



Bar Council response to the Government Equalities' Office Sexual Harassment in the Workplace Consultation Paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Government Equalities' Office consultation paper on Sexual Harassment in the Workplace.¹
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

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

4. The introduction of a preventative duty would be welcomed. Paragraph 1.5 of the consultation paper refers to the existing 'employers' defence' in section 109(4) of the Equality Act and the fact that it is rarely used by respondents. In our experience the types of measures that an employment tribunal would consider to constitute 'all reasonable steps' does not accord with what the majority of respondent employers understand as being reasonable, even employers that consider themselves quite 'progressive' in terms of instituting diversity measures in the workplace.

¹ [Government Equalities Offices consultation on sexual harassment in the workplace](#)

5. Thus, although maintaining consistency by mirroring a new statutory duty on existing provisions in the Equality Act will make matters straightforward for advisers and tribunals, it would not necessarily mean that employers will easily recognise what they have to do under the proposed duty (see response to Q2 below) as is envisaged in paragraph 1.13 of the consultation document.

6. A new EHRC statutory Code of Practice on sexual harassment would be welcomed and would give greater clarity to employers as to what is expected of them in relation to any new duty.

7. It is noted that the current priority (and subject of this consultation) is sexual harassment. However, given that the Equality Act was designed as a consolidating act to bring together legislation and regulations that were introduced piecemeal from 1974, it would seem that this consultation process, proposing a significant new duty in relation to one type of discrimination, provides a good opportunity to consider whether the other protected characteristics should also be included within the scope of that duty or a similar one.

8. Similarly, it would assist employers, employees, advisers and courts if mention could be made in the new Code of Practice of the extent to which that Code can (or should be) cross applied in relation to harassment on the grounds of other protected characteristics under s.26(1) of the EqA.

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

9. Yes, in our experience most employers are willing to comply with such duties if the enforcement provisions (and the benefits) are properly explained i.e. with funding for full publicity on the introduction of the duty and with information that is easily accessible. It is far more likely that employers will take action if the sanctions for failure to adhere to the duty are clear and are consistently and visibly enforced. We also welcome the inclusion of the EHRC on the list of prescribed whistleblowing bodies.

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

10. Yes. Enforcement by the EHRC alone – given its lack of resources to bring litigation – would not serve to ensure widespread compliance.

11. On the question of whether an act of harassment needs to have allegedly taken place prior to a claim being brought for a breach of the duty, we can see the arguments

on both sides. On balance, given the current poor state of awareness on the part of employers about their existing duties (and what constitutes a good defence under s.109(3)) we think that permitting claims to be brought without an allegation of harassment may cause problems. If the entire workforce of a small company with e.g. 20 employees were to make an application that the employer failed to comply with the duty, but with no act of harassment having taken place, the employer would no doubt find it crippling to pay up to 25% of its annual wage bill to the claimants. This is perhaps an exaggeration, but one can see that the remedy for a breach of the duty without any associated act of harassment would need to be carefully thought out.

12. Breach of the new duty coupled with an allegation of sexual harassment (with an additional award) is likely to be a powerful incentive for employers to make sure that appropriate measures are introduced.

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?

13. Yes, it is agreed that this is an appropriate measure. It should be provided that reductions to an award of 13 weeks' pay will be made to reflect the extent to which the employer had in fact complied with the duty. This may not be appropriate if the allegation of breach of duty is not accompanied by an allegation of harassment, or if the harassment is not proven.

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

14. The transparency measures suggested may well be effective and should be considered further. Certainly, the requirement to publish prevention and resolution measures would provide a simple annual reminder to employers of the duty.

15. The reporting of instances of harassment is a more complex issue. This response has been formulated by specialist practitioners in the field of discrimination law who are well aware of the many instances in which allegations of harassment are made but are nevertheless not successful, following what is usually a careful and sympathetic hearing by a specialist tribunal. As noted above, most employers do not even rely upon the statutory defence, and yet harassment claims have a relatively high failure rate. Requiring the disclosure simply of complaints made (or complaints of the same in exit interviews) could therefore result in a distorted picture of an employers' overall attitude and commitment to eradicating harassment.

16. A solution may be to only report instances where tribunals have made findings that the employer is liable for harassment, with provision for the employer to elaborate on steps they have taken in the wake of the finding.

17. It is within the knowledge of the writers of this response that the reasons why an employer may choose to settle a claim of harassment are many and varied, and often do not necessarily reflect a view on the part of an employer (or advice given) that the claim has reasonable prospects of success. Requiring publication of the number of settlement agreements reached where allegations of harassment have been made would again, therefore not necessarily accurately represent an employer's attitude and commitment to eradicating harassment.

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

18. Yes. However, there should be a requirement of some knowledge of the potential risk in advance.

19. A good example would be someone who works on the shop floor of the supermarket and comes into regular contact with the public. That employer should be required to take all reasonable steps to stop third party sexual harassment of its staff. An employer who does that would not be liable.

20. We would pause to note that we do not agree with the statements contained at paragraphs 2.6 and 2.7 of the consultation. At the time s.40 Equality Act 2010 was repealed, it was known that this would reduce, if not eliminate protection in cases of third-party harassment. This point was made at the time. The reform was implemented under the guise of reducing the burden on employers.

Q7. Do you agree that the defence of having taken 'all reasonable steps' to prevent harassment should apply to cases of third-party harassment?

21. Yes.

22. Should the law be reformed, this may provide additional motivation for employers to take reasonable steps to protect their staff from third-party harassment, putting in place security measures, procedures and relevant training.

23. We would suggest that any reform of the law should be accompanied by an ACAS or EHRC Code of Practice detailing examples of what would constitute reasonable steps and how they should be implemented. It may be that steps in respect

of third-party harassment may differ slightly from steps in respect of harassment by employees.

Q8: Do you agree that sexual harassment should be treated the same as other unlawful behaviours under the Equality Act when considering protection for volunteers and interns?

24. Yes, although particular attention should be paid to making provision for small charities with perhaps only a few employees but that can only operate by using volunteers. So far as the proposed new duty described in Part 1 is concerned, it would help if there was some recognition that complying with the duty may have additional complications where the workforce is made up of volunteers, some of whom may not be cooperative when it comes to requiring attendance at training etc. It would be hoped that compulsion to attend such training prior to or as part of being engaged as a volunteer would not affect the individuals' status as a volunteer.

25. The provision of the charity safeguarding programme will be an invaluable tool for many small and medium sized charities who until now may currently struggle with ensuring that they are in conformance with the multiple duties around safeguarding.

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

26. 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?

27. Please see answer to question 8 above. As noted above, the problems may come when looking at the differences between the degree of control that employers have over volunteers as opposed to employees. This is not an issue when looking at the volunteer/intern as a victim of harassment by an employed individual or worker. However, when looking at the types of organisation referred to – charities; volunteer led organisations or businesses – the issue of how sufficient control can be exerted over the volunteer or intern to ensure they are aware of their duties and possible sanctions and do not harass other volunteers is problematic.

28. The liability of the employer in this situation would presumably be covered by an extension of s.109 EqA to cover acts of volunteers and interns, or as agents under s.110.

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

29. There should either be a modified liability/new duty for small charities staffed entirely or wholly by volunteers. As it is, many small charities or unincorporated associations depend for their existence on volunteers for whom no employers' liabilities accrue, save for safeguarding and health and safety. Insuring against these risks is relatively inexpensive. However, the costs of becoming embroiled in harassment litigation may well destroy smaller voluntary organisations. The costs of insuring against such risks may be more than many such organisations can afford. It is suggested that a two-tier duty and/or level of compliance may be appropriate. Although this would need further consideration of what size of organisation might be exempt, criteria such as turnover; numbers of employees and numbers of volunteers might be appropriate measures to use. All of this information is currently submitted in a charity's annual return.

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

30. In most cases, we consider that the three-month time limit is appropriate, taking into account the availability of an extension via the just and equitable regime, which is relatively liberal. There is also the ability to go back further where there is an ongoing discriminatory state of affairs. The law as it currently stands, generally works well to cover the many varied types of situations that can relate to all of the different claims that are available under the Equality Act.

31. We consider that there should be a different time limit in respect of pregnancy discrimination as there are additional factors to consider.

Q 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?

32. We consider that there is a case for having longer time limits (at least six months) in situations of pregnancy and maternity discrimination.

33. We would suggest that unlike other areas of employment law, there is a legitimate and recognisable issue that arises from the nature of the claim that is being made. An individual may be facing particular difficulties at this point in their life and the commencing of litigation may seem like one battle too many when they are juggling so many issues. With a longer time limit, the individual would be able to

focus on the merits of their claim rather than have to balance the decision to make a claim against their wellbeing.

34. We would suggest that there is a legitimate policy issue to be addressed, namely the unique factors that relate to pregnancy and maternity leave and the particular factors faced by women experiencing discrimination relating to their pregnancy or maternity leave.

35. The government is asked to consider the 2018 research by the Equality and Human Rights Commission² which indicates the potential scale of such discrimination. In contrast, the September 2018 statistics in respect of claims received “suffer a detriment/unfair dismissal-pregnancy”³ suggests that in one month, 120 claims were received in England, Wales & Scotland. This is obviously a complex issue and there will be more than one factor creating a barrier to a woman bringing such a claim. However, this is clearly a policy area in which there is a stark difference between the perception of discrimination and the enforcement of it and further consideration by the Law Commission of the effect of time limits on this disconnect is merited.

36. A similar analysis would apply to paternity leave and shared parental leave cases and also adoption leave.

37. We do not consider that it is necessary to alter the law in respect of time limits regarding cases of sexual harassment. The law as it presently stands works well and does not require reform. We do not consider that it would be appropriate to treat cases of sexual harassment differently to other types of harassment prohibited by the Equality Act.

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

38. We do not support a general extension. We would suggest that any reform is kept to a minimum. We consider that there is a distinction in cases of pregnancy discrimination due to specific reasons relating to the well-being of the mother to be/mother and to paternity, shared leave and adoption cases as well.

² <https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/pregnancy-and-maternity-discrimination-research-findings>

³ ET statistics Annex C

Bar Council⁴
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⁴ Prepared for the Bar Council by the Law Reform Committee