



Government
Equalities Office

Consultation on Sexual Harassment in the Workplace

Legal protections under the Equality Act 2010

This consultation begins on 11 July 2019
This consultation ends on 2 October 2019

About this consultation

Duration: From 11 July 2019 to 2 October 2019

Enquiries (including requests for the paper in an alternative format) to:

Bridget West
Government Equalities Office
Sanctuary Buildings
20, Great Smith Street
London
SW1P 3BT

Email: workplaceharassment@geo.gov.uk

How to respond:

A template for responses can be found at
<https://www.gov.uk/government/consultations/consultation-on-sexual-harassment-in-the-workplace>

Please send your response by 2 October to:

Bridget West
Government Equalities Office
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20, Great Smith Street
London
SW1P 3BT

Email: workplaceharassment@geo.gov.uk

This consultation can also be found and responded to online at:

<https://www.smartsurvey.co.uk/s/Workplaceharassment-technical/>

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Executive summary

The Government is committed to tackling sexual harassment in all its forms, both at work and outside it. Sexual harassment has been against the law for decades and strong, clear laws against it are set out in the Equality Act 2010. However, even though these laws are in place, recent reports, including those of the #metoo movement, have shown that there is still a real, worrying problem with sexual harassment.

We want everybody to feel safe at work so they can succeed and thrive; so we are looking at whether the laws on sexual harassment in the workplace are operating effectively.

At the moment employers can be legally held responsible under the Equality Act 2010 for the sexual harassment of their staff at work, if the harassment is carried out by a colleague, and the employer did not take all steps they could to prevent the harassment from happening. We think this law is strong and effective.

But questions have been raised over particular elements of sexual harassment law, and so we want to explore in more detail:

- what more could be done to ensure that employers *do* take all steps they can to prevent harassment from happening;
- whether employers need to be made explicitly responsible for protecting their staff from harassment by third parties, like customers and clients;
- whether, in practice, there are any interns who are not currently covered by equality protections in the workplace;
- what the right balance is between the flexibility of volunteering and equality protections for volunteers; and
- whether people are being denied access to justice because of the three-month time limits for bringing an equality claim to an Employment Tribunal.

Our consultation also welcomes thoughts on non-legislative solutions to the specific issues raised, and the wider problem of workplace sexual harassment.

This technical consultation focusses on the details of the legal system underpinning the topics outlined above. It is accompanied by a public consultation that invites the views and experiences of members of the public, to help the Government understand people's lived-reality of these issues. Anyone is welcome to contribute to either or both processes, but as a general rule we would recommend that members of the public engage with the public consultation, and that organisations respond to this technical consultation.

Introduction

1. The Government Equalities Office is launching this consultation in order to help us ensure the laws on sexual harassment in the workplace are operating effectively.
2. The Government strongly condemns sexual harassment – and harassment of any sort – in the workplace and outside it. The Equality Act 2010 (‘the Equality Act’) sets out strong, clear protections against sexual harassment in the workplace.
3. The revelations that have emerged since the start of the #metoo movement in 2017 have made it abundantly clear that this is a problem that persists at a startling rate in our society, despite the existence of these legal protections.
4. It is vital that we address this issue if we wish to see not only women, but anyone who finds themselves in a disadvantaged position, succeed and thrive in the workplace. Harassment is often a product of power imbalances, both within the workplace and across wider society. As such, it is not a problem that isolates itself to a single group. We want a society in which everyone can achieve their best at work - a culture of respect is essential to that vision of true workplace equality.
5. Sexual harassment in the workplace has been prohibited by law for decades, and yet this unacceptable conduct and its damaging effects continue. Against the background of wider societal inequalities, it is clear that the law is not the silver bullet which will fix this problem. Nevertheless, it is vital that we have a strong legal framework in place, which both establishes clear standards and expectations for individuals and employers alike and is responsive to challenges in a changing world.
6. In its 2018 report on sexual harassment in the workplace, the Women and Equalities Select Committee (‘WESC’) highlighted a number of concerns with the coverage of sexual harassment protections in the existing legislation. In response, the Government committed to consulting on the concerns raised with a view to ensuring that our legislation is operating effectively.
7. As set out in our response to the WESC in December 2018, this consultation explores:
 - the evidence for the introduction of a mandatory duty on employers to protect workers from harassment and victimisation in the workplace;
 - how best to strengthen and clarify the laws in relation to third party harassment;
 - whether interns are adequately protected by the Equality Act;
 - the evidence for extending the protections of the Equality Act to volunteers;
 - the evidence for extending Employment Tribunal time limits in the Equality Act from three months.
8. Our response also set out plans to consult on non-disclosure agreements (NDAs). This consultation was published by the Department for Business, Energy and Industrial Strategy (BEIS) in February 2019, and looked beyond the use of NDAs and wider confidentiality clauses in sexual harassment cases, to consider the system as a

whole. The consultation has now closed and a response will be published in due course.

9. Although this document primarily focuses on sexual harassment, it is important to remember that harassment related to any protected characteristic (apart from pregnancy and maternity, and marriage and civil partnership) is also prohibited under the Equality Act, and the options we discuss in this document would apply equally to all forms of harassment. Protections against harassment are also closely linked to the Equality Act's protections against discrimination and victimisation, and so where appropriate the consultation covers all three protections, to maintain a consistent approach.
10. There are a number of pieces of legislation that sit alongside the Equality Act to make up the full picture of legal protections that apply to sexual harassment in the workplace. In this consultation, we have sought to take account of the full legal landscape in order to ensure that proposals result in a clear and coherent legal framework.
11. Finally, despite its focus on the law, this consultation encourages and welcomes views on non-legislative interventions to prevent sexual harassment before it happens or, where it has occurred, to stop it from happening again. While the role of the law is important – and people must have access to justice where it has been broken – we must first and foremost seek solutions that prioritise prevention.

Context: the current legal landscape

The Equality Act 2010

12. The Equality Act, which applies in Great Britain, makes it clear that sexual harassment in the workplace is against the law.

Definition of sexual harassment

13. Section 26 defines three types of harassment, which are prohibited by law.
14. The first type is 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.
15. The second type is 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.
16. The third type prohibits 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

17. 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.
18. 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

19. 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

20. 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).
21. 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. As the EHRC explains on its website:

We do not get involved in every issue or dispute, however. We only use our 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*
- *to challenge policies or practices that cause significant disadvantage, sometimes across a whole industry or sector*

To do this, we use the courts and tribunals to secure binding, positive judgments that reinforce, strengthen or expand people's rights.

By using our powers in this way, our legal actions secure widespread and lasting benefits, positively influencing the everyday experiences of millions of individuals.

Health and Safety legislation

22. Under the Health and Safety at Work etc. Act 1974, employers have a general duty to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all their employees, and to protect people other than employees – including volunteers, interns and members of the public – from risks to their health and safety arising out of, or in connection with, their work.
23. The Management of Health and Safety at Work Regulations 1999 also require employers to undertake a "suitable and sufficient" assessment of the health and safety risks that employees are exposed to at work, and to implement appropriate preventative measures if any are identified; these risks could include harassment in certain circumstances.
24. The Health and Safety Act is predominantly enforced by the Health and Safety Executive. However, individuals may be able to bring harassment claims under Health and Safety legislation in cases where personal injury has occurred.

Protection from Harassment Act 1997

25. The Protection from Harassment Act 1997 (PHA) provides additional legal protection against harassment. The protections are not workplace specific and state that a person must not pursue a course of conduct which "amounts to harassment of another" and which "he knows or ought to know" amounts to such harassment. Harassment is not defined within the PHA, but it is specified that it includes verbal

harassment and behaviours that cause a person alarm or distress. A “course of conduct” is defined as conduct on at least two occasions.

26. There are two enforcement options under the PHA for taking action against the harasser – a claim in civil proceedings, or making a report to the police, which could lead to a criminal penalty. Employers can be held vicariously liable for acts of harassment carried out by one of their employees or agents during the course of their employment. In this situation, an employer can be pursued for damages via a civil claim.

Sexual Offences Act 2003 and other criminal legislation

27. Behaviours that amount to sexual assault or rape are covered by the Sexual Offences Act 2003. Other relevant offences are captured in the Criminal Justice and Courts Act 2015.
28. If these behaviours take place in the workplace, a criminal prosecution may be taken against a harasser and, in parallel, action may be taken against the employer for failing to comply with harassment protections in the Equality Act.

Constructive dismissal

29. If an employee suffers any form of harassment, this may constitute a breach of the implied term of trust and confidence in the employment contract. An employee may then choose to resign their employment and pursue legal action on grounds of constructive dismissal in an Employment Tribunal.

Common law duty of care/breach of implied term of trust and confidence

30. Employers are required to take reasonable care of the safety of their employees, and to provide them with a suitable working environment. This includes taking reasonable steps to protect them from reasonably foreseeable physical or psychological injury. Some forms of workplace sexual harassment may result in either a physical injury or a recognisable psychiatric injury.
31. A failure to take this reasonable care can result in a personal injury claim; these are litigated in the County Courts and the High Court (depending on the value of the claim), where the unsuccessful party will usually bear the costs of the litigation.

The proposals

1) Preventing sexual harassment in the workplace

- 1.1 As outlined in the above section, the Equality Act sets out strong and clear protections against 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.
- 1.2 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; that they are indifferent to the risk of failing to comply with the law; or that they do not know how to prevent sexual harassment effectively.
- 1.3 Through this consultation the Government is interested in seeking views on how we can ensure the law in this area is better respected and, in particular, how employers can be made to prioritise the prevention of sexual harassment.

Planned and existing measures to support compliance with the law

- 1.4 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.
- 1.5 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 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.¹ The statutory code should therefore support employers to ensure they have the right preventative measures in place.
- 1.6 The Government is also undertaking research to identify the most effective workplace interventions to prevent sexual harassment, and we will make these lessons widely available to employers in order to support best practice.

¹ Evidence given by Joanna Blackburn, Q481

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/sexual-harassment-in-the-workplace/oral/84706.pdf>

- 1.7 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

- 1.8 It has been suggested that in order to make employers take their legal responsibilities seriously, a new mandatory duty should be introduced that requires employers to protect workers from harassment in the workplace. It is proposed that this would be enforced by the EHRC, using its powers under the Equality Act 2006. This approach, put forward by the EHRC, has the support of the WESC and others.
- 1.9 If introduced, a 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 the 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.
- 1.10 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.
- 1.11 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.

Formulation of a new duty

- 1.12 The simplest way for a new duty to be introduced would be for it to mirror current concepts in the Equality Act that impose employer liability for harassment. The new duty could require an employer to take all reasonable steps to prevent harassment of its employees in line with its existing obligations in the Equality Act. This would capture the existing obligations in the Equality Act, i.e. an employer harassing its employees or job applicants, and harassment carried out by employees, either of each other or third parties.
- 1.13 Maintaining consistency with the existing provisions in the Equality Act - which require 'all reasonable steps' to be taken to avoid liability - has the advantage of being a well-established concept with which employers and Employment Tribunals are already familiar. This should decrease uncertainty for employers.
- 1.14 The EHRC's 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*'. Further clarity will be provided by the EHRC's new statutory Code of Practice on sexual harassment and harassment at work.

Q1. If a preventative duty were introduced, do you agree with our proposed approach? [Yes; No; Don't Know] Please explain your answer, drawing on any evidence you have.

Enforcement options

- 1.15 Supporters of a duty argue that a key benefit would be that enforcement would no longer be dependent on an individual bringing a claim after an incident of harassment. The EHRC could investigate an organisation on the basis of a suspected breach of the duty, and examine the preventative measures it had in place. Such an investigation could be triggered in a number of ways, including through whistleblowing disclosures, which the EHRC will be able to receive by the end of this year, when it will be added to the list of prescribed whistleblowing bodies.
- 1.16 The EHRC's enforcement powers, as set out in the Equality Act 2006, reflect their regulatory role in helping organisations to achieve a positive equality outcome, rather than catching them out if they fall short. The outcome of most enforcement action is to agree an action plan with an organisation, setting out steps to avoid the repetition or continuation of a suspected unlawful action. If an organisation does not engage with this process, the EHRC has the option to escalate the matter to the County Court, but this is unnecessary in most cases. This enforcement model intentionally focuses on reaching the desired positive outcome and has a good success rate. However, the fact that it is not punitive means it is unlikely to act as a deterrent and have any impact on organisations beyond those that the EHRC engages with directly, which must necessarily be limited in number.
- 1.17 In light of the EHRC's limited capacity to enforce all breaches of the duty, a further option would be for it to be enforced both by the EHRC *and* individuals, in line with other workplace provisions in the Equality Act. This would still partially lift the burden of enforcement from individuals – as the EHRC's investigatory work could continue irrespective of individual incidents of harassment – while increasing the likelihood of enforcement action overall.
- 1.18 If enforcement by individuals were to be allowed, there is an open question over whether an act of harassment would need to have taken place for an individual to bring a claim based on the duty, or if a challenge could be brought on grounds of breach alone.
- 1.19 Under either approach, breach of the mandatory duty would not necessarily be directly linked with financial loss, and hence would not automatically result in compensation. If it was thought that a financial penalty should be directly linked to breach of the duty, we could look to replicate existing models in employment law, in which employers' failure to comply with a statutory duty results in compensation. For example, if an employer fails to comply with their statutory duty to inform and consult staff about a proposed transfer of undertakings² (known as TUPE), the maximum amount of compensation which can be awarded is 13 weeks' gross pay. This model could be used to set a standard for compensation in enforcement of the mandatory duty.

² Transfer of Undertakings (Protection of Employment) Regulations 1981

1.20 A further option to consider would be whether a claim for such an award should be self-standing, or should be dependent upon the employee having succeeded in a harassment claim.

Q2. *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.

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, drawing on any evidence you have.

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?

Transparency requirements

1.21 Systems based on reporting, transparency and raising the visibility of issues within an organisation have successfully driven change in other areas. An alternative, or additional option, would be to introduce a requirement to publish or report on prevention and resolution policies publicly, with Board sign-off, to ensure that companies are engaging with this problem at an appropriate level. This measure could be introduced independently, or combined with requirements for internal monitoring and reporting, for example of rates of harassment complaints and/or numbers of staff who have left the organisation citing problems with harassment or wider culture in their exit interviews.

Q5. *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.

2) Third party harassment

- 2.1 The law is clear that employers can be vicariously liable for harassment carried out by their employees.
- 2.2 Employer liability for failing to prevent the harassment of their staff by third parties - for example customers or clients – is less clear cut.
- 2.3 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 we acknowledge the arguments of those who call for it to be simplified.
- 2.4 We wish to ensure that any victims of third party harassment can be confident that they are protected by the law if their employer has not taken reasonable steps to protect them, and that they feel able to take legal action if they so wish. It is also important to ensure that employers are clear that they have this legal responsibility to protect their staff from third party harassment, and that they take all reasonable steps to provide this protection.

The existing law on third party harassment

Equality Act: section 40

- 2.5 Section 40 of the Equality Act 2010, as originally enacted, made employers liable for harassment of their employees by a third party if:
 - i. the harassment occurred in the course of the employee's employment;
 - ii. the employee had been harassed on at least two previous occasions (even if by different people each time);
 - iii. the employer knew, or ought to have known, about the two prior occasions of harassment; and
 - iv. the employer had failed to take 'reasonably practicable' steps to prevent the harassment.
- 2.6 In 2013, the explicit third party harassment protections in section 40 were repealed. The provisions were thought to be confusing and unnecessary, and at the time of review the provisions were only known to have resulted in two Employment Tribunal ruling since their introduction in 2008. Significant criticism was also made of the protection's design, which required two occasions of known harassment to have occurred before liability was triggered - known as the 'three strikes' rule.

Equality Act: section 26

- 2.7 Until 2018 it was thought that the Equality Act continued to provide protection in cases of third party harassment, under section 26, with the benefit that reliance on this part of the Act meant there was no requirement for 'three strikes'.
- 2.8 However, case law in 2018 transformed the legal landscape: in May 2018 the Court of

Appeal ruled in the case of *Unite the Union v Nailard*³ that the 2013 repeal of parts of section 40 meant that the Equality Act could no longer be considered to provide any protection in cases of third party harassment (albeit that employers remain liable if any failure to act on their part, following a complaint of harassment, is related to an employee's protected characteristic).

Protections outside the Equality Act

- 2.9 As set out in the Context chapter, the Equality Act is not the only legislation that can be used to hold employers and individuals to account for incidents of sexual harassment. However, in cases of third party harassment, our initial view is that, other than in extreme cases resulting in demonstrable personal injury, or where a criminal offence has been committed, none of the legal routes we have outlined in Context provide an effective alternative to the ability to bring harassment claims in the Employment Tribunal.

Explicit third party harassment provisions

- 2.10 In light of the Nailard ruling, the WESC, EHRC and other stakeholders have recommended that the Government strengthen explicit legal protections against third party harassment to give unequivocal clarity on this question. We are consulting with a view to delivering this clarity, in the form of explicit protections in the Equality Act.
- 2.11 For new protections to be introduced to the Equality Act, decisions need to be taken on a number of details:

Incidence of harassment

- 2.12 As set out above, the repealed Equality Act 2010 third party harassment provision relied on two known previous occasions of third party harassment for liability to apply. This 'three strikes' formulation has been heavily criticised and our initial view is that it was flawed. However, we have heard different views on what formulation would strike the correct balance: for example, the Fawcett Society suggests that '*a single incident of harassment should be sufficient*'⁴, while the EHRC view is that "*it is possible for employers to be aware that harassment is likely to occur without a worker having demonstrated that it has happened before*"⁵.

Knowledge of the event

- 2.13 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.

³ [2018] EWCA Civ 1203

⁴ <https://www.fawcettsociety.org.uk/Handlers/Download.ashx?IDMF=e473a103-28c1-4a6c-aa43-5099d34c0116>

⁵ <https://www.equalityhumanrights.com/sites/default/files/ending-sexual-harassment-at-work.pdf>

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

Defence

2.14 Section 109 of the Equality Act allows employers to use the defence of having taken 'all reasonable steps' to prevent the harassment from happening in any legal proceedings against them.

2.15 We propose that the same defence should apply if provisions for third party harassment are introduced to the Equality Act.

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

3) Volunteers and interns

- 3.1 The Government strongly believes that all people should be safe from discrimination, harassment and victimisation, and we would expect organisations to protect volunteers and interns from these behaviours. However, workplace protections against these behaviours in the Equality Act are explicitly linked to employment status and as such, do not cover volunteers and may not cover some interns or those on work experience. This does not mean these groups are unprotected: legal protection may exist under the common law duty of care and elements of health and safety law, in addition to which significant safeguarding measures have been put in place in the charity sector.
- 3.2 It is particularly important to get protections right for these groups, as the power dynamics often involved in sexual harassment means that they can be particularly vulnerable in the workplace. Furthermore, if sexual harassment does occur, they may be less likely to report it, either because they do not know what their rights are or because their position, both legally and in the organisation, is more precarious than that of an employee.
- 3.3 The Government wishes to better understand these groups' experiences so as to identify if, in practice, the approach taken in the Equality Act is resulting in inadequate precautions being put in place to protect these groups, or is preventing victims of unacceptable behaviours from seeking justice.
- 3.4 In this section of the consultation we are looking at whether there are grounds to extend all the protections in Part 5 of the Equality Act (i.e. not just those for sexual harassment) to volunteers and interns, on the basis that there we are not aware of strong reasons to treat sexual harassment protections differently in this context.

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, drawing on any evidence you have.

Current protections for volunteers and interns

- 3.5 The Equality Act covers protection from harassment in the workplace for those in employment (as defined in section 83), including job applicants, or those who fall within one of the wider work relationships, such as contract workers, public office-holders (excluding elected offices) and those seeking or undertaking vocational training. Parliamentary staff of both the House of Commons and the House of Lords, as well as staff of MPs, are protected under the Equality Act.
- 3.6 Equality Act protections do not currently extend to volunteers, as they are not employees for the purposes of section 83 of the Equality Act. This was confirmed by the Supreme Court in the case of *X v Mid Sussex Citizens Advice Bureau* [2012] UKSC 59, which determined that the Equality Act and the relevant EU Directive⁶ did not apply to voluntary activity, i.e. where the relationship is not governed by a legally

⁶ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

binding contract.

- 3.7 Whether a legally binding contract exists would be a question of fact in each individual case. For example, X (above) signed a volunteer agreement with a Citizens Advice Bureau, which was expressed to be “binding in honour only” and “not a contract of employment or legally binding”. The Employment Appeal Tribunal has suggested that where there is no sanction for not honouring an agreement between the volunteer and the employer, that would suggest there is no intention to create a legal relationship.⁷ Therefore, in practice, if a “volunteer” is expected to attend work at specific times, or receives payment which goes beyond reimbursement for expenses, such a person may qualify as an employee for the purposes of the Equality Act and hence be protected by the sexual harassment provisions.
- 3.8 We consider 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.
- 3.9 Outside of the Equality Act, volunteers and interns may be legally protected in cases where personal injury occurred or where a criminal offence has been committed (see above paras 22-28).

Safeguarding in the charity sector

- 3.10 In addition to these legal protections, the Government has been working with the Charity Commission and charity sector over the last year on a shared vision of charities as safe spaces for everyone, whether employees, volunteers or members of the public.
- 3.11 The charity safeguarding programme consists of raising awareness and ensuring that charities, whatever their size, know their responsibilities, know how to report concerns and have easily accessible advice to hand. The programme will provide freely accessible training on basic requirements and expectations, a tool to support charity decision-making in the handling and referral of concerns, and research on leadership behaviours in domestic charities. The Charity Commission can also record concerns and may investigate incidents that put the health and safety of a charity’s volunteers at risk.

Extending the Equality Act’s protections

Ensuring all interns are covered

- 3.12 Interns should have the same equality protections as any other person in the workplace, and it is our assessment that many, if not all, are already captured by the Equality Act’s workplace protections. However, if there is evidence that this is not the case, we will further consider how we can best ensure this group is protected.

⁷ South East Sheffield Citizens’ Advice Bureau v Grayson [2004] ICR 1138

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?

Protecting volunteers

- 3.13 The Government actively encourages volunteering. The Civil Society Strategy published last year highlighted the enormous benefits of volunteering for both individuals and society. There is evidence that it leads to increased self-esteem and life satisfaction for those who volunteer and can build healthier, more connected communities.
- 3.14 It is clearly right that an individual who gives their time for free to support their community or an issue they care about should be protected from harassment, discrimination and victimisation.
- 3.15 However, 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.
- 3.16 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; extending these protections to their volunteers would therefore 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.
- 3.17 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.
- 3.18 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.
- 3.19 We are keen to avoid any approach that might have a 'chilling effect' on the voluntary sector, either driving small organisations to close down, reducing the number of volunteering opportunities organisations offer, or discouraging new organisations from starting up. We likewise want to ensure that individuals who wish to volunteer on an informal basis do not find themselves having to deal with unnecessary red tape as

part of the process.

- 3.20 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 we are not aware of there being 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.
- 3.21 It should be noted that equality law is separate to wider employment law, and any extension of workplace Equality Act protections to volunteers would have no impact on volunteers’ wider rights under employment law.
- 3.22 We therefore welcome views on how best to balance the need to appropriately protect volunteers and maintain a thriving voluntary sector.

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

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?

4) Tribunal time limits for Equality Act cases

- 4.1 The standard time limit for bringing a claim to an Employment Tribunal, throughout both employment and equality law, is three months from the date of the act complained of. There are some exceptions – such as for cases relating to equal pay disputes – but the majority of cases brought to an Employment Tribunal will be subject to a three-month time limit.
- 4.2 Concerns have been expressed that three months is too short a period for bringing an Equality Act claim to an Employment Tribunal and that this may be creating a barrier to justice.
- 4.3 The Government recognises these concerns and, through this consultation, is seeking to better understand the evidence on whether the current time limits are a significant barrier to bringing an Equality Act claim to an Employment Tribunal.
- 3.23 We have again taken the view that in looking at time limits it would be unfounded to look only at sexual harassment, and we are therefore exploring whether there are grounds to extend three month time limits applying to Equality Act Employment Tribunal cases as a whole.

Bringing forward a discrimination, harassment or victimisation claim

- 4.4 The argument for singling out Equality Act claims under the jurisdiction of the Employment Tribunal, and not other areas of employment law, is that these incidents can be particularly traumatic and take longer to come to terms with on an emotional level. For example, anecdotal evidence suggests that in cases of sexual harassment it may be some time before an individual comes to terms with the incident, and/or is able to identify it as an unlawful act.⁸ In addition, the protected characteristic of ‘pregnancy and maternity’ is linked to a unique period of time in which the recent or upcoming birth of a child may make it particularly difficult to quickly organise a legal case⁹.
- 4.5 Once someone has identified an act as unlawful, and decided that they wish to take formal action, their first step will be to engage their organisation’s internal grievance process. If the internal process is unsuccessful, they may then seek legal advice before progressing further; this step could be further delayed if the individual made an application for legal aid and was waiting for a decision before taking further action. Or, if they choose to represent themselves, it may take them longer to navigate the legal formalities for bringing a case than if they had access to a qualified lawyer.
- 4.6 In addition, there is a compelling case for bringing Equality Act claims under the jurisdiction of the Employment Tribunal into line with the rest of the Equality Act, which allows a six-month time limit in relation to most other claims (e.g. equal pay, goods and services etc.).

⁸ Box 5 https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72507.htm#_idTextAnchor053

⁹ Paras 133-137 of WESC P&M report <https://publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/90/9002.htm> ; Justice Committee in its report on Courts and tribunal fees in 2016 Para 79 <http://www.publications.parliament.uk/pa/cm201617/cmselect/cmjust/167/167.pdf>

Q12. 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.

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

Existing mitigations to three-month time limits

4.7 While many people may be able to progress through the above stages within three months, it is clear that this would depend very much on the specifics of someone's situation. However, to a certain extent, the tribunal system makes allowances for the process to be adapted to different situations.

Tribunals' discretion for extension

4.8 At the request of an individual, an Employment Tribunal is able to extend the three-month time limit by any period of time that a judge considers is 'just and equitable' for Equality Act claims.

4.9 In 2018, the government collected data on extensions awarded by Employment Tribunals in cases related to the Equality Act. Over the January-March period data was gathered on pregnancy and maternity cases only, finding that of 21 requests for extension, all were granted¹⁰. Over the April-June period data was gathered across all cases (not limited to the Equality Act), finding that of 54 requests for extension, only one was rejected.¹¹

4.10 However, it is thought that many people are unaware that they have this option, or unclear regarding the grounds required for extension, which may disincentivise them from applying in the first place. Furthermore, evidence provided to the WESC suggested that legal advisors would usually advise their client against submitting a late claim given the uncertainty of whether it would be granted by the tribunal.¹²

Acas early conciliation

4.11 Before a case reaches an Employment Tribunal, the parties must first have notified Acas via early conciliation. This needs to start, but does not need to end within the three month time limit. In most cases, the clock stops during the Early Conciliation process¹³ but if a person has almost reached the end of the three month period before they start this process, they are able to issue a tribunal claim up to one month after the end of the Early Conciliation process.¹⁴

¹⁰ Statistical Notice: Employment Tribunal Out of Time Claims - Provisional Management Information as at 30 June 2018 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/740317/Statistical_notice_ET_Out_of_Time_Claims.pdf

¹¹ Ibid

¹² Elizabeth Prochaska, Q311 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/sexual-harassment-in-the-workplace/oral/83116.pdf>

¹³ Employment Rights Act 1996, s 207B(3)

¹⁴ Employment Rights Act 1996, s 207B(4)

Staying a case

- 4.12 Once a claim has been brought either party may apply to the Employment Tribunal to stay i.e. pause, a case. A person may make such an application to allow an internal grievance procedure to conclude before they take a decision on whether to pursue their claim in the tribunal. However, this option is not thought to be widely known or used. Indeed, the WESC's 2018 report raised concerns that the short timeframe for lodging a claim could put pressure on individuals to decide whether to progress to Tribunal before the conclusion of internal grievance procedures.¹⁵

Extending Employment Tribunal time limits

Managing inconsistencies in time limits

- 5.1 We are not proposing to change the time limits for all employment law cases if we were to extend time limits under the Equality Act, although it should be noted that the recent Law Commission consultation on Employment Law Hearing Structures separately raised the question of whether all Employment Tribunal time limits should be longer than three months.
- 5.2 This could result in more people finding themselves subject to two different time limits when bringing a case on multiple grounds, for example unfair dismissal and sex discrimination. This risks increasing confusion over time limits, and has potential to increase the number of people bringing out of time claims as a result. However, if this change were introduced we would seek to mitigate this risk through clear guidance.

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]

¹⁵ Para 91 https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72507.htm#_idTextAnchor053

5) Other options

- 5.3 As we acknowledge in the introduction, the problem of workplace sexual harassment cannot be solved by changes to the law alone.
- 5.4 The Government has already undertaken to deliver a package of measures to tackle this problem at a non-legislative level, and we continue to develop this. As a first step we are increasing our understanding of the issue by carrying out a nationally representative survey this summer, to help us tailor and target our solutions. Alongside this we have initiated a strand of our Workplace and Gender Equality research programme focussed on Gender Norms and Sexual Harassment, to help develop our understanding of what workplace interventions are effective in preventing sexual harassment and will be sharing our findings with employers. This will complement the EHRC's statutory code on sexual harassment, which will ensure employers are clear on their legal requirements.
- 5.5 Within the wider concerns about sexual harassment, a number of more focussed issues have also emerged. In March BEIS published a consultation putting forward proposals to help put an end to the unethical use of confidentiality clauses (often referred to as non-disclosure agreements/NDAs). BEIS will be responding to consultation responses, and the WESC report on the same topic, with their final proposals in due course.
- 5.6 The use of confidentiality clauses to cover up incidents of harassment, discrimination and victimisation is of particular concern where it might indicate that organisations are failing to recognise and address wider cultural problems. A number of recommendations have been made that seek to address this risk by raising senior accountability for, and visibility of, incidents and workplace prevention policies. We welcome views on these proposals, and any other suggested interventions that would help to ensure organisations take this problem seriously.

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.

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

| | |
|------------------|---|
| <p>Q1</p> | <p>If a preventative duty were introduced, do you agree with our proposed approach? Yes/No/Don't know Please explain your answer, drawing on any evidence you have.</p> |
| <p>Q2</p> | <p>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.</p> |
| <p>Q3</p> | <p>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.</p> |
| <p>Q4</p> | <p>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 alternative models?</p> |
| <p>Q5</p> | <p>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.</p> |
| <p>Q6</p> | <p>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.</p> |
| <p>Q7</p> | <p>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.</p> |
| <p>Q8</p> | <p>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.</p> |

| | |
|-------------------|---|
| <p>Q9</p> | <p>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?</p> |
| <p>Q10</p> | <p>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.</p> |
| <p>Q11</p> | <p>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?</p> |
| <p>Q12</p> | <p>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.</p> |
| <p>Q13</p> | <p>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.</p> |
| <p>Q14</p> | <p>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</p> |
| <p>Q15</p> | <p>Are there any further interventions the Government should consider to address the problem of workplace sexual harassment? Please provide evidence to support your proposal.</p> |

Thank you for participating in this consultation exercise.

Contact details and how to respond

For information about how we treat your personal data when you respond to our consultation, please see the **Privacy Notice at Annex A**.

Please send your response by 2 October 2019 to:

Bridget West
Government Equalities Office
Sanctuary Buildings
20, Great Smith Street
London
SW1P 3BT

Email: workplaceharassment@geo.gov.uk

You can also complete the consultation on-line at:
<https://www.smartsurvey.co.uk/s/Workplaceharassment-technical/>

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Government Equalities Office at the above address.

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at [web address].

Alternative format versions of this publication can be requested from [contact details].

Confidentiality

If you want the information that you provide to be treated as confidential, please explain to us why you regard the information you have provided as confidential. We will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on Cabinet Office.

Annex A – Privacy Notice for Cabinet Office consultations

This notice sets out how we will use your personal data, and your rights. It is made under Articles 13 and/or 14 of the General Data Protection Regulation (GDPR).

YOUR DATA

Purpose

The purpose for which we are processing your personal data is to obtain the opinions of members of the public, parliamentarians and representatives of organisations and companies about departmental policies, proposals, or generally to obtain public opinion data on an issue of public interest.

The data

We will process the following personal data: name, address, email address, job title (where given), and employer (where given), as well as opinions.

We will also process additional biographical information about respondents or third parties where it is volunteered.

Legal basis of processing

The legal basis for processing your personal data is that it is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the data controller. In this case that is consulting on departmental policies or proposals, or obtaining opinion data, in order to develop good effective policies.

Sensitive personal data is personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

The legal basis for processing your sensitive personal data, or data about criminal convictions (where you volunteer it), is that it is necessary for reasons of substantial public interest for the exercise of a function of the Crown, a Minister of the Crown, or a government department. The function is consulting on departmental policies or proposals, or obtaining opinion data, in order to develop good effective policies.

Recipients

Where individuals submit responses, we may publish their responses, but we will not publicly identify them. We will endeavour to remove any information that may lead to individuals being identified.

Responses submitted by organisations or representatives of organisations may be published in full.

Where information about responses is not published, it may be shared with officials within other public bodies in order to help develop policy.

If you respond your personal data will be stored on our IT infrastructure and will be shared with our data processors who provide email, and document management and storage services.

Your data will also be shared with a third party provider who will carry out analysis and summarisation of responses for us.

We may share your personal data where required to be law, for example in relation to a request made under the Freedom of Information Act 2000.

Retention

Published information will generally be retained indefinitely on the basis that the information is of historic value. This would include, for example, personal data about representatives of organisations.

Responses from individuals will be retained in identifiable form for three calendar years after the consultation has concluded.

Where personal data have not been obtained from you

Your personal data were obtained by us from a respondent to a consultation.

YOUR RIGHTS

You have the right to request information about how your personal data are processed, and to request a copy of that personal data.

You have the right to request that any inaccuracies in your personal data are rectified without delay.

You have the right to request that any incomplete personal data are completed, including by means of a supplementary statement.

You have the right to request that your personal data are erased if there is no longer a justification for them to be processed.

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You have the right to object to the processing of your personal data where it is processed for direct marketing purposes.

You have the right to object to the processing of your personal data.

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As your personal data is stored on our IT infrastructure, and shared with our data processors, it may be transferred and stored securely outside the European Union. Where that is the case it will be subject to equivalent legal protection through the use of Model Contract Clauses.

CONTACT DETAILS

The data controller for your personal data is the Cabinet Office. The contact details for the data controller are: Cabinet Office, 70 Whitehall, London, SW1A 2AS, or 0207 276 1234, or publiccorrespondence@cabinetoffice.gov.uk.

The contact details for the data controller's Data Protection Officer are: Data Protection Officer, Cabinet Office, 70 Whitehall, London, SW1A 2AS, or dpo@cabinetoffice.gov.uk.

The Data Protection Officer provides independent advice and monitoring of Cabinet Office's use of personal information.

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