

Consultation Response

Sexual harassment in the workplace

October 2019



Introduction

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We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Employment Law and Equalities Law sub-committees welcome the opportunity to consider and respond to the Government Equalities Office's consultation on sexual harassment in the workplace. We have the following comments to put forward for consideration.

Consultation Questions

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

No.

While we welcome the recognition that enforcement in this area still relies largely on individuals taking cases at their own risk and expense, we have concerns about the ability to effectively enforce a new preventative duty. We have not seen evidence of EHRC being sufficiently resourced to pursue individual enforcement actions against individual employers thus far. The introduction of any new duty must be contingent on ensuring proper resourcing to allow enforcement across the full range of employers, including small and medium sized employers, where the majority of employees work. We suggest that significant additional resources would be needed to allow them to enforce a new duty of this nature.

We are of the view that a mechanism for increasing compensation in individual cases for breach of the forthcoming Code of Practice on sexual harassment might have more effect in highlighting the risk of a breach of the Code.

We are also unclear as to what a case for breach of the duty would look like where there was no individual actually claiming harassment and what the relevant test and standard of proof would be.

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

No.

Unless the duty is backed by clear and well-resourced enforcement options, we do not think it will be successful. For larger employers, if it was accompanied by a duty to publish what they had done to comply with the duty, which required director-level sign off, this might increase the likelihood of prioritising prevention.

Question 3. Do you agree that dual-enforcement by the EHRC and individuals would be appropriate?

No.

See answer to question 1 above. Effective enforcement by EHRC in this area would only be possible with a commitment to full resourcing. We have concerns about how a case for breach of duty would work in the absence of having to prove individual acts of harassment. Furthermore, where there was sufficient evidence to support an individual claim as well as a breach of duty we would have concerns that it could lead to a double penalty for employers.

Question 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?

No.

We are unclear as to what a case for breach of the duty would look like where there was no individual actually claiming harassment and what the relevant test and standard of proof would be.

A penalty of 13 weeks' pay in an individual case is unlikely to be much of a deterrent if the only individuals who can claim are those who have a free-standing individual claim. If all employees are eligible to bring a claim irrespective of whether or not they have individual grounds for a claim, then the proposed penalty may be grossly excessive (think of the liability for an employer with 20,000 employees or more). We would suggest a model closer to the approach used where there has been a breach of the Acas Code of Practice on Disciplinary and Grievance Procedures in unfair dismissal cases where Tribunals have the power to increase a compensatory award by up to 25% for a party's unreasonable failure to comply with the Code.

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

See answers to questions 1-4 above.

For larger employers, we welcome the proposal to introduce the requirement to appoint a board director with responsibility for prevention of harassment. This could be backed up with a duty to publish an organisation's policy on prevention and resolution of harassment and the steps taken to comply with the Code of Practice.

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

Yes.

In our experience the previous provisions (the so called 'three-strikes' rule) were not at all effective in providing employees and workers protection from third party harassment. It is not clear that reducing the number of 'strikes' to one would in any way improve that protection. The same difficulty would arise in deciding disputes about whether the employer knew or ought reasonably to have known about the incident of sexual harassment.

Even if an employer knew about one incident or, did not but ought reasonably to have known about it, it will still avoid liability if it had, at the time of the alleged harassment taken all reasonable steps to prevent it and to protect its employees and workers from the harassment.

The majority of those currently protected under the Equality Act are carrying out duties which will bring them into contact with third parties whether as customers, suppliers, service users or in some capacity. While it may not always seem reasonably likely that those for whom an employer is responsible will be subject to sexual harassment specifically (as opposed to other kinds of inappropriate behaviour not related to any particular protected characteristic), it must at least be a possibility. Employers already have an obligation to ensure a safe working environment, including one which is free from discrimination and harassment for employees as a matter of contract law. In all the circumstances, it seems to us that the best approach is to require an employer to take all reasonable steps to prevent third parties sexually harassing those protected under the Equality Act rather than introducing a requirement for there to be an incident to trigger liability.

That does of course leave the question of what will be regarded as 'reasonable steps' to prevent the possibility of harassment occurring. It is hoped that the proposed EHRC Code on this subject will provide the necessary clarity needed by employers, and should be drafted to provide relevant guidance to employers of all sizes.

Question 7. 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 actions of third parties will always be out of the hands of an employer to be a large extent. However, there are things that an employer could do to prevent any harassment from arising ranging from making public statements/notices that such behaviour will not be tolerated to training staff on the procedures for reporting any instances of it happening and providing support if it does. Some such measures will not be particularly onerous even for small employers. It is appreciated that prescribing the exact measures to be taken by an employer if it is to successfully rely on the defence may be challenging. We consider that this is however an important step given the reluctance of employers (and their advisers) to rely on the defence to date. Certainty is needed and, as outlined in the response to question 6 above, it is hoped that the proposed EHRC Code of Practice on this subject will be of assistance to employers seeking to rely on the defence.

Question 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.

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

No.

Question 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.

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

Yes.

Question 12. Is a three-month time limit sufficient for bringing an Equality Act claim to an Employment Tribunal?

No.

There is an understandable reluctance on the part of individuals who find themselves on the receiving end of discriminatory conduct to challenge that conduct, particularly where the discrimination involves actions by more senior members of staff within that organisation. Employees will often be fearful that making complaints of discrimination will result in damage to their careers. Given the potential implications for individuals in raising these issues, it is important that individuals have a sufficiently long period of time to reflect upon what has happened and to decide whether they wish to raise issues of concern with their employer on a formal or informal basis, before making a decision as to whether to raise proceedings. If the individual chooses to raise matters on a formal basis, it may take some time for that formal process to be concluded. The situation will often arise where an internal grievance procedure is still ongoing three months after the conduct giving rise to the complaint, particularly where there has been a delay in the submission of the grievance while the employee has sought advice or considered whether submission of a grievance is an option they wish to pursue. Although the employee enjoys protection from victimisation as a result of the Equality Act, this is very unlikely to remove the concern that raising proceedings will place the relationship with the employer under even greater strain.

Extending the time period for raising proceedings from three months to six months gives the individual concerned additional time within which to consider carefully whether raising proceedings is the most appropriate course of action and to fully explore alternative courses of action, whether they be formal or informal, before raising proceedings, in order to achieve a satisfactory resolution.

Question 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?

No.

To impose different time limits for different types of claim under the Equality Act could create very substantial difficulties both for claimants and respondents.

Although we recommend extending the current time limit for discrimination claims from three months to six months, we also consider it is extremely important that there is one single time limit within which all discrimination claims should be raised. We take this view for three reasons.

Firstly, discrimination claims are often very complex. It may not always be immediately apparent to a legally qualified adviser, let alone an unrepresented individual, as to what claims to raise. To introduce an additional complicating factor related to the time limit within which different types of discrimination claims have to be raised will undoubtedly make the tasks of both advisers and individuals who pursue claims without the benefit of advice or representation even more difficult.

Secondly, there will often be an element of overlap between claims. In the field of sex discrimination, an individual may wish to argue that less favourable treatment arose not only because of pregnancy or maternity, but as a result of direct discrimination on the grounds of sex. If these claims are subject to different time limits, the claims will almost certainly have to be submitted in accordance with the shortest time limit, thereby removing the benefit of having additional time to raise particular claims.

Thirdly, if there are different time limits and an individual has failed to submit a claim within the necessary time limit for a particular claim, there is a risk the individual will seek to pursue claims which may not be the most appropriate claims to pursue, but which are the only claims which are not time barred.

Question 14. If time limits are extended for Equality Act claims under the jurisdiction of the Employment Tribunal, what should the new limit be?

Six months.

Question 15. Are there any further interventions the Government should consider to address the problem of workplace sexual harassment?

None.



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