



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

About Rights of Women

Rights of Women specialises in supporting women who are experiencing or are at risk of experiencing, gender-based violence, including domestic and sexual violence. We support other disadvantaged and vulnerable women including Black, Minority Ethnic, Refugee and asylum-seeking women (BMER women), women involved in the criminal justice system (as victims and/or offenders) and socially excluded women. By offering a range of services including specialist telephone legal advice lines, legal information and training for professionals we aim to increase women's understanding of their legal rights and improve their access to justice enabling them to live free from violence and make informed, safe, choices about their own and their families' lives.

Rights of Women is a registered charity 1147913 and Company Limited by Guarantee.

Rights of Women's consultation response

Before answering the specific questions asked in the consultation we would point out that as a women's legal organisation we will confine our responses to law and legal policy issues within our skills and experience.

Deeba Syed, Senior Legal Officer

Rights of Women

2nd October 2019

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

Rights of Women supports the introduction of a new mandatory preventive duty because current legislation alone has not been enough to curtail the prevalence of sexual harassment in the workplace. We are part of the #ThisIsNotWorking alliance and support this proposal, which we believe should be underpinned by a new EHRC statutory Code of Practice outlining reasonable steps for employers to take to prevent harassment.

As it is, the Equality Act protections do not provide a sufficient deterrent to perpetrators, nor do they protect women from the detrimental impact of sexual harassment on their lives and careers, emotionally and physically, which infringes women's ability to have equality in the workplace. We think a claim under this new duty should be available separately even if a claim for sexual harassment is also being sought by a survivor in the Employment Tribunal. We echo the findings of the Fawcett's Society's *Sex Discrimination Law Review*, which called for this new duty in 2018, as well as the Equality and Human Rights Commission (EHRC) and Women and Equalities Select Committee (WESC) who have done the same.

Since launching our free legal advice line for women who have been sexually harassed in the workplace in England and Wales in August 2019, we have been building a picture of women who have been sexually harassed in the workplace, which due to the entrenched imbalance of power women have in comparison to their employers, is one of disempowerment.

What we have learnt to date from focus group findings with survivors of sexual harassment in the workplace (July 2019) and from the calls we have had on the advice line (August-October 2019), is that the responsibility to pursue and resolve complaints of sexual harassment appears to fall entirely on the woman herself. We can see clearly that sexual harassment is much more prevalent in very male-dominated work environments. All the calls we have received have been complaints of sexual harassment perpetrated by men in positions of power, against women who are (or perceive themselves) to be in positions of lesser power. Most of the calls pertain to significant and sustained sexual harassment or harassment based on being a woman, over a period of several months usually, and in the most serious cases related to sexual assaults or rapes by a colleague in a workplace.

We know from our advice line that violence against women in the workplace has been neglected for far too long and we need to change the legal framework to protect all women. Most women we have spoken to are dissatisfied by their employer's grievance and investigations procedures. Many are retraumatised by the experience of complaining to their employer. Women tell us they are treated with disbelief or that their complaint is treated with a lack of seriousness. Many women are confused as to why successfully upheld grievances of sexual harassment do not trigger a disciplinary procedure for the harasser in question.

It is imperative employers be proactive in preventing harassment to take the responsibility off of women's shoulders, especially when it is already very difficult for women to report sexual harassment in the first place. This must be regardless of their employment status. Any new duty must include, but not be limited to, the self-employed, freelancers, agency workers and those employed on a short term basis.

The Equality Act section 109 defence available to employers against a sexual harassment claim is to show 'all reasonable steps' were taken to prevent the sexual harassment taking

place, but we know this defence is rarely used in practice because there is limited case law and understanding of what 'reasonable steps' means for employers in actuality in terms of policies and practices. This is partly why women often find themselves in Settlement Agreement situations, which frequently effectively silence them from speaking out. We have reason to believe some employers are keen to avoid scrutiny of their policies and practices in an Employment Tribunal. This may be because there is insufficient guidance available, which is why we welcome the EHRC' statutory Code of Practice for employers on how to prevent sexual harassment in the workplace, which should be enforceable in the Employment Tribunal and courts.

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

Rights of Women believes this duty will help prevent harassment, as many of the women who call us tell us that the perpetrators are known to their employer or have previous similar complaints made against them for sexual harassment or bullying. Yet no preventive steps are taken to protect employees from these known harassers.

This is clear evidence that sexual harassment is usually a pervasive cultural issue, which is treated with deference and inevitable acceptance, which in turn contributes to women preferring not to report or leads to women seeking employment elsewhere rather than raise a complaint or grievance with their employers. Far too often we see employers prioritise secrecy of sexual harassment matters rather than prevention. We are unfortunately not seeing employers taking a genuinely 'zero tolerance' approach to sexual harassment in the workplace, as very often it is the women who feel forced out of their job, and the perpetrator remains in posts. We have spoken to women who tell us their perpetrator has only been moved to a different role or location, which women feel is not sufficient; this is why a robust duty on employers to do more is required. All women deserve to work with dignity and safety and the existing legislation, which can only compensate women financially, is not enough alone. We must protect women from experiencing the untold physical and emotional, as well as the effect on their confidence and career paths that sexual harassment causes in the first place.

We believe a new duty will engage those at the top of organisations to be more vigilant to end the practice of pushing out the survivors of the harassment from organisations, rather than perpetrators, and this will help filter into workplace cultures. It will help cut to the key issue of a workplace culture, which allows sexism and harassment to thrive and take some of the unfair burden off women to hold the harassers to the account and put it back on to the employer instead. With a clear set of guidance, employers can prioritise the prevention of sexual harassment and it can be prioritised as an understood risk for employers, especially for younger women or those in junior roles and steps can be taken to ensure those at risk know how to report, what reporting will entail and their legal rights. The employer's approach to understanding different barriers faced by women in the workforce must be intersectional to mitigate risk. It must also be transparent and accessible for all employees anonymously.

However, for the duty to be effective there must be a sufficient level of severity in terms of financial sanctions against employers who fail to comply with the duty, this will mean credible and substantial fines for those who do not. We agree with the End Violence Against Women

Coalition (EVAW) that money raised from these fines should be ringfenced for sexual violence work and funding specialist services providing support.

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

Yes, we agree as enforcement is vital for the effectiveness of any new duty and the EHRC must be sufficiently equipped and resourced to do so. Other regulators must be allowed to contribute to this enforcement work anonymously too, as we know from our advice line, we have received calls about perpetrators who are in regulated professions, such as healthcare professionals and the legal sector.

We agree with the TUC that individuals should be able to enforce the new duty through the Employment Tribunal. If they have a successful sex discrimination claim this should lead to an uplift of compensation for those claiming. We endorse the Fawcett Society's recommendations on this too.

4. If individuals can bring a claim on the basis of breach of the duty should the compensatory model mirror the existing TUPE provisions and allow for up to 13 weeks' gross pay in compensation?

We would argue there should be more compensation available in different circumstances. It should not be a one-size-fits-all for all employers as the severity in failing to meet the duty will vary. There should be no caps or caveats. Rights of Women would like to see the minimum sum mirror the lowest statutory redundancy pay formula at the very least. As the TUC argues, if the claim is being brought with another sex discrimination claim there should be an uplift award and additional financial penalties for repeat infringements of 25% as a minimum with no cap.

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

We think there should be financial penalties along the lines of GDPR breaches. We endorse the idea of a central register documenting informal or formal complaints and grievances and employers having to make internal impact assessments of the risk of sexual harassment in their organisations. We endorse employers having to disclose these statistics in tender processes and the removal of Government grants for employers who fail to prevent sexual harassment. We also endorse regulatory sanctions for sexual harassers who are in regulated professions, which would result in fines and removal from the profession as a matter of public record.

We agree with EVAW that sexual harassment policies should be made publicly available and be accessible anonymously. We agree with the TUC that Employment Tribunals should be able to make recommendations to employers found liable for sexual harassment to change their workplaces cultures. Specific recommendations could be made to change this to prevent the same thing happening to women in the future in those organisations, which many women tell us is one of the main reasons they want to start proceedings against an employer.

We think the Government and the EHRC should supply free toolkits, training and education to employers and managers, including bystander training for employees to spot and stop harassment they may witness.

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

Yes, since many employers in certain sectors and industries are aware that there is a higher risk of their employees experiencing sexual harassment from third parties, then we believe that they should have liability regardless of incidents taking place.

From our advice line we have received calls from women in the retail, leisure, public sector and NHS who are working with members of the public where the risk of sexual harassment is plainly higher. The risk is even higher when women are expected to be working with people who are drinking alcohol or at events where alcohol is being served. We find it unlikely that there will be many employers who will never have had an incident of harassment before and therefore think it unfair a woman should have to wait for an incident to take place before their employer is liable.

We agree with the TUC and others, that section 40 of the Equality Act 2010 should be reinstated, strengthened and not require any prior incidents of sexual harassment to have occurred.

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

Yes, so long as there is clear guidance for what that would include for employers. We think women who have experienced sexual harassment by a third party should fall under the same legal framework as women who have experienced sexual harassment by colleagues; there should be no distinction.

8. Do you agree that sexual harassment should be treated the same as other unlawful behaviours under the Equality Act, when considering protections for volunteers and interns?

Everyone needs to be protected from sexual harassment. We have received calls on our advice line from women who are volunteers and interns and we believe they should have the same protections as others regardless of their employment status.

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

No.

10. Would you foresee any negative consequences to expanding the Equality Act's workplace protections to cover all volunteers, e.g. for charity employers, volunteer-led organisations, or businesses?

We endorse EAW's response to this question. It is important the Government funds help for voluntary organisations to be prepared for the new duty to minimise negative consequences.

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

Yes, we think all volunteers should be covered. No woman should be without legal protection from sexual harassment because they do not have the 'right volunteer status'. For example, on the advice line we have received calls from political activists who do not have access to legal recourse under the Equality Act, this is not right when volunteers are some of those who need the protections most. We endorse the Fawcett Society's answer to this question.

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

Rights of Women launched a survey in September 2019 to capture evidence about the time limit for bringing claims for sexual harassment to the Employment Tribunal.

We were concerned the time limit is too short and benefits employers too much. Since there are also many barriers for women to report sexual harassment in the first place, including fear of intimidation or repercussions from their harasser, the potential detrimental impact on their career and mental health, we do not think such a short time limit is justifiable and that it unfairly penalises women.

Sadly, it requires a lot of courage and confidence to come forward in the first place and we do not think that those who do make that decision should have to race against the clock in order to have access to justice. Also, many of the women we speak to have no idea that the time frame is so short and do not have sufficient access to the information they need.

We had 148 responses in total to our anonymous public survey.

Of those who responded to the survey in total 92% stated that 3 months is not the right time frame to bring a claim of sexual harassment to the Employment Tribunal.

Only 9% of respondents thought the time limit should be 6 months. 45% thought the time limit should be 1 year and a further 44% stated it should be even longer than one year.

73% said they had experienced sexual harassment in the workplace, of those 75% had chosen not to raise a grievance to their employer, which supports the findings of the TUC and Everyday Sexism survey in 2016 about most survivors choosing not to report.

When asked what the time limit should be, responses included:

- "There should be no limit; women should be able to come forward when they're ready."
- "It may take many women much longer to access counselling that could help them gain the courage required to pursue a case. Indefinite times must be allowed for this."
- "It should be a minimum of 5 years to allow for each individual to heal from the trauma that is caused."
- "It's a big decision that can affect careers and future employment options."

- “Trauma from the incident can render someone scared frozen or other. One year to three perhaps. Or discuss this. Sometimes it takes time to process.”
- “Honestly don't think a time limit can be put on it, but if it has to be, should be longer, 5-10 years.”
- “Sometimes it's dangerous for the employee to make a complaint so soon.”
- “It can take years for a person to be able to report an incident.”
- “At least one year or more. Even recognising SH is a slow and traumatic process.”
- “Longer than 1y. Why the tight limit? It may take more time to work up the courage to report.”
- “There should not be a time frame.”
- “When the victim is ready.”
- “Sometimes it takes a long time for a woman to feel safe to complain (e.g. for fear of reprisals) or because it takes longer to understand that what happened was harassment.”
- “Nearer the 10-year mark, or possibly indefinitely - some people don't feel able to speak up at the time, or even for a long time afterwards, for a multitude of valid reasons, and this shouldn't mean they're completely excluded from getting justice.”
- “It's a ridiculous time limit.”
- “It took me over a year to get to the point where I could cope with everyday life after I was harassed, and that was with a lot of counselling.”

Rights of Women have also gathered evidence showing that the current three-month time limit is too short because many women opting to go through an employer's internal grievance process can find it takes longer than 3 months to complete it. This is unfair because it will be at the end of a grievance process when a woman may wish to take legal action, and unlikely to be before. Furthermore, women may have any compensation won at Employment Tribunal reduced by 25% if they do not complete an internal grievance process, therefore any time limit to bring a claim should at least be triggered after that process is completed.

Many women naturally assume that bringing a claim before a grievance process has been completed would be premature and put their trust and faith in their employers to resolve their grievances internally, without having to resort to litigation. Some women have told us that they fear their employers are intentionally dragging a grievance process over 3 months, so they are out of the time-limit to bring a claim.

Respondents also told us:

- “It can take a while to realise what has happened /is happening when you're dealing with sexual harassment. I didn't find out for a couple of weeks that I was in a race against time because it wasn't until I finally sought legal advice that I was told about the time limits. By which point I'd already lost valuable time. Sexual harassment to the extreme that I experienced (sexual assault) is an extremely traumatic and difficult thing to deal with and has extreme implications on your mental stability, mental health and decision-making capacity. I don't believe that at the time I was trying to deal with the grievance complaints and process that I was actually in a position, mentally, to make those very difficult decisions on how best to proceed.”
- “The [grievance] process took nearly 18 months and was resolved to my dissatisfaction. But by this point, I just wanted it over.”

- “It is embarrassing and horrible to experience sexual harassment. In that time, you have to gain confidence to report it. In my experience I was on a 0 hours contract. When I experienced sexual remarks in my appearance I did not know who to report it to or whether I would lose my hours. So it's a vulnerable position and I had to gain confidence first, before reporting. This took me past the three-month window.”
- “It's been a total life-threatening nightmare. I have been victimised and vilified for raising concerns about a man who was known to be inappropriate and is in a public role. It has almost cost me everything to be heard. I am a fraction of the person I used to be.”
- “Lots of pressure to not raise formal grievance, then lots of delay, then removed from work 'in my interests' but perpetrator allowed to continue. Then 'encouraged' to take pay out with NDA and leave.”
- “All the power is with the employer who can run the clock down and afford legal fees. Time runs out for me in two weeks and my legal expenses insurance excludes discrimination cases (!). So, I am unlikely to get funding but can't really face the ordeal of tribunal either.”
- “There was no formal process so when I complained I was called a liar and threatened with the sack.”
- “The aftercare was appalling, I was moved to a totally alien department, denied access to the report and in the end, he was allowed back because of “he said, she said.””
- “It was humiliating. I was treated like the problem.”
- Many of the women we have spoken to have been signed off work for months at a time by a GP due to the stress, anxiety and depression caused by the sexual harassment and subsequent bullying and victimisation they have suffered, including being demoted, being forced into limiting their working arrangement, changing their work patterns or hours, all in order to avoid having to work directly with their harassers. Some are also keen to leave their workplaces because carrying on with their employment is untenable given the harassment they have faced or resulting bad treatment from their employer in handing their investigation or grievance. Therefore, we feel even a 6-month time limit is too restrictive. Clearly, if women are not in a financially secure place or are still looking for employment whilst they are also expected to be starting legal proceedings, they will be at a disadvantage.

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?

We think there are grounds for establishing a different time limit for different types of discrimination claims in view of the specific and known barriers to reporting. There is significant cultural stigma discouraging women against reporting or pursuing a sexual harassment claim in the Employment Tribunal. There is a 6-month (less one day) time limit for equal pay and redundancy claims, but discrimination, particularly sexual harassment is a violation of a person's personal dignity and should be treated just as seriously. We do not think all discrimination claims should be brought in line with the same time limit for the sake of it.

The current time limit appears to act as a disincentive to women to either stay in their jobs or raise a complaint. It should be noted that since many women we speak to are leaving their jobs and their employment relationship is ending because of the sexual harassment they have

received, there is no need for the time limit to be as short and it would be beneficial if it were longer in consideration of the fact that they may be prioritising reorganising their lives around this disruption. For those who are considering complaining and trying to stay in their jobs, the time limit discourages them from taking a legal route. It is simply a gross over-simplification to treat all discriminations as the same, as for example the ability to pursue a pregnancy and maternity discrimination will clearly be impacted on fact the claimant may have given birth very recently.

In our survey, we asked respondents to tell us why they did not raise a grievance with their employer after the sexual harassment they had experienced, their responses included:

- “Fear.”
- “I was too embarrassed.”
- “I raised it with senior management informally and was explicitly told nothing could be done.”
- “I only worked with men who thought it funny.”
- “Concerned about the impact on my career.”
- “Didn't feel it would get me anywhere.”
- “I was new and didn't think anybody would believe me.”
- “I was in a state of shock for a long time and then by the time I felt able to address it too much time had passed.”
- “It was systemic, HR were uninterested, and as it cost me my career anyway it was not worth it.”
- “I felt the person who sexually harassed me was too popular and held too much power over me (I was new and he was well established).”
- “The person I was supposed to raise a grievance to was the person who acted inappropriately.”
- “A colleague told me it was 'normal' for older men to 'flirt' with me.”
- “Because when I tried to it was written off as a joke and me overreacting as other women hadn't minded the same treatment.”
- “Because I wasn't resilient enough and didn't have the time and energy or capacity to at the time.”
- “I would have been sacked as the harasser was my boss.”
- “Didn't want to rock the boat; felt uncomfortable relating the incident; didn't want to be seen as over reacting.”
- “I knew the employer would not take it seriously.”
- “I was scared of the perpetrator finding out and wanting to retaliate. I was scared I wouldn't be believed. I was scared of my own behaviour being examined in case they thought I had caused it. I was told if I raised a grievance, I would be cut out of the process from that moment and not be informed of the outcome. I was told that it could be a major deal and I'd be subject to a lot of publicity. And I was far too weakened by that point to face any of it.”
- “Too junior to be taken seriously, would affect the likelihood of me being kept on at work.”
- “It wasn't serious enough to warrant the level of hassle and grief I'd get.”
- “It didn't seem worth my time to just be ignored or not be taken seriously.”

- “Because I’m worried I won’t get another job and won’t have another reference or anything to support me. I was only woman in job and all the men would join in harassing me and saying they’ll rape me “as a joke” even the bosses laugh.”
- “I knew nothing would really happen on the back of it, other than the person perhaps getting a warning, and I’d then have to continue working with them which would have made work really awkward for me.”
- “I was a temp and was worried I’d lose my job.”
- “Not knowing how.”
- “He was the golden man and I knew I would be sacked for being a troublemaker.”

We know from the calls we have taken to date on our advice line that many women are signed off sick from work by a GP often for weeks and even months due to stress, anxiety and depression caused from the sexual harassment, poorly handled grievances and investigations or further victimisation they have had to suffer. We know from our survey and the advice line that women’s reports are often not been treated with sufficient seriousness and the harassment is minimised or dismissed altogether. We know that women do not feel like the harasser will be appropriately sanctioned, if at all.

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

Rights of Women would like to see the time limitation period start from when a final grievance, (including appeals) outcome is given rather than the incident of harassment itself and be up to 12 months afterwards. If a grievance process has been impossible to pursue, we suggest the 12-month time limit should begin from when the claimant triggers the Early Conciliation process with Acas. This is because all women should be given sufficient time to resolve the situation internally in good faith, without losing time overall to bring a claim at the Employment Tribunal.

We also need clear guidance on what circumstances should constitute a ‘just and equitable’ extension. We believe that the courts and parties could save money and resolve matters quicker, if the time issue stops becoming a jurisdictional issue, therefore preventing wasting precious judicial and court time on granting extensions and instead using that time to focus on the issues at hand.

Rights of Women would like to see published guidelines of factors that would be considered a ‘just and equitable’ reason to ask for an extension from the Employment Tribunal to bring a claim in a claimant’s favour, as many women self-select out of the process as they are not confident that a judicial decision will find in their favour.

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

We think that employers should be required to internally report sexual harassment complaints and grievances into a central risk register, so there is clear oversight. Current practice appears to be for complaints to go into an HR folder and often no further. This reporting is how employers could establish patterns of behaviour, which can be audited, or spot checked by the EHRC.

We think employers should nominate champions at board room level to oversee complaints and grievances. These champions should be a designated board role for example CFO level or particular senior directors.

We are also concerned by accounts of sexual assault in the workplace where employers are reluctant to conduct internal investigations or suspend perpetrators without the survivor making a report to the police. We agree with EAW that reports of sexual harassment or assault in the workplace should not be predicated on a report to the police. We also endorse EAW on their calls for sustainable specialist funding, effective sex education from primary school and protecting migrant women and those with insecure immigration status as per Latin American Women's Rights Service report 'The Unheard Workforce: Experiences of Latin American migrant women in cleaning, hospitality and domestic work.'¹

Finally, we call on the Government to fully restore and expand legal aid for sexual harassment cases at the employment tribunal. Whilst discrimination claims remain in the scope of legal aid, the EHRC's research shows that between 2013/14 and 2017/18 no workplace discrimination cases received legal aid funding for representation in the employment tribunal² which is insufficient given the prevalence of sexual harassment in the workplace. The need for accessible legal aid in this area is clear. However, until this changes it will only be those who are financially stable and able to self-fund who can access justice. Our callers tell us that they are dissatisfied with the service from Acas, including in terms of timeliness, all whilst the clock on their time limit for bringing a claim runs down, which is why early legal advice is vital.

As long as the costs of going to tribunal outweigh those gained through compensation awards of going to an Employment Tribunal, then we agree with the WESC that the system is not working, especially when pursuing litigation comes at such a high emotional cost and is often retraumatising for the survivor. We worry that only women with strong documentary evidence will feel this option is available to them, when so much harassment takes place behind closed doors, without witnesses and is based on the woman's account.

We agree with the TUC that overall remedies must be improved, and we believe it must be employers who pay employee's costs if they lose, as the current cost regime disincentivises women from making claims. We also agree with the WESC that the Employment Tribunal is very onerous and complex for litigants in person to navigate and therefore we call on the Government to provide legal representation at Employment Tribunals.

¹https://www.academia.edu/40225323/The_Unheard_Workforce_experiences_of_Latin_American_migrant_women_in_cleaning_hospitality_and_domestic_work

² <https://www.equalityhumanrights.com/en/our-work/news/discrimination-going-unchallenged-legal-aid-system>