The powerful effect of organisational culture - preventing sexual harassment in the workplace

Maria Strauss and Jane Foster| 16 February 2018

As sexual harassment cases continue to dominate the headlines, there are a number of questions we are all asking. How widespread is this behaviour? Is this the tip of the iceberg? Are certain industries and professions more vulnerable than others? After decades of equality legislation, why are these cases emerging now? Why has unacceptable behaviour remained unchallenged for so long?

This note has been prepared in the midst of the #MeToo campaign, as major businesses and whole industries are affected by sexual harassment scandals.

Many different sectors have been implicated, from arts and culture, media, politics and manufacturing. Whilst this note is written in the current climate of widespread reports of sexual harassment, the guidance here can also be used to prevent and detect other types of workplace harassment.

The relevant law

Harassment is "unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the individual" (s26 Equality Act 2010).

There is also a specific definition of sexual harassment under the Equality Act 2010 which is similar to the general definition above. Section 26(2) of the Equality Act 2010 states that sexual harassment occurs where a person (A) engages in unwanted conduct of a sexual nature towards another (B); and the conduct has the purpose or effect of either violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

The Protection from Harassment Act 1997 can be used to deal with a wide variety of distressing behaviour. The Act gives both criminal and civil remedies. There are two criminal offences:

- pursuing a course of conduct amounting to harassment; and

If you require further information on anything covered in this briefing please contact Maria Strauss (maria.strauss@farrer.co.uk ; +44(0)203 375 7259), or your usual contact at the firm on 020 3375 7000. Further information can also be found on the Employment page on our website.

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- a more serious offence where the conduct puts the victim in fear of violence.

In addition, civil courts can impose injunctions in harassment cases as well as awarding damages to the victim for the harassment.

Employers owe a duty of care to their employees. This means that they should take all steps which are reasonably possible to ensure their health, safety and wellbeing at work. Legally, employers must abide by relevant health, safety and employment law, as well as the common law duty of care. Requirements under an employer's duty of care may manifest in many different ways, such as:

- protecting staff from harassment, whether from colleagues or third parties;
- providing communication channels for employees to raise concerns; and
- consulting employees on issues which concern them.

An employer can be deemed to have breached their duty of care by failing to do everything that was reasonable in the circumstances to keep the employee safe from harm.

Statistics

We have all known for a while that sexual harassment is a common problem. Take the following statistics from a 2016 TUC report "Still just a bit of banter?" carried out in association with the Everyday Sexism Project:

- More than half (52%) of all women polled had experienced some form of sexual harassment;
- 35% of women had heard comments of a sexual nature being made about other women in the workplace;
- 32% of women had been subject to unwelcome jokes of a sexual nature;
- 28% of women had been subject to comments of a sexual nature about their body or clothes;
- Nearly one quarter of women had experienced unwanted touching (such as a hand on the knee or lower back);
- One fifth of women had experienced unwanted sexual advances. More than one in ten women reported experiencing unwanted sexual touching or attempts to kiss them;
- In the vast majority of cases, the perpetrator was a male colleague, with nearly one in five reporting that their direct manager or someone else with direct authority over them was the perpetrator; and
- Four out of five women did not report the sexual harassment to their employer.

These statistics were collated before allegations against Harvey Weinstein became public and before the #MeToo campaign.

So, how do you create a safe culture for staff?

We believe that the following key areas are critical in preventing and detecting workplace sexual harassment:

1. Governance and leadership

If there was ever a time to reflect on the culture within your business, it is now. Boards, trustees, governors and other senior leaders should ask these questions:

- What are the organisational values?
- How do we embed and promote them?
- Do we stress test our systems?
- Do we subject our systems to regular independent scrutiny and evaluation?
- Do we have a critical friend who can support this process?
- Do our current HR systems help or hinder the promotion of our values?
- Are we confident that all staff are empowered to speak out and that channels are in place to facilitate this?
- Do all of our leaders and senior managers understand their legal duties?
- Do all staff recognise and understand the importance of a culture where there are clear boundaries?
- How do we test staff and management's understanding in this area?

2. The importance of organisational culture

Peter Mantagnon, Director of the Institute of Business Ethics, ended his recent speech to the NCVO Charity Trustees Conference with the following:

"*a good culture liberates and empowers an organisation while keeping it safe. The benefits are there for the long term, while clearing up the mess will take a lot of time and trouble if it goes wrong*".

The impact of a poor culture within a business cannot be underestimated. It can lead to low staff morale, legal claims, reputational and financial risk. The impact of a major scandal engulfing a business (for example allegations of widespread sexual harassment) can be mission critical and can lead to regulatory intervention, criminal investigations, reputational damage, resignations, loss of clients or sponsors and the cost of crisis management; some of this damage could take years to repair.

A leading academic on safeguarding and organisational culture, Marcus Erooga, states that culture can best be described as "the way we do things here". Studies of perpetrators of sexual offending against children in organisations show that there is a reduced likelihood of abuse taking place where the organisation's messages and rules are clear and applied consistently to all staff irrespective of their position.

The values of the business (set out in company policies and articulated through training) need to be clear and "lived" at each level of the business (including through

the conduct of the leaders and senior staff). This is the context within which people judge the appropriateness of their own behaviour and that of their colleagues.

Embedding a good culture takes positive and courageous leadership where professional standards are always maintained, where "cultural slippage" is challenged and where appropriate action is taken when boundaries have been transgressed. This means having meaningful and clear values and, where possible, involving staff in setting these values so that everyone feels they have "buy in" and are part of the business.

3. Be proactive

Regularly review your policies (before something goes wrong!).

Policies on recruitment, training, equality, anti-bullying, whistleblowing, disciplinary should be robust and create a zero tolerance policy on defined, unacceptable behaviour. Policies should complement staff codes of conduct and other related policies and systems. The IT system can be especially relevant bearing in mind that sexual harassment can be facilitated by emails and social media.

Check that all policies are up to date, legally compliant, meet best practice standards and are communicated to all. Now might be a good time to review and relaunch your whistleblowing systems.

We say that you should seek to go beyond compliance and make it clear that your business seeks best practice.

Values and expected behaviours can be communicated even before a person is recruited to the business. If strong messages about the business values are properly communicated, then the recruitment process itself can act as a powerful deterrent to anyone who may seek opportunities to commit abuse.

It is equally important to note the occasions when it appears that further communication or training is required. This could be for example as part of a response to a concern, an allegation or general staff feedback.

Messages from leaders can be very powerful. Their presence at training sessions for example can help emphasise the importance of the subject to the business.

4. Know your vulnerabilities and reduce opportunities

Every business will have different weak areas. This could be particular groups of people, physical location, working patterns or particular events.

We recommend taking time to determine and recognise who within your organisation could be most vulnerable to pressure or harassment. Is it the intern, work experience student, apprentice, trainee, job applicant, junior members of staff, individuals with disabilities, individuals at particular points in their careers or individuals who are vulnerable because of their particular circumstances (for example bereavement or divorce)?

This is also a good time to reflect on the positions in your organisation which provide the greatest opportunity for one person to exert power over others. What steps are you taking to protect individuals from harassment from those in positions of power?

Are there particular locations or working patterns which facilitate the opportunity for harassment? Now would be a good opportunity to review lone working, mentoring arrangements, health, safety and site security procedures.

Be mindful of external events and activities outside the workplace such as Christmas parties, team building events and away days. Sometimes social events can present opportunities for abuse and harassment to occur.

Staff surveys and HR audits can be useful tools to identify some of the more vulnerable areas of your business.

5. Encourage a "speak out" culture

Staff should know how to raise concerns and report issues. They should be assured that they will not suffer a detriment as a consequence of reporting a concern.

Communicating your whistleblowing policy is vital. Does the whistleblowing system work in practice bearing in mind a diverse workforce?

Again surveys and audits can be useful for the business in learning about individual cases or about wider cultural problems. Businesses should always act on the results and recommendations.

Consider training managers and employees on the benefits of reporting concerns. Training on recognising abuse in the workplace can be very valuable. From the child protection cases we have seen, we know that adults working alongside perpetrators of child sexual abuse have, time after time, failed to recognise the signs of abusive behaviour.

Offer a choice of reporting channels to staff, for example in person, online, designated telephone number or a mobile phone app.

6. Take prompt and appropriate action when concerns or complaints are raised

A good culture requires management who are prepared to act appropriately in responding to staff who raise concerns.

All complaints should be investigated and the parameters of the investigation clearly set out. Is this an isolated complaint or part of a bigger problem? Is this particular complaint also perhaps an opportunity to review workplace culture?

The TUC survey referred to above indicated a lack of confidence on the part of staff in transparency and the effectiveness of codes of conduct, investigations into complaints and inconsistencies in the way in which disciplinary sanctions were applied. Where staff do not have confidence in the process, this can act as a major deterrent to the workforce reporting issues. It is equally common for staff to fear that they may suffer

some detriment in having raised a concern.

Consider how in practical terms staff can be protected from ongoing harassment and what support can be put in place for them including potentially external support. Managers should give staff confidence that their concerns will be investigated and appropriate action taken.

7. Consider an external review

External and independent investigations and reviews can be useful when responding either to a specific case or in response to a major crisis. Depending on the type of investigation or review, there can be much to consider, including the impact on other investigations for example criminal or regulatory, engagement with complainants, reporting obligations to external agencies, data protection, issues of anonymity and confidentiality and legal privilege.

We mentioned above the benefits of an audit. A recent report from the Charity Commission into concerns raised in a high profile international charity, made a number of recommendations relating to that charity's HR culture, overall governance and management of safeguarding. It concluded that “the charity needs to be more mindful of the allocation of resources which enables an appropriate balance between proactive and preventative activity and the investigation of individual allegations” and commented that the charity in question had committed to the following actions:

- an externally led review of its HR culture, to ensure senior programme staff are recruited, trained and managed and supported in a way that ensures that they live the organisation’s values, as well as complying with all relevant laws;
- extending the terms of reference for an existing independently led governance review to ensure that trustees have appropriate information, oversight and accountability on safeguarding matters;
- review organisation structures, management reporting lines and resourcing to support the effective delivery of the organisation’s safeguarding objectives; and
- ensure that an effective safeguarding management framework is developed.

8. Work with your regulators

Where possible, it is always helpful to be on good terms with the relevant external agencies and regulators. For example, organisations who work with children are well served by having a good working relationship with their Local Authority Designated Officer (LADO) and local Police child protection contact. Having strong relationships with these agencies is a great start if you find yourself in the position of having to work alongside them to resolve an issue. Consider whether there is an equivalent in your industry.

9. A crisis management strategy

If a crisis hits, the best organisations will form an operational strategy to deal with the response. This will include input from all relevant departments HR, legal, communications and PR.

This plan should risk assess the situation and plan accordingly. The plan should include the support available for staff or others who are impacted, the media line, the legal issues and the steps being put in place to investigate and resolve matters.

10. Learn lessons from past cases

It is not always possible to prevent workplace harassment and there is no 'silver bullet'. The above practical steps should assist businesses in preventing and detecting workplace harassment. Where it does occur, in addition to investigating the matter properly and appropriately supporting those involved, it is always important to learn from each case. What went wrong? What steps can be taken in future? Could we have dealt with the issues in a better way? What lessons can we learn and how can we communicate these?