BIRMINGHAM LAW SOCIETY

one profession • one region • one voice

Response to the Government Equalities Office Consultation on Sexual Harassment in the Workplace

October 2019

Pre-consultation questions

1. Name:	**Linden Thomas**
2. Job Title:	**President, Birmingham Law Society**

3. Are you responding on behalf of an organisation or as an individual?

On behalf of an organisation

4. If you are responding on behalf of an organisation, what is the name of the organisation?

Birmingham Law Society

5. **Are you happy for us to publish your organisation's response to this consultation in full?** [Yes/No]

Yes

If no, please explain why not, referring to specific sections where relevant. Please note, this does guarantee that we won't publish your response.

N/A

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

A representative body

7. If your organisation is responding as an employer, how many employees does it have?

N/A

These questions cannot be answered without reference to the full Consultation on Sexual Harassment in the workplace; please read it before completing this template.

The consultation can be downloaded from:

https://www.gov.uk/government/consultations/consultation-on-sexual-harassment-in-the-workplace

Consultation questions

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

[Yes/No/Don't know]

Please explain your answer

No.

We do not see that there is value in introducing such a preventative duty. There is already an obligation on employers to prevent the sexual harassment of their employees, and failure to do so may result in a claim under the existing provisions of the Equality Act 2010.

We do believe that there may be merit in enhancing the enforcement powers of the EHRC. We believe that the current barrier to effective enforcement of sexual harassment legislation is not the nature of the protections under the Equality Act, but the lack of legal support available to individuals seeking to pursue such a claim. We would recommend that the government consider extending access to legal aid to victims of harassment, or providing the EHRC with additional funding to support such cases. Currently, victims of harassment may well find themselves representing themselves in proceedings. They could find themselves in a position where they have to personally cross-examine their harassers. This is clearly unsatisfactory, and may well prove a barrier to an individual bringing a 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.

No.

We believe that this is unlikely to prompt employers to prioritise prevention any more than the existing risk of a claim.

We believe that a more effective measure would be to provide employers with clear guidance as to what amounts to "all reasonable steps" under section 109 of the Equality Act 2010. In our experience, employers are very cautious about using this defence. If clear guidance were provided on this issue, employers would be more likely to take these steps in order to provide themselves with a realistic prospect of defending a claim.

We understand that the government intends to issue a code of practice in respect of this defence. We would welcome this step.

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.

As set out in our response to question 1 above, we would recommend that the government consider a significant extension of the EHRC's enforcement powers. We believe that a key barrier to effective enforcement of the provisions of the Equality Act is that in the vast majority of cases, individuals would have to pay privately for legal assistance. In many employment matters, particularly cases brought by individuals who remain in employment, legal costs would be likely to outweigh the value of a claim. Individuals would therefore face the prospect of pursuing their claim as a litigant in person, which can be a daunting prospect.

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. We do not believe that it would be just to link this award to earnings. In practice, this would mean that compensation for breach of this duty would be substantially more for high earners.

Further, linking the award to earnings would mean that for people earning only slightly more than the average salary, the award would fall within the middle band of Vento. This means that compensation for breach of this duty would be the same as for a serious and ongoing case of harassment. In this context, the level of the proposed award seems excessive.

We would recommend that the compensation for breach of duty be assessed in a similar way as injury to feelings. Tribunal could be given a discretion to set the level of the award depending on the severity of the breach. We would suggest that this discretion be restricted to an award within the lower band of Vento.

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.

We would recommend two key steps:

1) Employers should be provided with clear guidance as to what actions would amount to "all reasonable steps" to prevent harassment. This will provide employers with a key incentive to prevent sexual harassment, as they will view the "reasonable steps" defence as a viable option for defending a claim; and
2) Employees should be provided with appropriate legal support in order to assist them with bringing a claim. In our view, it is entirely inappropriate that individuals who have been through a difficult and distressing experience such as sexual harassment could be left to deal with the court system almost entirely alone.

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.

No.

We do not see how it could be appropriate to hold an employer liable for third party harassment where no such harassment had taken place.

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.

Yes.

If an employer has taken all reasonable steps to prevent harassment and has followed available guidance, they should be allowed to use this as a defence to any claim. This would also mean that there was consistency between claims brought on the basis of harassment by an employer's own employees, and those brought on the grounds of harassment by a third party.

We appreciate that this may result in the unsatisfactory situation in which an employee may be left without a claim for compensation, despite having suffered harassment. However, it would be equally unjust for an employer to be held liable for the actions of a third party over which it had little or no control, despite having taken all reasonable steps to prevent it. There may also be other means of redress available to the individual, such as under the Protection from Harassment Act 1997.

The government may also wish to consider introducing an express right under the Equality Act to sue a third party and/or that third party's employer.

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 interns are not generally protected by the provisions of the Equality Act. We believe that it would be appropriate for sexual harassment protections to be extended to cover volunteers and interns.

If sexual harassment protections are extended to cover volunteers and interns, then we agree that, for consistency reasons and to provide businesses with certainty, it is important that other discrimination protections under the Equality Act (in relation to other protected characteristics) are treated in the same way and also extended to cover volunteers and interns.

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.

In the legal profession, it is common for students to undertake unpaid work experience which may only amount to one or two weeks (or even less). To give another example, students may attend 'open days' which are a single day of experience in a firm. In those circumstances, it is unlikely the students would qualify for employee status within the meaning of the Equality Act but for reasons of fairness it seems right that individuals in this situation should still be protected from harassment in the workplace.

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.

We foresee that the expansion of the Equality Act protections would create a cost burden for the voluntary sector. In particular, if charities and volunteer-led organisations are subject to the same provisions in respect of providing reasonable adjustments for disabled volunteers, this could place a considerable financial burden on these organisations. We would recommend that evidence should be sought directly from organisations and businesses within this category.

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. For consistency reasons and to provide businesses with certainty, workplace protections should be extended to all volunteers.

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 evidence you have.

Yes.

Our experience is that the three month time limit is generally sufficient to bring a claim. Whilst there may be exceptions to this, the Tribunal has a discretion to extend time in circumstances where it would be just and equitable to do so.

The ACAS early-conciliation process has also assisted Claimants in this regard as the 'stop-the-clock' mechanism can provide additional time depending on when the Claimant contacts ACAS and how long the conciliation period lasts.

Some Claimants may encounter difficulties if they do not have the necessary legal understanding of their situation. In these circumstances, we consider that they would benefit from greater availability of pre-claim assistance and advice (from agencies such as ACAS) to help them understand their position in respect of time limits.

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.

No.

In order to provide both claimants and respondents with certainty, we consider that the time limits for claims under the Equality Act should be kept consistent. Otherwise, this could create circumstances where a Claimant has to bring a claim within three months for a certain kind of discrimination but has a longer period for a sexual harassment claim even though the Respondent may be the same employer. This then creates additional work for the parties involved and for the Employment Tribunal (which ultimately may end up consolidating the claims).

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]

We do not believe that the time limits should be extended, but in the event that they are we believe that the extension should not be longer than 6 months.

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.

In our experience, Claimants did make use of the repealed discrimination questionnaire provisions (section 138 of the Equality Act) and that the potential consequence of 'adverse inferences' did encourage employers to complete the questionnaires. The range of potential questions that Claimants could ask (including at a pre-claim stage) meant that they could obtain information about, for example, their employer's wider record on matters relating to equality and diversity (information which would not otherwise be available to them). Although an informal question and answer process is still available, if a Claimant does not have access to legal advice they may not know about this option and, in any event, if the Respondent is not encouraged to reply through the procedure then they may refuse to engage even if questions are raised. Therefore, the reintroduction of a questionnaire procedure could assist Claimants and help to reveal employers that have underlying problems that go beyond a single claim.

Similarly, another measure which may go towards resolving wider discrimination issues is the Employment Tribunal power (previously contained in section 124 of the Equality Act) to make appropriate recommendations in discrimination claims. At present, the Tribunal is restricted to making recommendations which relate to the Claimant's specific claim (for example, it could make recommendations about references and so on). Reinstatement of the power to make wider recommendations (for example, that the employer update its equality policies or engage in appropriate training) may assist where there are employers who have persistent equality issues.

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.

You have the right in certain circumstances (for example, where accuracy is contested) to request that the processing of your personal data is restricted.

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.

INTERNATIONAL TRANSFERS

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.

COMPLAINTS

If you consider that your personal data has been misused or mishandled, you may make a complaint to the Information Commissioner, who is an independent regulator. The Information Commissioner can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF, or 0303 123 1113, or casework@ico.org.uk. Any complaint to the Information Commissioner is without prejudice to your right to seek redress through the courts.