforcement of the Equality Act. This must change if the Government is serious about tackling discrimination and eliminating sexual harassment from our workplaces.

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

Yes

6. The CWU is strongly in favour of the Government’s proposal to implement a new mandatory duty that compels employers to take all reasonable steps to prevent sexual harassment in the workplace. This would shift the emphasis away from employer liability after an incident of harassment, to a proactive duty before any unlawful conduct has taken place. We agree that existing primary legislation – the Equality Act 2006 – should be amended to make provision for this new preventative duty.

7. The CWU believes that every worker, regardless of whether they have a contract of employment or a contract for services, should be treated with dignity and respect at work and protected from sexual harassment. We therefore believe the Government should expand the scope of the preventative duty to include workers currently not covered by provisions within the Equality Act 2006. This includes those employed on a short term basis, freelancers, volunteers and interns.

8. The CWU is concerned that although the reasonable steps defence under the Equality Act states that employers must protect all workers from harassment, it makes no mention of sexual harassment. In order to address this, we believe the new preventative duty should strengthen the obligation in relation to the reasonable steps defence by concentrating explicitly and solely on sexual harassment.

9. The CWU supports the Government’s proposal to introduce a new EHRC statutory Code of Practice to underpin the new preventative duty. The CWU believes that the Code of Practice should outline all reasonable and practical steps that an employer should take to prevent sexual harassment. This should include such things as establishing robust policies for combatting sexual harassment based on a zero-tolerance approach; introducing sexual harassment training for all staff; and ensuring there is a clear process for staff to safely raise
a complaint about sexual harassment. We also believe the Code of Practice should place an obligation on employers to work more closely with trade unions to help tackle this issue.

10. In addition, employers can help to identify any potential risk areas for discrimination or harassment by monitoring gender diversity and participation structurally and at every level of the workforce. The use of anonymous employee surveys to ensure open and honest feedback is also a useful tool for assessing workplace culture. Adopting these strategies will enable employers to begin to develop and establish proactive strategies for removing all forms of discrimination and harassment in the workplace.

11. The CWU agrees that a key benefit of a new preventative duty would be that enforcement would no longer be dependent on an individual bringing a claim after an incident of harassment. The EHRC could carry out investigations in workplaces where suspected breaches may have occurred. We also consider that there is a need for proper routine periodic workplace inspections, which mirrors the practices, recognition and facility time afforded to trade union health and safety representatives under health and safety legislation. Trade unions can play a pivotal role in deploying, monitoring and reviewing an employer’s preventative performance in the workplace.

12. The CWU believes where breaches occur, the EHRC should have the power to issue and enforce substantial fines, and to publish names of organisations that have been penalised. This could mirror the approach to sanctions in health and safety legislation, with penalties set at a level proportionate to the organisation’s size and the severity of the breach of duty. Financial penalties and reputational risk should act as an effective deterrent ensuring employers comply with the law and prioritise prevention.

13. The CWU is calling for sufficient funding and resources for the EHRC to carry out its role and enforce the law effectively. The substantial funding cuts to the EHRC over recent years makes its task of enforcing the Equality Act impossible. This is a major contributory factor to discrimination and the rise of inequality across a range of indicators which continues to damage our society and hold back our economy.

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

14. The preventative duty would not require an incident of harassment to take place for enforcement action to be taken. Instead, the EHRC could take action against employers for a failure to take one or more preventative steps set out in the Code of Practice. Employers
would therefore be compelled to shift their focus from managing redress to proactive prevention.

15. We believe the introduction of a preventative duty will help to bring a change in workplace culture and establish a zero tolerance approach to sexual harassment through adherence to well-defined expectations. Employers will need to create policies that deal specifically with sexual harassment and make them known, ready and available to all employees.

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

Yes

16. We agree that compliance with the new duty should be ensured through enforcement action taken by the EHRC and by the right of individuals to pursue litigation action through Employment Tribunals. However, as identified by the Women and Equalities Select Committee, the system of enforcement should ensure that individuals rarely need to challenge discrimination in the courts.³

17. We also believe that trade unions, women’s organisations and regulators should have the ability to report any suspected breach of duty anonymously to the EHRC, in addition to individuals. This will help to lift some of the significant burden that individuals face in relation to enforcing their rights.

18. Moreover, it is essential to the success of dual-enforcement that individuals are made aware of their rights and employers’ legal duties towards them. Therefore we support the TUC’s view that the Government and the EHRC should work with trade unions to ensure workers are fully aware of new mandatory duties, safe reporting mechanisms and how to enforce their rights.

19. Trade unions play a fundamental role in promoting equality and campaigning against discrimination, including sexual harassment in the workplace. Thus, trade unions should be an important 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.

---

Q4: If individuals can bring a claim on the basis of the breach of the duty, should the compensatory model mirror the existing TUPE provisions and allow for up to 13 weeks’ gross pay in compensation?

20. The CWU agrees with the principles of sanctioning employers for breaching legislation, including enhancement awards where evidence shows that employers have failed to follow the statutory Code of Practice. We believe that a maximum of 13 weeks’ gross pay is unlikely to be adequate in many cases. We also believe there should be additional financial penalties for repeat infringements, at a minimum of 25% as recommended by the TUC.

Q5: Are there any alternative or supporting requirements that would be effective in incentivising employers to put measures in place to prevent sexual harassment?

Yes

21. The CWU believes that promoting collective bargaining and improving transparency measures and corporate governance are all essential for lifting workplace standards and guaranteeing compliance with the new preventative duty.

22. It is in the wider interests of employers to embrace these objectives because of the many problems that workplace harassment can bring for an organisation. These include low employee morale, poor industrial relations, lost productivity, absence, poor staff retention and damage to a company’s reputation.⁴

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

Yes

23. The CWU believes that it should be possible to pursue enforcement action against employers for failing to take practical and reasonable steps to protect workers from sexual harassment, irrespective of whether that is from a member of staff or a third party. This should help to encourage a workplace culture in which sexual harassment is not tolerated and improve compliance with the law.

24. The CWU also recommends, in line with the union’s national policy, that the government reinstates an improved and reinforced section 40 of the Equality Act 2010, which permits

---

individuals to make claims of unlawfulness and pursue litigation without the need of a previous incident taking place.\(^5\)

**Q7:** Do you agree that the defence of having taken ‘all reasonable steps’ to prevent harassment should apply to third party harassment?

Yes

25. For the purposes of consistency and to establish standardisation across the Equality Act, the CWU agrees that the defence of having taken ‘all reasonable steps’ to prevent harassment should apply to cases of third party harassment. Any benchmark for ‘all reasonable steps’ should be set as high as possible.

**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?

Yes

26. The CWU is of the view that all workers should be protected against sexual harassment, regardless of their employment status, as we set out in question 1. Everyone has the right to work free from the threat of violence and harassment, whether they are in paid employment or working on a voluntary basis.

27. We agree that sexual harassment should be treated the same as other unlawful behaviours under the Equality Act, and that all protections in Part 5 of the Equality Act 2010 (i.e. not just those for sexual harassment) should be extended to volunteers and interns.\(^6\)

**Q9:** Do you know of any interns that do not meet the statutory criteria for workplace protections of the Equality Act?

No.

**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?

---

\(^5\) CWU, Women’s Conference, 2019, motion 5.

No.

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

Yes

28. As previously mentioned in question 1 and question 8, the CWU is of the view that all workers irrespective of their employment status should be covered under the Act. This should cover all volunteers, no matter if the arrangement is informal or formal.

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

No

29. The CWU believes that the three month time limit for bringing an Equality Act claim is too short and that there is a genuine need to extend this. We also wish to see a stronger, more effective Employment Tribunal system, and greater freedoms for trade unions to help workers enforce their rights under the Act. For example, we support the reinstatement of the power (removed under the Deregulation Act 2015) for Employment Tribunals to make recommendations for the benefit of the wider workforce, not just the individual claimant.7 We are also calling on the Government to promote collective bargaining as a vehicle for raising workplace standards and ensuring compliance with labour laws.

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

30. The current three month time limit for Employment Tribunal claims under the Equality Act should be extended for all types of claim under the Equality Act.

31. However, there are circumstances under which an individual may have been unable to meet the standard time limit and where it would be reasonable to extend this further. We believe there is a need for a trauma-informed approach to sexual harassment claims that affords individuals more time to process what has occurred, to seek legal advice and consider their options.

7 Employment tribunals lose power to make wider recommendations in discrimination cases, XpertHR, accessed on 23rd September 2019 at: https://www.xperthr.co.uk/legal-timetable/employment-tribunals-lose-power-to-make-wider-recommendations-in-discrimination-cases/155556/
Q14: If time limits are extended for Equality Act claims under the jurisdiction of the Employment Tribunal, what should the new limit be?

32. We agree with the TUC’s view that a minimum of six months be afforded to individuals to bring Employment Tribunal claims relating to the Equality Act. This six month period should be extended where necessary in sexual harassment cases where reporting has been delayed due to trauma.

33. The CWU is concerned that the current restrictions on workplace discrimination claims undermine positive initiatives to eradicate workplace sexism, racism, homophobia and prejudice against people because of disability or age.

Q15: Are there any further interventions the Government should consider to address the problem of workplace sexual harassment?

34. The CWU calls on the Government to urgently address the use of Non-Disclosure Agreements (NDAs) to cover up cases of where sexual harassment has occurred. Casework indicates that CWU members have become reluctant to call out cases of sexual harassment due to a lack of evidence and a culture in which they believe they may be accused of raising claims in bad faith, thereby placing themselves in a vulnerable position.

35. The CWU believes there must be clear guidelines and penalties to ensure employers do not use NDAs in cases of sexual harassment.

For further information on the view of the CWU contact:
Dave Ward
General Secretary
Communication Workers Union
150 The Broadway
London
SW19 1RX

Email: dward@cwu.org
Telephone: (+44) 0208 971 7251

Date: 2nd October 2019