

## **Sexual Harassment in the Workplace: Consultation**

The Government is consulting on measures to improve legal protections against sexual harassment in the workplace. Despite longstanding legal provisions, recent reports, findings and the #metoo movement indicate that sexual harassment remains a worrying problem. The Government is therefore reviewing whether the laws work effectively or can be clarified and strengthened.

Details of the consultation are set out below including the consultation questions along with our comments. To assist us in our response we should be grateful if authorities could send us their views on the points and questions set out below. Please send your comments to [eru@local.gov.uk](mailto:eru@local.gov.uk) by 6 September 2019. Should authorities want to respond directly to the consultation the details of how to do so are on the consultation website and the closing date is 2 October 2019. We should be grateful if you would send us any such response, again to [eru@local.gov.uk](mailto:eru@local.gov.uk)

The current law There are several potential legal routes where sexual harassment is an issue. This depends to some extent on the severity of the case and impact on the individual and ranges, for example, from individual action in an employment tribunal (based on the provisions of the Equality Act or claims for constructive dismissal), through enforcement action by the Health and Safety Executive (based on health and safety legislation) to criminal prosecution by the police (under Protection from Harassment Act 1997, Sexual Offences Act 2003). This consultation focuses on the provisions of the Equality Act 2010.

### **The Equality Act**

The Equality Act makes it clear that sexual harassment 2010 in the workplace is against the law.

#### **Definition of sexual harassment**

Section 26 defines three types of harassment which are prohibited:

1. harassment related to age, disability, gender reassignment, race, religion or belief, sex, or sexual orientation which involves unwanted conduct that has the purpose or effect of violating the victim's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the victim.
2. sexual harassment, which is defined as unwanted conduct of a sexual nature that has the purpose or effect of violating an individual's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the victim.
3. treating someone less favourably than another because they have either submitted, or failed to submit, to sexual harassment or harassment related to sex or gender reassignment.

#### **Employer liability**

Section 40 prohibits employers from harassing their employees or job applicants. Under section 109 employers may be vicariously liable for acts of discrimination, harassment and victimisation carried out by their employees in the course of employment. The combined effect of these provisions means that an employer may be legally liable for sexual harassment carried out by their staff. This

employer liability applies regardless of whether or not they have approved, or are even aware of, their employees' actions.

However, section 109(4) specifies that employers have a legal defence if they can show that they took 'all reasonable steps' to prevent their employee from acting unlawfully.

### **Scope of the Equality Act's protections**

Workplace protections in the Equality Act apply to individuals who have an employment contract, an apprenticeship contract, or a contract to personally do work. This is a broader definition than that of an "employee" or "worker" for employment law purposes. Protections also apply to a variety of wider work relationships beyond employment, such as contract workers, police officers, partners, barristers and advocates, public office-holders and those seeking or undertaking vocational training. Protections do not currently extend to volunteers.

### **Enforcement of the Equality Act 2010**

The main way that the Equality Act is enforced is through individual legal action at employment tribunals (for workplace breaches) or a County Court (for all other breaches).

The Equality and Human Rights Commission ('EHRC') also has powers to investigate and ultimately intervene in situations in which it suspects that a person or organisation has committed an unlawful act. However, the EHRC's enforcement role is intended to be strategic, and it is not set up for high volumes of enforcement action.

The EHRC does not get involved in every issue or dispute, however. It uses its legal or enforcement powers when it is the best way to achieve change, such as:

- to clarify the law, so people and organisations have a clearer understanding of their rights and duties;
- to highlight priority issues and force these back to the top of the agenda; and
- to challenge policies or practices that cause significant disadvantage, sometimes across a whole industry or sector.

### **The proposals**

The proposals are broadly categorised under 5 themes:

- Preventing sexual harassment in the workplace
- Third party harassment
- Volunteers and interns
- Employment tribunal time limits
- Other options

### **Preventing sexual harassment in the workplace**

Employers are liable for harassment carried out by their employees at work, unless they have taken 'all reasonable steps' to prevent it. However, despite the fact that there is such a clear legal position on this issue there is significant evidence to suggest that workplace sexual harassment remains

widespread. This suggests that employers are not taking adequate steps to prevent harassment from happening. Potential explanations for this are that:

- employers are unaware of their legal responsibility;
- employers are indifferent to the risk of failing to comply with the law; and/or
- employers do not know how to prevent sexual harassment effectively.

### **Measures to support compliance**

Work is underway to introduce a statutory Code of Practice on sexual harassment and harassment at work, which will further clarify the law on this matter. The EHRC will first release technical guidance on this topic later this year, with plans for it to form the basis of a statutory Code of Practice to be laid in Parliament following the outcome of this consultation. The EHRC will consult on the Code of Practice before it is laid.

A statutory code will help employers to better understand what is expected of them by law and, in particular, what might be considered 'all reasonable steps' to prevent harassment. This will be an important clarification. Evidence to the 2018 Women and Equalities Select Committee (WESC) inquiry suggested that in sexual harassment cases employers very rarely feel able to use the defence of having taken 'all reasonable steps' to prevent the harassment, in part because lawyers feel uncertain about advising their client on this, and in part because employers themselves feel that they do not know what 'all reasonable steps' entails. The statutory code should therefore support employers to ensure they have the right preventative measures in place.

The Government is also undertaking research to identify the most effective workplace interventions to prevent sexual harassment, and will make these lessons widely available to employers in order to support best practice.

The Government believes that the introduction of a statutory Code of Practice, together with an information campaign for employers, will be most effective to increase employers' prevention efforts.

### **A preventative duty on employers**

The Government is considering the introduction of a 'preventative duty'. If introduced, this new duty would not require employers to take any practical steps they are not already expected to take. The rationale for a new duty is that the shift from employer liability after an incident of harassment, to a proactive duty before any unlawful conduct has taken place, would make it clearer to employers that they must play a role in prevention and encourage them to make more effort towards it.

The duty has the potential to create change in two ways: creating a sufficiently high risk of enforcement to incentivise prevention; and/or sending a signal to employers that they must prioritise prevention.

Introducing a new duty would require a change to primary legislation. For the Government to take such a significant step it would need compelling evidence that the change would be effective.

The new duty might simply mirror the concepts in the Equality Act and 'require' an employer to take all reasonable steps to prevent harassment. This would have the advantage of being a relatively familiar concept for employers and tribunals.

In this respect it is worth noting that the EHRC's existing statutory Code of Practice on employment already provides guidance on what might be considered to constitute all reasonable steps, stating

‘reasonable steps might include: implementing an equality policy; ensuring workers are aware of the policy; providing equal opportunities training; reviewing the equality policy as appropriate; and dealing effectively with employee complaints’. However, further clarity will be provided by the EHRC’s new statutory Code of Practice on sexual harassment and harassment at work.

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

- Yes
- No
- Don’t Know

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

**LGA comments** We anticipate that local authorities will agree with the proposed approach and we will respond accordingly unless told otherwise. In any event, many authorities will already have in place measures to prevent harassment so the introduction of the duty is unlikely to mean that authorities will need to make any substantial changes to their practices.

If such a duty were introduced consideration needs to be given to how it would be enforced.

The EHRC could enforce, however, as is the situation now it does not have the resources to get involved in many cases. Therefore there is the further possibility that it could be enforced by individuals. Whatever the mode of enforcement, there remains the open question as to whether an actual act of harassment needs to have taken place first. In particular could an individual bring a claim on grounds that the employer had not taken sufficient steps alone, regardless of the fact that so far there had been no case of actual harassment.

Breach of the duty would not necessarily equate to financial loss with corresponding compensation. However, punitive penalties could be applied to the employer. This might be based on other models such as failure to consult in the event of collective redundancies or TUPE transfers which provide for a maximum of 13 weeks’ pay.

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

- Yes
- No
- Don’t know

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

**LGA comments** As set out above, local authorities will already be taking steps to prevent harassment. Nevertheless we anticipate that a new duty may prompt authorities to refresh their practices, so on balance we intend to respond ‘yes’ to this question, unless authorities tell us otherwise.

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

- Yes
- No
- Don't know

If 'no', please explain your answer, drawing on any evidence you have.

**LGA comments** We anticipate that authorities will agree with this approach, bearing in mind the EHRC's limited resources. Please let us know though if you consider otherwise.

**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?

- Yes
- No
- Don't Know

If 'no', can you suggest any alternatives?

**LGA comments** Again we anticipate that authorities will agree with this approach, provided there is clear guidance setting out how the award should be applied, including examples of when awards at the lower end of the scale should be applied. Please let us know though if you consider otherwise.

There may be alternatives or additional options for preventing sexual harassment such as introducing requirements on employers to publish or report on policies, rates of harassment complaints or numbers of staff leaving the organisation citing problems with harassment or wider culture issues.

**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? Please provide evidence to support your view.

**LGA comments** We would welcome local authorities' suggestions on this.

### **Third party harassment**

The law is clear that employers can be held vicariously liable for harassment carried out by their employees. However, employer liability for failing to prevent the harassment of their staff by third parties such as customers or clients is less clear cut.

The Government is clear that employers have a responsibility to take reasonable steps to protect their staff from third party harassment where they know, or ought to know, that their staff are at risk. But the legal landscape on this issue is complex, and it acknowledges the arguments of those who call for it to be simplified.

### **Existing law on third party harassment**

Originally section 40 of the Equality Act provided that employers were liable for third party harassment in circumstances where an employee had been harassed on two prior occasions, the

employer was aware of it and had failed to take reasonably practical steps to prevent the harassment. However these provisions were repealed in 2013, as the Government considered them confusing and unnecessary.

It was thought that the Equality Act continued to provide protection under section 26, with the benefit that this did not require 'three strikes'. However, case law has ruled that since the repeal of parts of section 40 in 2013, the Equality Act does not provide protection from third party harassment (unless failure to act on the employer's part following a complaint of harassment is related to an employee's protected characteristics).

While there are other routes, other than in extreme cases resulting in demonstrable personal injury or where a criminal offence has been committed, these would not provide effective ways to bring harassment claims.

The WESC and the EHRC have called on the Government to strengthen explicit legal protections against third party harassment.

For new protections to be introduced into the Equality Act decisions need to be taken on the incidence of harassment, the knowledge of the event and the possible defence.

The Government accepts that the previous 'three strikes' approach was flawed. The Fawcett society suggests a single incident should be sufficient whereas the EHRC say it is possible for employers to be aware that harassment is likely to occur, without a worker having to demonstrate that it has already happened before.

If at least one incident of harassment were required to trigger liability, there is a separate question of whether an employer should be required to 'know' that the incident took place, or if it should be sufficient that they 'ought to know'? The formulation 'ought to know' has the benefit that it is more likely to avoid cases getting fixated on establishing whether an employer was told or not, but it introduces an additional element of subjectivity in establishing in what circumstances it can be considered that an employer 'ought to know' about an incident.

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

- Yes
- No
- Don't Know

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

**LGA comments** We would welcome local authorities' views on this.

#### **Existing law continued.**

Section 109 of the Equality Act allows employers to use the defence of having taken 'all reasonable steps' to prevent harassment from happening in any legal proceedings against them. The Government proposes that the same defence should apply if provisions for third party harassment are introduced into the Equality Act.

**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

- No
- Don't Know

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

**LGA comments** We anticipate that authorities will agree with this proposal, as it is only reasonable that the employer should be able to rely on such a defence. Otherwise they could be liable where it was not reasonable for them to be so.

## **Volunteers and interns**

Workplace protections against discrimination, harassment and victimisation in the Equality Act are explicitly linked to employment status and as such may not cover volunteers, interns or those on work experience.

The Government is keen to get protections right for these groups as the power dynamics often involved in sexual harassment means they can be particularly vulnerable. They may also be less aware of their rights and be aware that their position is more precarious than an employee.

The Government is considering whether to extend all of the provisions in Part 5 of the Equality Act (i.e. not just sexual harassment) to volunteers and interns on the basis that there appears to be no strong reason for sexual harassment to be treated differently.

**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
- No
- Don't Know

If 'no', please explain your answer, drawing on any evidence you have.

**LGA comments** We anticipate that local authorities will agree with this, as it would provide protections against all the unlawful behaviours. Please let us know though if you consider otherwise.

## **Interns**

The Government considers that many interns would likely satisfy the employment requirements and fall within section 39 of the Equality Act, as they would usually have some form of contract and should receive at least the National Minimum Wage. However, there is no legal definition of an intern, and the common view of what constitutes an internship (i.e. personally performing work or services for the primary purpose of obtaining access to practical work experience) is not reliant on meeting these criteria.

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

- Yes
- No
- Don't know

If 'yes', how could this group be clearly captured in law?

**LGA comments** We would welcome local authorities' responses on this.

## **Volunteers**

Given the wide range of types of volunteering, from informal, ad hoc arrangements such as helping out at a school fundraising event to a regular, formalised engagement such as volunteering for an emergency service or providing administrative support for a charity, there are practical difficulties in implementing blanket provisions to cover all volunteers. Formalised volunteering arrangements might be more easily captured by legal protections, but for less formal arrangements there is a complicated balance to be struck to maintain the informality of the arrangement while ensuring the individual is appropriately protected.

Large organisations, which rely on the support of volunteers, would already be within scope of the Equality Act's protections with regard to their employed staff. Therefore extending these protections to their volunteers would seem proportionate, given that they would simply need to extend the scope of existing arrangements. Likewise, it seems appropriate that the Equality Act should apply to people volunteering in a more formal capacity that closely mirrors a workplace relationship.

However, extending protections to cover people carrying out ad hoc, informal volunteering, such as helping out at a school event, and/or those supporting small, volunteer-led organisations, such as a local youth group, could create a disproportionate risk and difficulties for the organisation.

A volunteer-led organisation might not have the resources or expertise to meet the legislative requirements. The cost of putting in place procedures for monitoring and dealing with complaints, or formalising processes for selecting volunteers to avoid any accusation of discrimination, might be disproportionately high for a small organisation. There is also the financial risk attached to potential legal action, both if it materialises but also potentially from insurance costs.

The Government does not want to do anything which has the effect of reducing volunteering or requiring unnecessary red tape but does wish to ensure that volunteers are protected from harassment, discrimination and victimisation.

There are a number of ways in which an expansion of the Equality Act protections to include some, but not all, volunteers may be achieved. For example, while there is not a single statutory definition of 'volunteer' or 'intern', some helpful distinctions exist in the National Minimum Wage Act 1998 between "voluntary workers" (i.e. those who work for charities, voluntary organisations, associated fund-raising bodies and statutory bodies) and other types of volunteers. Alternatively, any expansion could include a carve-out for a 'small employer' (for example, an employer who qualifies for Small Employers' Relief), or an entirely volunteer-led organisation.

**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?

- Yes
- No
- Don't Know

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

**LGA comments** We anticipate that local authorities will agree that the negative consequences set out above could apply for the types of organisations identified, but we would welcome any comments from authorities.

**Question 11** 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?

**LGA comments** We would welcome authorities' view on this, and in particular on whether volunteers in large employers such as local authorities should be covered, but not those in small and volunteer-led organisations.

### **Tribunal time limits**

Other than some exceptions such as equal pay claims, the general standard for bringing claims in the employment tribunal is three months from the date of the act complained of. The Government is considering whether three months is too short a time to bring an Equality Act claim. It therefore is looking not just at harassment claims but all Equality Act claims.

The logic for this is based on the premise that such incidents can be particularly traumatic and take longer to come to terms with. Further it can take longer to identify the treatment in question as an unlawful act. Also where discrimination is linked to maternity or pregnancy this could occur at a time when it may be particularly difficult to organise a legal case due to health and childcare issues. Another factor is that the Equality Act already has a longer six month time limit for bringing other claims in relation to goods and services.

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

- Yes
- No

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

**LGA comments** We would welcome authorities' comments on this, based on their experience of dealing with potential and actual claims.

**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?

- Yes
- No

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

**LGA comments** Although there is some basis for treating certain claims differently, on balance authorities may consider that one time limit for all Equality Act claims would be

simpler and easier for all to understand. We would welcome views on this though.

### **Tribunal time limits cont.**

The consultation also points out the following factors which are relevant to whether Equality Act time limits should be extended. First of all it notes that an employment tribunal is also able to extend Equality Act limits by any period of time that a judge considers is 'just and equitable'. In many cases judges grant an extension but it is possible that many workers are not aware of this possibility.

There are also considerations in relation to the interaction with the Acas early conciliation scheme and the ability to stay cases. Partly the issue is that employees are not fully aware of their options and may feel pressurised to pursue claims before concluding internal procedures.

This consultation focusses on the Equality Act enforcement provisions although independently there are other pressures to extend other employment law tribunal claim time limits. The Government states that any differences in time limits for different types of claim might increase confusion although if this change were made and that were the case it would seek to mitigate the risk through clear guidance.

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

- 6 months; or
- more than 6 months

**LGA comments** We anticipate that local authorities will consider that a 6-month time limit strikes the right balance between an individual's opportunity to bring a claim and certainty for the employer. Please let us know though if you consider otherwise.

### **Other options**

The final part of the consultation indicates that the Government is taking other steps in relation to confidentiality clauses to prevent incidents being covered up, although it accepts that the problem of sexual harassment cannot be solved by the law alone. It continues to research the issue and is seeking to understand what workplace interventions are effective in preventing sexual harassment.

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

Please provide evidence to support your proposal.

**LGA comments** We would welcome any suggestions on this that authorities may have.