



Scottish Women's Rights Centre

Response to the UK Government's Consultation on Sexual Harassment in the Workplace 2 October 2019

The Scottish Women's Rights Centre (SWRC) is a unique collaborative project that provides free legal information, advice and representation to women affected by violence and abuse in Scotland. The SWRC exists because of abuses of power and because a gap persists between women's experience of violence and abuse and their access to justice.

The SWRC strives to fill these gaps by working with specialist solicitors and experienced advocacy workers. Informed by our direct work with victims/survivors of violence and abuse, we seek to influence policy, research and training to improve processes and systems, and ultimately to improve the outcomes for women who have experienced gender based violence.

In August 2019 the SWRC launched a specialist sexual harassment service funded by the Justice and Equality Fund to support women who have experienced sexual harassment at work, in further education, and online.

Pre-consultation questions

- 1. Name:**
Sarah Mennie
- 2. Job Title:**
Solicitor
- 3. Are you responding on behalf of an organisation or as an individual?**
An organisation
- 4. If you are responding on behalf of an organisation, what is the name of the organisation?**
Scottish Women's Rights Centre
- 5. Are you happy for us to publish your organisation's response to this consultation in full?**

Yes

6. Is your organisation responding as an employer, or as a representative body?

Representative body

Consultation questions

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

[Yes/No/Don't know]

Yes.

The Scottish Women's Rights Centre considers that a preventative duty could encourage employers to work proactively to prevent harassment (as well as discrimination and victimisation) and supports its introduction. We agree that the preventative duty should mirror the existing obligations under the Equality Act (2010). Limiting the duty to the existing obligations will be the simplest way to introduce the new proactive duty.

However, we disagree somewhat with the government's statement that the concept of "all reasonable steps" is "well-established" and that this model should "decrease uncertainty" for employers.

Under the current regime, the question of what amounts to "all reasonable steps" varies depending upon the size and resources of an employer and is something that is ultimately a question for a Tribunal taking into account all of the circumstances of the individual case. We understand that any preventative duty will retain this variability, and given the proposal to move away from employer liability *after* an incident of harassment to a proactive duty *in advance* of unlawful conduct we consider that greater clarity is needed for employers. We note reference to the new statutory Code of Practice from the EHRC and submit that this would need to set out firmer parameters for employers to work within than those that currently exist.

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

[Yes/No/Don't know]

Yes.

It is clear that employers are not prioritising prevention of harassment and there appears to be no real incentive for employers to take any preventative steps under

current legislation. Although section 109 (4) offers a defence to employers, we know that this defence is rarely relied upon. It also requires an individual to bring a claim for harassment before an employer's actions will be examined. We know from a large number of surveys, including the Trade Unions Congress 2016 survey "Still just a bit of banter?", that the vast majority of people do not report incidents of harassment at work (the TUC survey found that 4 out of 5 women who had experienced sexual harassment at work did not report this). By introducing a duty to prevent harassment employers will be required to take preventative action or face investigation by EHRC and possible financial penalties.

Consideration should of course be given to the size and resources of organisations when considering the preventative duty so that there is not an unnecessary burden on small businesses.

Q3. 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.

Yes.

The EHRC should have powers to investigate and enforce any preventative duty. However, the limited resources of the EHRC must be recognised and therefore it would be appropriate for individuals to also have the right to enforce the preventative duty. It is appropriate for individuals to have the right to enforce the preventative duty, as distinguished from the EHRC's sole power to enforce the public sector equality duty, as they are more likely to be directly impacted by their employer's failure to comply with the preventative duty.

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/No/Don't know]. If 'no', can you suggest any alternatives?

No.

SWRC considers that individuals should have the right to bring a self-standing claim for failure to comply with the duty to prevent harassment; however, the proposal to allow compensation to mirror the existing TUPE provisions would not be appropriate. By its very nature the TUPE Regulations apply in very particular and defined circumstances relating to the transfer of businesses. The duty to prevent harassment is an ongoing duty that will apply to organisations of all sizes in a number of different ways. It is considerably more subjective than a question as to whether an organisation has consulted with employees about a specific issue (the TUPE

transfer) within a relatively defined timeframe. The duty to prevent harassment will be ongoing and compliance with the duty will vary depending upon the size and resources of an employer.

It would be more appropriate to consider an uplift on compensation as part of a claim for harassment in line with the uplift afforded for failure to follow ACAS Codes of Practice on discipline and grievance procedures. An uplift of up to 25% increase would seem appropriate. This could then be determined on a scaled basis relative to what steps the employer has taken. For example, a 25% uplift would be afforded where no steps to comply with the preventative duty have been taken. A 10% uplift could be awarded where most but not all steps have been taken.

If an individual seeks to raise a self-standing claim for failure to comply with the duty to prevent harassment without a claim of harassment as well, it is not clear that there would be any basis to make an award of compensation. Where there is no individual claim of harassment it would be more appropriate for the EHRC to have the power to levy a fine.

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

Public reporting about steps taken to prevent harassment would be welcome if the preventative duty is not established. However, this will not have the same teeth as a duty to prevent given that it does not reflect how organisations deal with complaints in practice. SWRC believes that the preventative duty, alongside the proposed enforcement measures, is the most appropriate way to ensure that employers take action to prevent sexual harassment.

We do not consider that a public reporting duty would be necessary where the preventative duty is introduced. A public reporting duty serves the purpose of encouraging employers to introduce harassment policies but the preventative duty will already require employers to do this.

We have concerns about any proposals that require organisations to report on the number of complaints they have received as this may result in employers discouraging employees from raising concerns and complaints. It is important that employers encourage employees to raise complaints as we know that the majority of incidents of sexual harassment go unreported.

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

[Yes/No/Don't know]

Don't know.

It is not clear in what context it is proposed that an employee would bring a claim without an incident having taken place, or rather what compensation they may hope to gain.

Where an incident of harassment has occurred at the hands of a third party, employers should be liable where they have not taken steps to prevent harassment that was foreseeable. We support the proposal to reintroduce a specific liability for third party harassment and agree that the "three-strike" rule should not be reintroduced as part of this.

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/No/Don't know]

Yes.

It would be inappropriate to hold employers to a higher level of liability for third party harassment than any other kind of harassment.

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/No/Don't Know]. If 'no', please explain your answer.

Yes.

Volunteers, and many interns—for example those who are in unpaid internships—, currently have no protection under the Equality Act and we believe that they should be protected. We consider that this protection should be applied to sexual harassment as well as harassment, discrimination and victimisation.

Q9. 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?

Yes.

A large number of interns within the charitable sector are unpaid. They receive only remuneration for expenses incurred. They do not, therefore, meet the broader definition of a worker for the purposes of attracting protection under the Equality Act.

The definition should be broadened to include interns and volunteers who are engaged on any formal basis, for example where there is a volunteer agreement and where the individual is required to attend on any regular basis. This definition should also include anyone on work experience or work shadowing in a business.

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]

Don't Know.

We agree that smaller volunteer-led organisations may not have the resources to put in place procedures for monitoring and dealing with complaints, or formalising processes for selecting volunteers. However, rather than restricting the protection of volunteers, we believe that this issue would be best addressed when giving consideration to the subjective interpretation of what was reasonable for those organisations to do, taking account of their small size and limited resources.

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?

Yes.

All volunteers should be protected from harassment and discrimination.

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

[Yes/No]

No.

The SWRC believes that the 3-month time limit for bringing Equality Act claims before an Employment Tribunal is wholly insufficient. Sexual harassment, harassment, victimisation and discrimination of any kind are traumatic experiences. It can be difficult for anyone who has experienced these types of behaviour to define what has happened to them and articulate this timeously. Often the individual's

primary focus is on how to cope with the trauma rather than seeking redress for what has happened to them.

We also know that those most vulnerable to harassment and discrimination face financial barriers when accessing legal advice. Although the tribunal has the power to extend time where it is just and equitable, we have spoken with women who were unaware of the Tribunal's powers to extend time and thus by the time they were able to contemplate raising a court action believed that they were unable to do so as the short 3-month time frame had passed.

Further barriers which victims/survivors of harassment and discrimination must overcome include concerns about job security and fear of reprisals from the perpetrator. All of these can lead to delays in reporting and seeking support and advice about harassment and discrimination.

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]

No.

All claims under the Equality Act should have the same time limit and this time limit should be extended. Individuals can experience trauma from any type of harassment or discrimination and therefore all possible claims should be extended.

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]

The SWRC supports an increase to the time limits for Equality Act claims brought before the Employment Tribunal. We believe that a minimum of 6 months is necessary and note that this would be in line with time limits for other, non-work-related claims under the Equality Act. We believe that there is also a case to be made for extending time limits to more than 6 months due to the barriers faced by victims/survivors of harassment and discrimination, noted above. We would suggest that a 1 year time limit would be appropriate. This is still shorter than the time limits for personal injury claims and mirrors the time limits for claims brought under the Human Rights Act 1998. The 1 year time limit should apply to all claims under the Equality Act.

It will be vital to retain the existing discretion to extend time limits where it is just and equitable to do so.

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.

We know that many people struggle to define sexual harassment as they experience it and also that many people are not aware of their employment rights. We will continue to develop legal guides about sexual harassment and legal options. However, the government should consider a public education campaign about sexual harassment and what steps employers should be taking to prevent sexual harassment in the workplace. The new preventative duty will need to be clear for both individuals and employers and this could be the centre of this education campaign. It would also be a valuable opportunity to address the issue more broadly to help inform discussions about sexual harassment and provide information about what steps employees can take if they do experience sexual harassment at work. This should include information about: time limits, as well as grounds for extending time; best practice for dealing with complaints internally; and the tribunal process.