Response to: EHRC Consultation: technical guidance on sexual harassment and harassment at work

About Rights of Women

Rights of Women is a legal rights organisation which specialises in supporting women who are experiencing – or at risk of experiencing – all forms of Violence Against Women and Girls (VAWG), including domestic and sexual violence. In our approach, we recognise the additional barriers posed by the intersection of gender-based abuse, racism, structural inequality and other forms of discrimination and oppression that impact on women's vulnerability, exclusion and marginalisation.

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. We empower women to make informed choices where they come into contact with the criminal, family, employment or immigration and asylum legal systems so they can live free from violence.

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.

Rights of Women

6th August 2024

1. Does the guidance explain the preventative duty clearly?

No. Please see the response to Question 2.

2. Explain why the guidance does not outline the preventative duty clearly.

1. In 2019, RoW launched its free, confidential legal advice service for women who have been sexually harassed in the workplace (survivor/victim referred to as "survivors" from here on) in England and Wales to access support and advice from women employment lawyers, specialising in harassment and discrimination law. RoW has legally advised on nearly 2,000 calls over the past five years. It is uniquely positioned to shed light on the policy and legal issues survivors of workplace sexual harassment and sexual violence face. This is predominately centred on the entrenched imbalance of power working women have in comparison to their employers. Our consultation response has been developed with our internal employment lawyers and employment lawyer volunteers, who have collectively advised on thousands of hours of calls with survivors and our advisory group of policy and legal experts.

2. What we have learnt from our advice line calls is that the responsibility to pursue and resolve sexual harassment falls mainly on the survivor herself. We can see that sexual harassment is much more prevalent in workplaces in which men more heavily dominate. This is reflected in the calls we receive where nearly all reports of sexual harassment have been perpetrated by men who are predominantly in positions of power over women who are (or perceive themselves) to be in positions of less power.

3. RoW states our disappointment the new *preventative duty* has been diluted beyond recognition during its passage into law. The inability to bring a standalone legal claim for breach of the statutory duty and the continuing lack of third-party harassment protections means that more survivors will have to suffer before being able to enforce the new duty. Furthermore, a statutory Code of Practice, which was meant to accompany the *preventative duty* and would have been legally binding on employers, has not come to fruition either. All of which will irrevocably undermine the effectiveness of the *preventative duty*. RoW will continue to campaign to bring these other necessary measures into place.

4. The *preventative duty* was meant to mirror the recent positive duty placed on employers in Australia to eliminate workplace sexual harassment. While the Worker Protection Act 2024 (the "WPA") still does not go far enough, it is a step towards instigating a culture shift from employers *responding* to sexual harassment **after** it happens to **proactively** *preventing* sexual harassment from occurring in the first place. We know from our advice line that currently, employers' handling of sexual harassment is usually centred on the expectation that survivors report sexual harassment, only to be subjected to intrusive

scrutiny, exposing themselves to financial and professional risk, and ultimately let down by internal processes (stacked against them), primarily motivated by employers not wanting to be 'on the hook' for any legal liability.

5. RoW presses upon the EHRC that the effectiveness of the WPA now hinges on the support, education and guidance employers can access to give the *preventative duty* a chance to achieve a meaningful impact in the elimination of sexual harassment in the workplace. Fundamentally, the guidance needs to provide employers and workers clarity on what the new *preventative duty* requires an employer to do before 26th October 2024, when the WPA comes into force.

Who is the guidance aimed at?

6. The current guidance is supposed to be for both employers and workers (stated in para 1.1). Therefore, the consultation would have benefited from specific engagement with survivors of workplace sexual harassment. The EHRC must give far more thought to how the guidance is to be used by women in the workplace, whose dignity and safety are at stake, given the extraordinary scale of sexual harassment in the workplace, as documented over many years by the TUC.[1]

7. We disagree with the EHRC's approach that explaining the new duty should be directed solely at employers. Workers must go to extraordinary lengths, stress, and financial/emotional expense to enforce the new *preventative duty*. This is especially relevant when sufficient clarity on the *reasonable steps* expected to be taken has not been forthcoming in the draft. If workers had sufficiently clear guidance, they could raise issues and grievances **before** sexual harassment happens, meaning fewer survivors need to suffer sooner rather than later, and **genuine** prevention could be achieved.

Structure and repetition in the updated guidance

8. RoW disagrees that a new chapter can be inserted into the current guidance to outline the new duty sufficiently. This will be detrimental to establishing a clear understanding of the duty needed for **workers** and **employers**. This is because the current guidance was not written with the new duty in mind and, therefore, cannot be sufficient for these purposes as it is. RoW has consequently decided to recommend an approach based on updating, restructuring, and reordering the current guidance, as a minimum, to achieve a clear outline of the new duty and *reasonable steps*.

9. RoW's concern with this approach is that important, separate, distinct concepts have been conflated. This could be rectified with appropriate amendments, reordering, and further details. We have identified the conflated issues (by reference to the current guidance paragraph numbering) as:

    - Distinguishing the "*all reasonable steps defence"* versus the "*reasonable steps to prevent"* **new** duty; and

[1] https://www.tuc.org.uk/research-analysis/reports/still-just-bit-banter

- RoW recommends that para 4.20, "*Taking all reasonable steps to prevent harassment*," be renamed *"Taking all reasonable steps to prevent harassment defence for employers"* to provide clarity.

- Distinguishing *preventing* vs. *responding* to sexual harassment:

  - RoW recommends that Chapter 5, "*Taking steps to prevent and respond to harassment,*" has a new section entitled "*Taking steps to prevent **sexual** harassment"*, which the new Chapter 3 can cross-reference to within; and
  - A subsequent chapter should be added to the current guidance entitled "*Responding to harassment*". The information in Chapter 5 should be reordered across these two chapters and the existing paras within. Those that focus on reporting should be moved to the *responding* chapter.

10. On explaining the duty itself, RoW states that the proposed new paras 3.24 - 3.26 contain unnecessary duplication of para 2.29 in the current guidance. As much of the current guidance is already dedicated to explaining the law, this is a missed opportunity to add more detail on what the new duty means in practice. RoW recommends:

    - Removing the definition of sexual harassment in para 3.24. This can be cross-referenced to the current guidance, which has already gone to great lengths to explain the definition;
    - Removing para 3.25, as this only repeats the first line of para 3.24 and adds nothing new;
    - Removing para 3.26, as this only repeats the first line of para 4.16 in the current guidance (also, we question whether it is misleading to state sexual harassment can be "*committed*" by a third party, more on which we expand below); and
    - Removing the wording "*committed"* and indeed throughout the current guidance too. This is due to its criminal law connotations (which already confuses employers), whereas *"harassment **by** a worker"* would suffice. Instead, this should be replaced with, "*an employer can be held liable for sexual harassment by another worker*", etc. Or "*The preventative duty applies to sexual harassment by workers, an agent, etc."*. However, as stated, RoW does not think this adds anything new or clarifies the new duty, presumably intended by the new chapter.

<u>The Australian Model</u>

11. In 2023, the Australian Human Rights Commission (AHRC) published "*Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984*" ("The Australian Guidelines"), which sets out seven "*standards*"[2] for employers to adopt to prevent sexual harassment:

    (i) Leadership;
    (ii) Culture;
    (iii) Knowledge;

[2] https://humanrights.gov.au/sites/default/files/2023-08/Guidelines%20for%20Complying%20with%20the%20Positive%20Duty%20%282023%29.pdf

(iv) Risk Management;
(v) Support;
(vi) Reporting and response; and
(vii) Monitoring, evaluation and transparency.

12. RoW strongly recommends the EHRC adopt the same approach that the AHRC has carefully developed over several years to create a practical **framework** for employers to measure the **effectiveness** of any steps they take. Clear, practical and tailored guidance is needed. Unfortunately, the EHRC's draft updated guidance does not go far enough in explaining what the **preventative duty** requires from different types/sizes of employers (more on this is discussed below). The update is an excellent opportunity for the EHRC to mirror the many practical examples in the Australian Guidelines.

13. We also refer the EHRC to *Australia's Safe Work* "*Sexual and gender-based harassment guidelines"* which can be mirrored too, as well as the *Respect@Work*, "*Good Practice Indicators Framework for Preventing and Responding to Workplace Sexual Harassment*"[3] which give clear benchmarks for employers to **measure** the effectiveness of steps.

Paragraph 3.19: *The preventative duty is an anticipatory duty. Employers should not wait until an incident of sexual harassment has taken place before they take any action. The duty requires that employers should* ***anticipate*** *scenarios when their workers may be subject to sexual harassment in the course of employment and take action to prevent such harassment taking place* (RoW's emphasis added).

Assessing and Managing Risk

14. Anticipating *"scenarios"* appears to be a critical concept that the EHRC considers for employers to be able to adhere to the new duty. However, the updated guidance does not give sufficient direction, tools, or resources on how employers can "*anticipate*" risks and **what** preventative measures they should implement. Since the new duty only requires *reasonable steps* to be taken, workers and employers should readily and widely understand these steps as practical and simple to implement.

15. Workers need to be able to easily identify **how** and **what** to: (i) raise an anticipatory risk to their employer; or (ii) challenge a breach either in an informal or formal grievance process and/or Employment Tribunal proceedings. The Australian Guidelines give clear and detailed examples of **how** employers can assess the risks to anticipate scenarios and **what** preventative *control measures* should be considered through a more comprehensive risk assessment lens. For instance, it states that for employers to determine appropriate *control measures*, consideration should be given to the **duration** (how long a person is exposed to *the* risk), **frequency** (how often a person is exposed to the risk) and **severity** (level of seriousness) of the risks identified. Also, para 3.19 is silent on how employers should prioritise risk. This is crucial so employers do not focus on 'easier' risks to mitigate, and workers who disagree with their employer's assessment of the risks should be able to input and contribute to this process.

[3] https://www.respectatwork.gov.au/resource-hub/good-practice-indicators-framework-preventing-and-responding-workplace-sexual-harassment

16. Without including more detail on the **how** and **what**, it follows that:

    - Employers will not put in place the necessary measures to prevent sexual harassment at work, meaning women will continue to be subjected disproportionately to sexual harassment, which may have been preventable;
    - Survivors will still have to bear the burden of *reporting* sexual harassment without the tools to include relevant information in any subsequent grievances and/or Employment Tribunal proceedings regarding their employer's potential breach of the *preventative duty*; and
    - What is **reasonable** will instead be determined by the Employment Tribunal on a case-by-case basis and would be a missed opportunity for the EHRC to shape this vital understanding (see para 32 of our response below).

17. We acknowledge that the EHRC's guidance is not binding on the Employment Tribunals but is undoubtedly persuasive. Leaving Employment Tribunals to determine the issue, given the costs and risks associated with litigation, will mean only certain 'types' of Claimants can progress their case to a Final Hearing and/or Remedy Hearing (and beyond). These Claimants will likely have the financial means to instruct lawyers, who can advise them on the law and strategy to progress the case using vast resources and experience. This means also bringing forward the 'right' type of claim.

18. The data[4] from the Trade Union Unison's case to scrap Employment Tribunal fees showed that women and marginalised women were more likely to be impacted by the introduction of fees since they were more likely to be discrimination claims, which were more complex and costly. The EHRC risks the interpretation of the WPA being unlikely to be formed around women and minoritised groups' lived experiences. Given that the new duty was meant to be supported by this guidance, establishing *reasonable steps* via the Employment Tribunal is counter-intuitive to the aim of the WPA and does not give employers a chance to 'get it right' in the first place.

19. Furthermore, wording such as "*employers should not wait until an incident of sexual harassment has taken place before they take any action*" (para 3.19) indicates the EHRC assumes employers recognise and acknowledge when sexual harassment has happened. The EHRC should know better that this is resoundingly hardly ever the case. In practice, employers are overwhelmingly reticent to acknowledge sexual harassment has occurred at all, knowing that in doing so, they would be willingly accepting legal liability and running the risk of strengthening a worker's claim against them. This wording also assumes employers are starting with a 'blank slate' from when the WPA comes into the law, which is resoundingly not the case. Adding a line that recognises many employers will **already** be aware of existing issues is more representative of the accurate picture. We also recommend removing the word "*incident*" (here and throughout the guidance) as this language reinforces sexual violence myths which portray sexual harassment as 'isolated' and 'unusual' events when, in fact, it is commonplace, continuous and often escalatory in nature.

[4] https://www.unison.org.uk/news/article/2014/03/dramatic-fall-in-tribunal-claims-shows-disastrous-impact-of-fees/

20. In actuality, employers are: (i) either aware via 'rumours' or 'whispers/network' that sexual harassment has occurred (often by serial perpetrators too) but do nothing proactive to combat it (assuming without formal reports they cannot, even **should** not, in 'fairness' to the possible perpetrator); and/or (ii) when a report of sexual harassment is finally made (and only by those who are **willing** and therefore already inherently unfair as an approach as all survivors having a multitude of reasons not to report), no findings are upheld against the perpetrator; and (iii) increasingly employers (which we provide training on for handling sexual harassment in the workplace lawfully) receive anonymous *disclosures* (which essentially go ignored and never investigated) and survivors are seeking our legal advice on *disclosures* (e.g. of previous sexual harassment of perpetrators to **future** employers).

21. This is vitally important to address because we know from our callers that employers routinely close investigations after a survivor leaves their employment. Employers incorrectly assume that without a survivor to 'propel' a process to conclusion and/or with potential legal claims settled (or in circumstances where the perpetrator resigns from their employment during the process or is offered redundancy to circumvent formal processes to spare them and the employer any embarrassment and reputational damage), they believe they are free to abandon ongoing processes. The reality of this 'out of sight, out of mind' employer culture has not been engaged at all within the update by the EHRC.

22. RoW recommends the guidance states that "*has taken place*" does not mean the employer needs to have obtained **findings** of sexual harassment against a perpetrator. Further, **any** and **all** rumours of sexual harassment should be treated as *knowledge*, which should now trigger the employer to act under the new duty, i.e. undertaking **proactive investigations**. It is imperative to draw out this nuance to shift the burden off survivors having to report and onto employers acting proactively based on **any** and **all** *knowledge*, even where there are no findings of fact that sexual harassment "*has taken place*." Para 3.19 must make explicitly clear that even if an employer is unaware of any sexual harassment (whether rumoured or reported), it still needs to put its mind to the risk of sexual harassment in the workplace and put measures in place to prevent it. All *disclosures* should merit **proactive investigation** and should be able to result in possible disciplinary action accordingly.

23. We recommend the updated guidance specifically include the following circumstances that are necessary to anticipate risk sufficiently:

    - Anonymous *disclosures* (even if not from employees, e.g. from the public);
    - *Knowledge* (or more appropriate language is *disclosures*) to be treated as significant information and intelligence, rather than 'accusations' (akin to the mindset many employers already adopt for whistleblowing, anti-bribery and money laundering regulations, health and safety and safeguarding);
    - *Knowledge* of reporting and/or internal processes of sexual harassment in previous employment; and
    - Adapting recruitment processes, e.g., 'safer recruitment' practices (regarding safeguarding duties), encourages employers to explore job

applicants' motivations and their ability to contribute and commit to safe workplaces; this can be adapted for sexual harassment too.

24. RoW does not agree that the risk of sexual harassment is **only** found within "*scenarios"*. This does not recognise that sexual harassment is not simply circumstantial or situational. It is also relational and indeed **intentional,** which is in the legal definition[5] within the Equality Act 2010 (EqA) by the inclusion of "*purpose*" of unwanted sexual conduct can violate dignity, etc. It must, therefore, be acknowledged that risk is **also** held in individual employees and their *behaviours* (and patterns therein). Especially when already harmful, such as poor management skills and/or relationships with other employees. For example, our callers will tell us that their perpetrators may have a longstanding "*reputation*" for being a "*bully*", "*toxic*", "*domineering*", "*unreasonable*", or "*problematic*" regarding race/disability, etc., or have existing patterns of not hiring or promoting women (or indeed only hiring women) and/or initiating capability/performance reviews and/or disciplinary action against women. These are all notable *behaviours* which inherently indicate the risk of potential discriminatory conduct and specifically sexual harassment of other employees, too.

25. Therefore, the EHRC should recommend that employers also look to behaviours when assessing risk. *Behaviours* (as listed above) should be addressed 'head-on' by leadership as a means of *prevention*, continuously monitored as part of broader performance reviews/criteria and included in the *leadership's* overall compliance with the new duty. This would signify a shift away from these *behaviours* only ever being addressed if willingly 'complained' about, and only create the conditions for sexual harassment to thrive.

26. Australia's *Safe at Work, "Sexual and gender-based harassment Code of Practice",* identifies *behaviours* as a key consideration for risk. Similar advice should be included in the EHRC's guidance. We highlight para 3.1 from the Code to be mirrored (RoW emphasis is added):

    - *Review any relevant information or records you hold that may identify sexual and gender-based harassment. For example, **records of past incidents** (including grievance and bullying complaints), exit interviews or surveys; and*
    - *Observe how workers and others at the workplace interact. The presence of **other harmful behaviours** may indicate a risk of sexual and gender-based harassment:*
        - *Observe how leaders, managers, supervisors, workers and others interact (e.g. are there **poor relationships** or do workers avoid being around certain people?)*
        - *Identify trends or patterns in behaviour that may highlight areas of concern or affected workers (e.g. think about whether a worker is performing differently, suddenly taking more personal leave, withdrawing from colleagues, not attending work functions, or if a work group has had a number of resignations).*
        - *Listen to how workers speak, whether they use crude language, innuendo and offensive 'jokes'.*
        - *Consider whether there is an acceptance of inappropriate behaviour by workers, managers or third parties (e.g. racially or sexually crude*

[5] https://www.legislation.gov.uk/ukpga/2010/15/section/26

conversations, hazing rituals, innuendo or offensive 'jokes' are part of the accepted culture).

27. Overall, when compared to the Australian Guidelines and the *Safe at Work* guidelines, the EHRC's guidance does not 'zoom out' to consider strategically tackling the *drivers* of sexual harassment, including gender balance, gender pay gap and diversity in recruitment, all of which correlate to the prevalence of sexual harassment. We recommend including a section on the importance of *leadership* championing the prevention of sexual harassment as a vital inclusion in the EHRC guidance. This is crucial for changing perceptions and shifting the burden off survivors making 'complaints', which employers perceive as needing to be 'shut down', towards accountability that starts and stops with the *leadership*.

28. Additionally, the EHRC has separate guidance on *"Preventing sexual harassment at work; a guide for employers,"* which refers to seven **steps**, namely: (i) policy; (ii) engage staff; (iii) assess and take steps to reduce risks in your workplace; (iv) reporting; (v) training; (vi) what to do when a harassment complaint is made; and (vii) dealing with third parties. We recommend that this guidance is copied across and cross-referenced into our proposed updated section on *prevention,* more of which is explained below. It would be helpful to include it and to label these as the **steps** that the new duty *reasonable steps* expect, which can be achieved by simply amendments by the EHRC to the current guidance.

Size of employers

29. The updated guidance contains scant consideration of the different employers and workers that will be using the guidance, only stating, *"what is reasonable will vary from employer to employer and will depend on factors such as (but not limited to) the employer's size, the sector it operates in, the working environment and its resources."* This is too broad and lacks specificity on the **how** and the **what** for managing risk**.** We know this will not be sufficient because our callers represent a wide cross-section of industries and sectors, ranging from large public sector employers (e.g. the NHS and civil service) to small/family-run businesses with no HR functionary. Whilst in our experience, the size of the organisation does not necessarily equate to better systems to *prevent* and/or *respond* to sexual harassment, it is more likely that larger organisations will have a better level of sophistication and understanding of risks and obligations concerning the new *preventative duty*.

30. Furthermore, tailored guidance must be offered for workers within a range of organisations so they can be informed and empowered to 'call out' employers for any non-compliance. Equally, suppose the guidance provided a better understanding to employers of *reasonable steps* depending on their size. In that case, they may be more willing to implement those measures if they feel it is within their means. For example, survivors working in micro-businesses, where perpetrators are the owners, are subjected to stark abuses of power. Grievance processes become defunct as the perpetrator is effectively the 'judge, jury and executioner' in these circumstances. As these are the second largest type of private employer in the UK[6], presenting specific challenges for survivors, it is

[6] https://researchbriefings.files.parliament.uk/documents/SN06152/SN06152.pdf page 12

insufficient that it is not currently addressed in the guidance. The updated guidance cannot be a 'one-size-fits-all' approach.

31. RoW recommends that the EHRC adopts the Australian Guidelines and gives detailed and tailored advice to:

    (i) Organisations and businesses without workers;
    (ii) Small organisations and businesses;
    (iii) Medium organisations and businesses; and
    (iv) Large organisations and businesses.

Reasonableness

32. We note that the explanation of *reasonableness* in the context of the new duty could be improved. The updated guidance has not provided more specific examples of *reasonable steps*, such as those provided in the EHRC's "*Employing people: workplace adjustments guidance*"[7] (the "Adjustments Guidance"). This will be left to the Employment Tribunals to develop but could be addressed with further detail in the updated guidance. For example, unlike the Adjustments Guidance, *reasonableness* has not been linked to the **effectiveness** of the steps, and the sexual harassment guidance should make the same link to steps being effective in preventing sexual harassment to be reasonable. Nor is the cost of *reasonable steps* identified as a factor for reasonableness (in para 3.33). This is particularly important when policies and training have been otherwise emphasised as *reasonable steps*.

33. The EHRC's Adjustments Guidance suggests assessing reasonableness with health and safety risks. If the EHRC adopted the same approach for the new duty, this would be an ideal place to draw out how failing to take *reasonable steps* to prevent it could be linked to breaching their duty of care towards workers, too. Furthermore, the reasonable adjustments guidance gives several examples of adjustment in practice. RoW notes that this approach is based on tailoring to individuals' needs, whereas the new duty must apply to all employees. However, as explained in our response, we do not accept that an individualised approach to *preventing* is not sometimes required, especially when perpetrators remain employed, even when processes have been concluded.

34. RoW highlights relevant examples that are instructive for the new duty and the contrast in specificity:

    - Adjustments to premises;
    - Allocation of duties;
    - Transferring to existing vacancy;
    - Altering working hours;
    - Reassignment; and
    - Providing supervision.

[7] https://www.equalityhumanrights.com/guidance/business/employing-people-workplace-adjustments/what-do-we-mean-reasonable

*Paragraph 3.19: If sexual harassment **has taken place**, the preventative duty means an employer should take action to stop sexual harassment from happening again. However, if an employer fails to take reasonable steps to comply with the preventative duty, there are consequences.* (RoW's emphasis added)

35. The first sentence of para 3.19 needs clarity. It appears that the draft guidance conflates the distinction between *responding* (i.e. "*sexual harassment has taken place*") and *preventing*. If sexual harassment has **already** taken place in circumstances where no preventative reasonable steps have been taken, this must mean the employer has already breached the duty, and EHRC enforcement is appropriate. Contrary to the current formulation, the *preventative duty* does not mean "*the employer should take action for sexual harassment happening **again**.*" The duty is to take *reasonable steps* to prevent sexual harassment of all employees. It is, therefore, not triggered after an occurrence of sexual harassment, but before. It is not about provoking a **response** from the employer. In any event, what response could be so effective to "***stop** sexual harassment from happening again*"? "*Stopp[ing]"* sexual harassment is entirely likely within no employer's gift (and this also raises questions on advice to employers about disciplinary action, discussed below). Therefore, RoW recommends that 'stop' be replaced with 'prevent'. Regardless, the EHRC's *"consequences"* should not only be triggered **after** sexual harassment has occurred, as the duty itself does not require this. The same paragraph states, "*Employers should not wait until an incident*" before acting. While sexual harassment must have occurred for workers to bring claims, it does **not** follow that the EHRC needs sexual harassment to have taken place to be able to enforce the duty.

36. The second sentence is important as it is the first mention of the EHRC's approach to enforcement of the new duty, i.e. "consequences" (as stipulated in para 3.37 to be the EHRC's enforcement powers) and requires further clarity. The formulation of the sentence seems to imply that the reasonable steps expected inadvertently is 'to comply', and failure to do so would constitute the breach, rather than the *reasonable steps* required is **to prevent sexual harassment**." I.e. an employer cannot 'reasonably' decide not to take steps. It also seems to suggest that the occurrence and any further reoccurrence of sexual harassment can measure failure to prevent reasonably. RoW recommends a more precise formulation: "*fails to take reasonable steps* **to prevent sexual harassment of employees**."

37. Further, this wording does not acknowledge the possibility that an employer may have taken *reasonable steps* to prevent, and yet sexual harassment happens again. Otherwise, this would mean that in Employment Tribunal cases, Claimants need only point to previous sexual harassment and a reoccurrence (despite any steps taken) to argue that the duty has been breached. Although RoW does agree that if the steps are ultimately ineffective, this should indicate they are not reasonable. This paragraph exposes the inherent problem of the EHRC not linking the reasonableness of the steps to their effectiveness in preventing sexual harassment (discussed above). Even after the WPA is in force and even if employers do take *reasonable steps*, it is likely to be the case that sexual harassment will still occur and reoccur. This is because sexual harassment is a pervasive form of gender-based violence. It is deeply entrenched in complex gender inequalities and a manifestation of *male violence* seeking to assert control and dominance over women through power dynamics, which cannot easily be prevented.

38. The impact of this approach raises questions: (i) how will workers be able to demonstrate to the EHRC that sexual harassment "*has taken place*" (when employers routinely do not uphold findings – unless the EHRC states here that it is not necessary for employers to uphold findings to enforce) and; (ii) will workers have to have their cases upheld in the Employment Tribunal first before the EHRC would consider enforcement. When so few sexual harassment cases go all the way through the Employment Tribunal process (and even less so upheld in the Employment Tribunal (see research from 2022 by openDemocracy[8]), this would drastically limit enforcement potential. This approach is also not workable for third-party harassment enforcement (see our para 43 below) since employers are not liable and unlikely to investigate, open processes or make any findings in the first place. Nor has the EHRC instructed employers to do this under the *preventative duty*. Therefore, it cannot be that sexual harassment needs to be upheld, so then it is unclear why any previous sexual harassment is necessary to trigger enforcement. RoW recommends removing reference to "*already taken place"* to ensure the EHRC's enforcement powers act as an effective deterrent and avoid any perception of a 'strike-out' mentality, which may only incentivise employers further not to uphold findings. This would also serve to dispel the myth that sexual harassment has not happened unless the employer has agreed so.

39. As currently drafted, RoW understands para 3.19 to mean we can advise survivors that they could demonstrate a breach if previous sexual harassment has occurred (and *reasonable steps* are subsequently not taken to prevent sexual harassment from happening again). Therefore, this could be reported to the EHRC, and *consequences* would be appropriate. This is important because, in our experience, **previous** sexual harassment, which survivors point to in internal processes, is largely ignored and treated as irrelevant (especially where formal reports were not received). Reports and processes tend to be treated in isolation. Every survivor effectively starts from 'zero' because reports' stand or fall' on the evidence found around the specific allegations raised, no matter how many survivors have 'tried and failed' before. This means a 'blind eye' is turned to systemic issues often left to fester and are further entrenched. For example, it is common for our callers to tell us, "*He has done this to other women before*," and, "*Other women have left the organisation because of how he behaves*." It is, therefore, vital that the updated guidance clearly explains that employers can no longer hide behind informal or (seemingly) 'unsubstantiated' formal reports if they are not upheld. Instead, as suggested in the Australian Guidelines, employers should now keep records of **all** informal and formal reports and their subsequent outcomes to monitor the effectiveness of steps.

40. What the "*consequences*" are is not detailed or cross-referenced in para 3.19 and would benefit from uniform cross-referencing. At first glance, it is unclear if this is meant by the EHRC. We recommend adding words regarding the effect of "*regarding EHRC enforcement"* and the financial consequences of the new uplift. The next mention of *"consequences"* in para 3.21 cross-references to paras 3.37-3.43 (i.e. explanation of the EHRC's enforcement powers). However, the next mention of *"consequences"* in para 3.27 about third-party harassment cross-references to paras 3.62-3.68 (paras 4.31-4.37 in the current guidance). However, paras 4.31-4.33 relate to "*Harassment of former workers"*,

[8] https://www.opendemocracy.net/en/5050/workplace-sexual-harassment-cases-tribunal-conservative-party/

which does not seem correct, and paras 4.34-4.37 are about liability around third party harassment, not "c*onsequences of breaching the preventative duty"* as para 3.27 states*,* and therefore should cross-reference to paras 3.37-3.43 instead.

41. The "*consequences"* should also include the new financial repercussions of the uplift. This should refer to a person's ability to trigger the "*consequences*" (not necessarily the survivor, but other workers and even the public), whether anonymously, informally and/or formally or directly to the EHRC. We also recommend that paras 3.37 - 3.38 include information on how reports of breaches can be made to the EHRC, which will be critically important for the effectiveness of para 3.19. Increasingly, we find that survivors require EHRC oversight due to the frustrating limitations of trying to get their employers to accept discrimination and harassment that has occurred when employers do not consider this to be in their best interest. Including this information is a simple and effective means for the EHRC to improve its intelligence about sexual harassment in the workplace.

42. RoW recommends in para 3.29, "*There are no criteria or minimum standards an employer must meet"*, be removed as it undermines fostering a sense of proactivity and a 'call to action' in para 3.16. Instead, RoW recommends that the updated guidance signposts to the Australian Guidelines as an example of best practice and to add our proposed chapter on *prevention* (albeit our preference would be for the EHRC guidance to go much further and in line with the Australian Guidelines).

Paragraph 3.27: *The preventative duty includes preventing sexual harassment by third parties. Therefore, if an employer does not take reasonable steps to prevent sexual harassment of their workers by third parties, the preventative duty will be breached. The consequences of breaching the preventative duty are explained further in paragraphs 3.62 – 3.68 below.*

43. RoW questions if the EHRC's position on third-party harassment is correct. During the passage of the WPA, Parliament accepted amendments to: (i) the removal of Clause 1 of the Bill restoring third-party harassment protection (previously included and subsequently repealed from the EqA); and (ii) the obligation for employers to take "***all*** *reasonable steps.*" The debate regarding whether third-party harassment claims can be pursued is concluded.

44. Section 1 of the WPA states, *"An employer (A) must take reasonable steps to prevent sexual harassment of employees of A in the course of their employment."* We understand that some legal commentators believe this could allow third-party harassment claims to be pursued via 'the backdoor'. However, RoW queries whether this will be possible for the following reasons:

    - The breach of the preventative duty under the WPA is not a standalone claim.
    - As such, workers would need to bring and win a claim for sexual harassment against either an: (i) individual Respondent; or (ii) an employer Respondent (the EqA permits a wider range of respondents). A sexual harassment claim cannot be brought against a third party.
    - Only at the remedy stage of proceedings will the Employment Tribunal consider whether the preventative duty has been breached and what uplift to apply to the compensation.

- Whilst the Employment Tribunal *may* consider sexual harassment by third parties when determining whether the preventative duty has been breached and any subsequent uplift, given a Claimant must have already succeeded in their claim (although not necessarily a sexual harassment claim as set out below) against the Respondent(s), RoW is sceptical the Employment Tribunal will give much weight to third party harassment in this context, as it will not be relevant to the sexual harassment that forms the substance of the claim brought.
- Or is it the EHRC's position that an employer could reduce the risk of the 25% uplift being applied in circumstances where the employer **did** take reasonable steps to prevent sexual harassment by third parties but **did not** take reasonable steps to prevent sexual harassment by its **own** worker? This approach implies that the employer could argue that they had taken reasonable steps to prevent sexual harassment generally, even if they had failed to reasonably *prevent* the relevant circumstances of the sexual harassment in question. This view further runs the risk of the preventative duty becoming a 'tick-box' exercise aimed at mitigating financial losses rather than eliminating sexual harassment in the workplace (which, given the dilution of the WPA, is unlikely to occur in any event).

45. It is, therefore, unclear to RoW why the updated guidance emphasises third-party harassment. Whilst we understand the EHRC will have enforcement powers for breach of duty, it will be predominantly brought by workers against their employers, to be considered by the Employment Tribunal at the remedy stage. It is fundamentally important that workers understand the extent of the claim that they can bring under the WPA and not be lulled into a false sense of security that sexual harassment by a third party is also an actionable claim. RoW recommends that the updated guidance removes and/or limits reference to third-party harassment until such time that protection from third-party harassment is reinstated as a standalone legal protection. The law is clear that there is no ability to bring a sexual harassment claim against third parties. This inference will likely confuse workers on the extent of their employer's duty and liability under the WPA.

46. It is also difficult to understand why the enforcement approach in para 3.19 is inconsistent with para 3.27 regarding third-party harassment. Para 3.27 does **not** stipulate sexual harassment must have already happened. Presumably, this is because workers would not need to demonstrate third-party harassment "*has already taken place*" with support from employers' processes. This is especially unrealistic when it is not in employers' interest to accuse their customers and clients of sexual harassment. If this is the case, this means the threshold for enforcement is effectively **lower** for third-party sexual harassment and **higher** for sexual harassment by employees, for which the employer **does** have legal liability and cannot be correct. All of which indicates an unnecessary confusion between actionability and enforcement.

47. Putting to one side RoW's views as to whether the *preventative duty* applies to third-party harassment, given it is the EHRC's view that third-party harassment does fall within the preventative duty, para 4.34 to 4.37 of the guidance should be updated to be consistent with the new guidance. Indeed, para 4.37 clearly states, *"there is no specific protection against third party harassment under the Act, employers should still take reasonable steps to prevent third-party harassment.* This should be amended and cross-referenced in

Chapter 3. Para 4.27 in the current guidance must also be linked to the '*consequences*' section in the updated guidance.

48. Furthermore, para 3.35 repeats para 3.27. The types of third-party harassment are already covered in the current guidance (in para 4.34) and are an unnecessary repetition. The last sentence of para 3.35 can either be moved to para 3.27, cross-referenced to the current guidance or removed altogether, as it does not add anything new. Also, para 3.36 repeats para 3.31 and is only another missed opportunity for the EHRC to provide tangible examples of *reasonable steps*.

Paragraph 3.42: The amount of the compensation uplift must reflect the extent to which the employment tribunal considers the employer has not complied with the preventative duty. It must be no more than 25% of the amount of compensation awarded to the worker ***for the sexual harassment*** (RoW's emphasis added).

49. RoW does not consider the EHRC's explanation and/or understanding of the uplift to be correct. The draft guidance seems to suggest the 25% uplift will **only** apply to the amount of compensation **awarded to the worker for sexual harassment.** Based on new WPA legislation, our understanding of the operation of the uplift is as follows:

    - Claimant brings a claim for sexual harassment (often in conjunction with other claims, including sex discrimination and harassment related to sex);
    - Claimant succeeds in a claim for sexual harassment;
    - Employment Tribunal awards compensation under s124(b) EqA[9];
    - Employment Tribunal then considers whether the Respondent breached its preventative duty under s124 of WPA[10];
    - Employment Tribunal finds that the preventative duty has been breached and considers the % uplift to give based on the sexual harassment which has occurred; and
    - Employment Tribunal then applies that % uplift to the **total** compensation awarded to the Claimant under section 124(b) **not** just an uplift of any compensation award given regarding the sexual harassment claim in isolation.

50. If this is not the case (i.e. the uplift only applies to the compensation allocated towards sexual harassment), then the reality is that only an Injury to Feelings award will be eligible for a 25% uplift. Given the Injury to Feelings award is set by the Vento Bands in addition to any losses for past/future losses, it does not seem correct that the WPA only permits an increase to an Injury to Feelings award. Indeed, the Vento bands are divided into bottom, middle and top bands and increase annually in line with inflation. RoW questions the additional financial consequences for breach of the preventative duty if Judges can already increase an Injury to Feelings award under the Vento Bands. If this issue is not appropriately considered and the information in the guidance is not clarified, it would

[9] Section 124(b) **E**qA *https://www.legislation.gov.uk/ukpga/2010/15/section/124#:~:text=124Remedies%3A%20general&text=(b)order%20the%20respondent%20to,c)make%20an%20appropriate%20recommendation.&text=(b)is%20satisfied%20that%20the,of%20discriminating%20against%20the%20complainant*.

[10] https://www.legislation.gov.uk/ukpga/2023/51/section/3

impact a survivor's cost versus litigation outcome analysis, which could determine whether she decides to pursue a claim. A bump to Vento Bands is less likely to incentivise pursuing a claim, but a % increase to an overall award could be.

51. Given that a sexual harassment claim is likely/could be brought in conjunction with other claims, it carries more weight if the 25% uplift is applied to the total compensation award to act as an effective deterrent to employers for breaching the preventative duty. RoW, therefore, recommends that in para 3.24, the wording "*for the sexual harassment*" is removed.

3. Does the guidance explain what employers should do to comply with the new duty?

No.

4. Explain why the guidance does not outline what employers should do to comply with the new duty.

52. As already set out above, it is unclear to RoW how we could use the updated guidance to advise working women on asserting that their employer is in breach of the preventative duty. Given that we provide survivor advice daily on their legal rights about sexual harassment in the workplace, this is a fundamental requirement of the guidance. Indeed, the same applies to how the guidance will inform our (and others') training to employers for compliance with the WPA.

53. Again, we note that the EHRC's existing guidance on *preventing* sexual harassment should be in one place and not dispersed across various guidance and chapters, so we have recommended restructuring and amending the current guidance.

54. We note that the only steer on what employers should do to comply with the new duty is in para 3.34, "*Chapter 4 provides detailed guidance on practical steps employers can take to comply with the preventative duty*."

55. We also note that the reference to Chapter 4 here is incorrect and should be amended to Chapter 5.

56. Having reviewed Chapter 5 through the lens of the WPA, we note there is valuable information that, if only structured differently, would better meet both workers' and employers' needs, be more accessible, and assist RoW in our work advising survivors. It should be as user-friendly as possible and be ordered in a way which follows the journey from *preventing* to *responding*.

57. While Chapter 5 is split into two parts: (i) *preventing*; and (ii) responding, we do not think the information within, correctly corresponds and, indeed, occasionally conflates these concepts. Broadly, we also note the EHRC must recognise that *reporting* is not necessarily a means of *preventing*. Nor are policies and training in and of themselves a means of preventing. We advise survivors in organisations with both in place but where sexual harassment is still prevalent. The guidance, therefore, needs to be tailored between

"*anticipating*" (as part of *prevention*) and "*detecting*" and "*reporting"* (part of *responding*) and be moved accordingly.

58. RoW, therefore, disagrees with para 3.34 that Chapter 5 *"provides detailed guidance on practical steps to comply with the preventive duty".* Chapter 5 does not outline any "*steps"* nor flow in the logical order required for prevention, nor does it give direction on what is "*practical*" or not. Chapter 5 only provides a baseline from which employers and workers can begin understanding what measures are needed to prevent. Also, Chapter 5 does not go far enough, particularly when contrasted with the detail contained within the Australian Guidelines. Therefore, RoW has set out recommendations below for Chapter 5 as necessary amendments if the EHRC intends that Chapter 5 be relied upon for compliance with the duty, as para 3.34 states.

Amendments Chapter 5

59. Chapter 5 was written regarding the 'all reasonable steps defence'. Since the preventative duty was diluted from "*all"* to only "*reasonable steps"* (a much lower threshold), Chapter 5 must be updated to clarify this distinction so that workers understand the different thresholds and legal applications. The *prevent* section was also written about **all** harassment, and not **sexual** harassment specifically. Furthermore, relying on soon-to-be out-of-date guidance regarding a different legal test and purpose seems irresponsible. Still, it can be addressed by our recommendations in time for October 2024.

60. The first section of the Chapter should start with our leadership recommendations, which are central to the successful execution of steps with a commitment that they are measurable, i.e., through developing "*prevention plans"* as recommended in the Australian Guidelines. Para 5.32 on "*Addressing power imbalances"* should be included, where leadership also focuses on eliminating *drivers* of sexual harassment. This is foundational and strategic *prevention* work, all of which are *reasonable steps* before even considering policies. It should not be arbitrarily assumed that this work would be included in policies focusing on operational matters, not strategic ones.

61. A section on *knowledge* should follow and flow into "*Assessing risk",* as the two are linked. Bullet point one in para 5.16 about centralised records would fit here, as well as para 5.17, which explains that "*complaints"* do not correlate to the prevalence of sexual harassment. (Refer to our recommendations elsewhere on the significance of severing the link from *prevention* to upheld reports and how employers act on *knowledge*).

62. Para 5.24 on *"Assessing risks relating to harassment"* should be moved before *"Effective policies".* As discussed above, anticipating *"scenarios"* is deemed central to the duty. Therefore, ideally, employers would have carried out their risk assessment exercise **before** developing and updating their policies and procedures to ensure the risks are sufficiently addressed. Since para 5.24 already approves of a health and safety approach, we see no reason why the EHRC does not add much more detail based on Safe Work Australia's comprehensive guidance[11].

[11] https://www.safeworkaustralia.gov.au/safety-topic/hazards/sexual-and-gender-based-harassment/managing-risks

63. We suggest adding a new section on *"Control Measures"* after para 5.24, with examples of typical control measures that would be reasonable to adopt, to address the factors identified in para 5.24. Since control measures are likely similar and widely applicable to many employers, we see no reason for the EHRC to leave employers to work these out for themselves, when a non-exhaustive list could be provided.

64. We do not wish to repeat what other responses are likely to suggest, but we do wish to draw the EHRC's attention to some scenarios and suggest *reasonable steps* from our frontline experience:

    - Perpetrators obtain a survivor's personal phone number from the work WhatsApp group and begin a campaign of harassment through seemingly a private message thread. Preventative measures could include the use of private mobile numbers for work-related matters;
    - Employers do not pay for women's travel home after working late at night, and perpetrators offer them 'lifts' home. Preventative measures should include travel arrangements for women who work past a particular hour in the evening; and
    - 'Intimate'/sexual relationship between colleagues in the workplace, which begins consensual and becomes abusive (or indeed begins abusive). A *reasonable step* should be inclusion in policies that employers recognise the existence of domestic abuse occurring between colleagues and that the consensual 'intimate'/sexual relationships present a risk of possible abuse of power.

65. RoW presumes responses to the consultation may suggest CCTV as a *reasonable step*, so we seek to add from our frontline experience of this in practice. Some survivors tell us their employers could or should have had CCTV (which might have prevented what happened, or at least assisted in collecting evidence or identified perpetrators regarding third-party harassment) and could be sensible in sectors like healthcare or factory work. However, employers routinely do not uphold reports for lack of 'proof' or 'hard evidence' and advise caution. This is why RoW makes a broader recommendation that a specific section on "*Investigations"* is required in the current guidance to combat commonly held misunderstandings of the law rooted in misogyny and sexual violence myths. RoW will not expand on these recommendations here. We have previously advised the EHRC that this is crucial guidance for employers to *respond* to sexual harassment lawfully and will create effective processes conducive to *prevention*.

<u>Policies</u>

66. In para 5.7, the exposition on "*Malicious Complaints"* does not fit well into Chapter 5 on *prevention*. This can be included at the outset of the guidance to address misconceptions about sexual harassment (we refer to our recommendations on *knowledge,* triggering proactive investigations and informing risk assessments). It does not make sense to discourage the inclusion of "*Malicious Complaints"* statements in policies, acknowledging the deterrence effect they have on reporting (especially when *reporting* is otherwise expected to be key to *preventing*), only then to accept statements could be included. These bullet points would be better placed in the "*Effective policies"* section in para 5.4 instead.

These statements should be advised **against** as part of "*good*" and "*effective"* policies. This is not a non-trauma-informed practice based on harmful sexual violence myths, which is counter to the spirit and aims of the WPA. The EHRC must take leadership and provide clear direction to employers against this misguided, counterproductive and harmful practice.

67. Para 5.13 encourages employers to raise awareness in their workforce of having a "*zero tolerance approach"* in sexual harassment policies. However, this language has no meaning in law and will now have no practical application regarding the new duty. In truth, sexual harassment is routinely tolerated in the workplace and will continue to be the case unless what no "tolerance" means is spelt out. We recommend the EHRC move away from the "*zero tolerance*" language altogether (unless it can provide a working definition for workers and employers). This is because this language misleads expectations of how employers should *respond* and is not representative of survivors' experiences. Instead, this should be amended to encourage employers to revise their policies to embed a **preventative approach** instead of a "*zero tolerance approach*".

68. RoW believes the EHRC has a responsibility to address the imbalance of power between employer and worker by highlighting workers' rights to report to the EHRC (and **other regulators**) in the guidance by amending the *"Effective policies"* section. Otherwise, employers will not readily offer this information. Employers benefit from it not being widely known, inaccessibility to workers and a general lack of oversight. Without advice and support, many survivors are wholly unaware of professional regulators or even assume they are not permitted to disclose information for fear of reprisals.

69. RoW also recommends that the current policy guidance be amended to be more "*effective"* by tailoring policies to the type of employer. For example, third/public sector employers should include **relevant safeguarding obligations regarding sexual harassment**. For example, the Charity Commission specifies sexual harassment as a *"serious incident"*[12] to be reported to them. Likewise, the EHRC should recommend employers operating within regulated professions expressly set out any **relevant regulatory obligations regarding sexual harassment** (e.g. guidance from the General Medical Council (GMC), Solicitors Regulated Authority (SRA), and Financial Conduct Authority (FCA) in their policies). This will increase the effectiveness of policies to prevent sexual harassment, add transparency needed to foster trust and send a clear signal that the *leadership* acknowledges their responsibilities and accountability to relevant regulators.

<u>Responding</u>

70. We do not think para 5.31 on "*Confidentiality Agreements*" (specifically NDAs) makes sense in a *preventing* section. Our callers often tell us that employers weaponise confidentiality obligations against them and frighten them into silence during the reporting, grievance and/or investigation stage under the threat of disciplinary action. While we agree that guidance on confidentiality is vital, it should be moved to the *responding* section

[12] https://assets.publishing.service.gov.uk/media/5bd706d9ed915d789dcd63ef/RSI_guidance_what_to_do_if_something_goes_wrong_Examples_table_deciding_what_to_report.pdf

instead. Information about NDAs, especially regarding reporting, can be included in the "*Effective policies"* instead of disrupting the flow of the section.

71. Para 5.19 on "*Detecting harassmen*t" should be moved to the *responding* section. This paragraph also seems to rely heavily on reports, i.e. made through "***post**-employment surveys*" and *"**exit** interviews*". Relying on information obtained after employment misses the "*warning signs"* until it is too late and, therefore, cannot be *preventative* steps. Any disclosures after employment should be recommended as they form the *knowledge* employers are now expected to act on proactively and investigate (without the need for reports) and data for risk assessment and monitoring the effectiveness of steps.

72. Further, the purpose of the duty is to put in place measures **before** "*warning signs appea*r." As such, whilst giving guidance that sickness absence or deterioration in performance are indicators of sexual harassment (e.g. multiple resignations is also a common indicator missing from the list), the guidance should encourage employers to take a wider risk assessment approach to its entire workforce. This should identify systemic issues rather than relying on individual behaviours as indicators. None of these are steps to *prevent*, anyway, and are necessary to shift employers from reactive to proactive. RoW recommends that the examples in para 5.19 be more clearly distinguished into those that can be used as steps to *prevent* and those that sit more squarely with *responding*.

73. Para 5.20 should be moved to a *responding* section as it outlines alternative reporting methods and is not a step for *preventing*. Also, para 5.23 on training would better be served in the *responding* section.

Monitoring and evaluating effectiveness

74. A further section should be added which gives guidance on how employers can **monitor and evaluate the effectiveness** of the *reasonable steps* they should have taken already. Much of the "*Evaluation of policies"* information in para 5.16 would be better served there. It need not be linked to policy evaluation only. For example, staff surveys should be **in** employment and make efforts to be representative of workers more likely to be vulnerable to sexual harassment (and its consequences), i.e. women and marginalised groups.

75. This section should also have the following appendices:
    - Sample climate survey (we recommend the TUC's examples) to collate data to assist with implementation and effectiveness (NB: collaboration with the ICO is likely required from a GDPR perspective);
    - Sample risk management tool (e.g. risk assessment) for employers of varying sizes to start the process to enable them to identify **what** the risks are and, thereafter, what measures to put in place; and
    - Sample of a 'record-keeping' tables, i.e.' accident books' under health and safety law, so that employers can adequately record and track times, dates, and details of incidents to spot trends and collate the necessary data needed to choose control measures and effectively monitor their effectiveness regularly in consultation with employees and Trade Unions representatives.

76. These appendices will also be useful for workers to provide to their employers to ensure *preventative* measures are implemented. Where a worker's employer ignores or does not complete them, this gives the worker the tools and evidence to demonstrate that the preventative duty has been breached and the foundations to ask the right questions to employers.

77. RoW also notes the increasing appetite, particularly in corporate workplaces, from ''male allies'' to advocate for safer and equal workplaces as they are more likely to have the power to do so with less risk. RoW supports any work towards the elimination of sexual harassment in the workplace that takes the onus off survivors. We urge the EHRC to provide more tangible examples of *reasonable steps* to assist in this broader movement to improve workplace cultures.

Chapter 5: recommendations, observations and amendments

78. Chapter 5 (and the guidance more widely) uses "*complaint*" throughout. This language is not trauma-informed and adds to survivors' feelings that by reporting they are being a *''nuisance''* or acting *''litigiously''*. Instead, RoW recommends using *''reports''*, which is neutral language reinforcing that workers have a right to work free from sexual harassment and recognising it is the employer who is legally responsible for any discrimination and harassment suffered by survivors. *''Reports''* instil that employers should *respond* responsibly, with due regard to all duties, including the new preventative duty. For example, reports of health and safety breaches have been normalised and generally accepted as being in the employer's best interest and protecting employees' safety and wellbeing. They are not treated as "*complaints*", although both trigger potential liability. Simple changes like this will help employers shift from reactive to proactive.

79. The Australian Guidelines in para 3.1 sets out its "*Guiding Principles*", which directs employers to adopt an approach which is "*person-centred*", "*trauma-informed*", and "*intersectional*"[13]. RoW would further suggest that the EHRC recommend a ''survivor-centred'' approach to foster the necessary trust and confidence in the employer for survivors to report. However, these concepts are absent from the EHRC guidance. Given that we regularly refer and advise survivors to use the guidance to aid them in their cases, more care must be taken to ensure the language used and approach will not compound any trauma. The updated guidance is an excellent place to begin educating employers on trauma-informed practice for which support is available. It would further increase availability if employers were only encouraged to be curious and seek it out. RoW recommends in para 5.21 directing employers to seek advice and training on trauma-informed practice from specialist providers.

80. The Australian Guidelines also detail **how** to respond to harassment allegations in circumstances where findings are upheld and not upheld. The Australian Guidelines recognise that the key to *preventing* sexual harassment is ensuring survivors have confidence in processes, that processes are robust, will not exacerbate trauma and are championed by the leadership. As the Australian model of *prevention* is world-leading,

[13] https://humanrights.gov.au/sites/default/files/2023-08/Guidelines%20for%20Complying%20with%20the%20Positive%20Duty%20%282023%29.pdf page 10

we see no reason why the EHRC does not go further or at least highlight examples from it. In stark contrast, the EHRC's guidance seemingly relies on the incorrect assumption that reports will be fairly and transparently investigated and subsequently upheld. The EHRC has no data to support this assumption. Since the aim is to *prevent,* the guidance must be considered through the lens of improper processes to be sufficiently robust and grapple with why many survivors never come forward.

81. RoW has legally advised on enough calls to state that, by and large, for survivors who do report, grievances are rarely upheld. A significant proportion of them are 'exited' out of the organisation and settle their cases (usually under non-disclosure clauses, which many find objectionable). They are also effectively ''pushed out'' of jobs despite not being at fault. This allows employers and perpetrators to evade scrutiny; worse still, many perpetrators continue to perpetrate again. As such, the exclusion of accountability from the leadership for the monitoring and effectiveness of compliance with the new duty in the updated guidance is a significant failure.

82. What we see in practice are employers repeatedly failing to investigate or pursue disciplinary action, instead pressuring survivors into informal routes, allocating them to different locations even against their wishes, instructing them to confront perpetrators or enter mediation with them even when inappropriate and detrimental to their safety and wellbeing, accepting *''apologies''* which have not been sought or opting for informal *''reprimands''* of perpetrators instead. Further, it is common for our callers to tell us that their harasser, following suspension pending an investigation, has been returned to the workplace. Employers' poor investigations (whether deliberate or complacent) make it increasingly difficult for survivors to successfully argue that disciplinary action is necessary, with employers relying on ''insufficient findings'' not to pursue further action. As such, disciplinary action or/and dismissal of perpetrators is rare in practice (although we note that in the regulated sectors, there is beginning to be a trend away from this due to the new explicit expectations, i.e. from the FCA), resulting in serial perpetrators posing continuing risk and often a complete breakdown in trust of an employer's internal processes. A vicious cycle is born. *Leadership* and accountability are the only hope of breaking that vicious cycle and instilling faith in those processes. However, the updated guidance is entirely silent on this point.

83. In conjunction with instilling trust in an employee's processes, it must be better addressed in the guidance on what to do when perpetrators remain in employment (even after investigations and/or disciplinary action is concluded). We recommend that *knowledge* (e.g. informal/formal reports, investigations and/or disciplinary action) should put an employer effectively ''on notice'' of a *continuing* and *future* risk of sexual harassment of other employees. Therefore, we recommend the employer records the information (as already suggested in para 5.16 of the current guidance) and carries out their (regular) risk assessment exercise akin to a *safeguarding* approach, in terms of that specific individual employee concerning *all employees,* e.g. by considering who they line manage or supervise, avoiding them having 1-to-1 meeting, including others in their communications and monitoring their interactions at social events.

84. Any hesitation or discomfort by employers to record, keep under review or put *safeguarding* measures in place without upheld findings is misconceived. This speaks to

widely held misconceptions, where employers operate under a presumption of 'innocent until proven guilty' held by many and society. All of which feeds into a general sense of trepidation and reluctance to act for fear of 'getting it wrong.' Indeed, much of the wider work RoW does in providing training is centred on educating professionals and employers about the law and debunking these myths. Therefore, severing the perception of 'innocence' without upheld findings is fundamental to underpinning a major shift towards prevention that employers can embrace as essentially safeguarding *all* employees.

85. Furthermore, the EHRC needs to give guidance that previous reports, etc., can and should be treated **cumulatively** and be used to update and inform risk assessment. All too often, employers default to an assumption of a 'first-time offence' in sexual harassment cases, especially if any other reports have not been upheld (which would likely not be taken with other disciplinary matters perceived to be less 'sensitive' and the threshold is artificially elevated). Survivors cannot reasonably expect to challenge this due to employers withholding data, even weaponising data protection rules against them. Our callers commonly tell us that "*no previously upheld complaint*" or an "*otherwise exemplary record"* are frequently cited as reasons not to uphold findings or pursue disciplinary action.

86. As explained above, the risk of sexual harassment is also held in individual employees' *behaviours;* undoubtedly, one of the most effective *reasonable steps* for employers when it comes to 'known' perpetrators is not only triggering investigations by *knowledge* (not only formal reports), seeing all investigations through to the end but also handling perpetrators appropriately due to the increased risk they posed. However, the current guidance seems reluctant to engage with sexual harassment as grounds for gross misconduct (nor does the ACAS Sexual Harassment 2021 guidance). Without sufficiently addressing this in key guidance, employers will remain fearful of treating sexual harassment as gross misconduct, and guidance is needed to support employers. This is routinely the case even when it is undoubtedly appropriate for them to do so, i.e. criminal allegations. Employers tend to prefer to defer to police investigations and/or push back on survivors to report to the police, particularly when it comes to allegations of domestic abuse, sexual assault or rape. In these cases, employers regularly apply the incorrect standard of proof and, yet again, artificially elevate the threshold for survivors of workplace sexual violence. This cannot be accepted when employers do not take the same approach with other types of criminal behaviour, e.g. drug use, also amounting to gross misconduct. In those circumstances, employers would naturally expect to conduct their investigation, navigate the burden of proof comfortably, presume no police involvement necessary at all and dispense disciplinary action accordingly. Misconceptions, biases, and stereotypes mostly drive this, and it is entirely avoidable with better direction.

87. RoW has previously advised the EHRC that the guidance, as a matter of priority, needs to cover the *balance of probabilities test* with instructive examples. Since *reporting* and *responding* are conflated and incorrectly extrapolated as a means of *prevention*, we can only reiterate how vitally important this is given the shockingly poor responses our callers tell us daily. This indicates a pressing need for advice and support on acting lawfully when *responding*, and not least to aid survivors in their appeals and legal claims.

88. We recommend including scenarios where employers have been dismissed for gross misconduct regarding sexual harassment as part of the examples to provide much-needed

clarity and reassurance for employers when appropriate. The example in para 4.54 mentions gross misconduct, but this is not about sexual harassment, which is a significant oversight for guidance centred on sexual harassment.

Cultural shift from reactive to proactive

89. A culture shift from the individual to the collective should be adopted so it does not rest solely on survivors' reporting but on the entire workforce to 'call out' behaviour. We recommend that the EHRC mirror guidance from regulated sectors. For example, RoW advised the GMC to update the "*Good medical practice"* guidance, which now explicitly covers sexual harassment and places a responsibility on doctors who witness harassment and discrimination *"to act"*. Also, new guidance from the SRA requires lawyers "*to challenge bullying and/or discriminatory conduct*."[14]

90. The WPA, which survivors, Trade Unions and equalities organisations have fought hard to secure since the MeToo movement began, was to drive a major culture shift in employers' attitudes. We want to see the WPA live up to its promise and create a transformative change from employers adopting a *'bunker mentality"*, which *"closes ranks"* and refuses to accept any liability as a means of self-preservation, to a positive obligation to create dignified and safe workplaces based on risk management and developing best practice for all employers to learn from. For the *preventative duty* to have any hope of making a difference, survivors and allies need to be given the tools to challenge their employers. However, the updated guidance does not give new, creative or practical ways for employers to either understand **what** their new duty entails or **how** to implement measures across their wide-ranging differing needs for advice.

91. Survivors who do make the difficult decision to come forward, in good faith and reasonable expectation their employer will intervene and protect them (and their colleagues, too), are all too often treated with hostility and suspicion. Survivors are horrified to find their employers more interested in protecting themselves from reputational and litigation risk than protecting their safety and wellbeing. We know from our callers that employers are currently primarily focused on denying and/or suppressing allegations of sexual harassment in the understandable assumption that this is prudent in avoiding liability and reputational damage. Many of our callers are forced into long leaves of absence from the workplace, taking months, sometimes even years, to rebuild their lives. Many develop severe mental and physical issues not only from the sexual harassment experienced but often needlessly exacerbated by employers' unlawful and discriminatory *responses*, steeped in misogyny, victim-blaming and sexual violence myths. Ultimately, they too often bear little fruit when changing the culture or protecting others. Simply pointing to policies and training as means of *prevention* for an issue as deeply entrenched and corrosive to gender equality as sexual harassment is insufficient, given the vast scale of the problem and the devasting impact on survivors' lives. This could be mitigated by better-updated guidance if the EHRC is genuine in stating that "*tackling sexual harassment"* is their "*number one priority theme of focus"* for the coming year.[15]

[14] https://www.sra.org.uk/solicitors/guidance/workplace-environment/
[15] https://www.equalityhumanrights.com/about-us/our-strategy/our-business-plan/business-plan-2024-2025

92. This is a far cry from the work the EHRC did with the CIPD in 2020, developing guidance for employers on domestic abuse in the workplace, which included a "*four-step framework for supporting survivors*", advice on "*responding appropriately to disclosures*," *"spotting the signs of abuse*", and even a model policy. The approach recommended by the EHRC regarding sexual harassment does not need to be different, but any framework or template is lacking. RoW would support the EHRC adopting a similar approach, which would provide a more consistent and holistic approach on *preventing* all forms of violence against women and girls in the workplace.

5. Are the examples in the new section helpful?

No.

6. Outline which examples are not helpful and explain why.

Example 1

93. As identified in our response to Question 2 above, too much emphasis is placed on third-party harassment, given that the WPA cannot currently be enforced against third parties. However, we hope this changes in the future. Examples without third parties should be prioritised instead to communicate the new duty in practice effectively.

94. Example 1 states, "*The employer carries out a risk assessment to assess the risk*". This sentence is repetitive and circular, and at such a high level, it is meaningless. RoW recommends stating instead:
    - Who conducts the risk assessment and how;
    - What risk assessment contains (using the **duration**, **frequency** and **severity** criteria in the Australian Guidelines);
    - Identification of the harm and impact for the worker as well as the employer, e.g. ‘employee's fears for her safety, her underlying disability of depression and anxiety is impacted, employee requests to no longer work 'front of house' and staff shortage ensues';
    - What information should it seek to collect;
    - How risk should be prioritised;
    - How the employer should record thought processes and conclusions;
    - Where these are recorded and kept;
    - Who has been consulted as part of the process (e.g. Trade Union reps, nominated 'allies', health and safety reps);
    - How workers can access the risk assessment and related information from the employer; and
    - How the leadership is accountable for monitoring and evaluating the effectiveness of *control measures.*

95. Given risk assessments will likely form the foundation to demonstrate adherence to the new duty, the EHRC should suggest scenarios which would always warrant a risk assessment in and of itself as part of their planning process (like health and safety

protocols many employers are already comfortable doing), e.g.' off-site' events organised by the employer like conferences, 'Christmas parties', 'away days', 'team holidays' etc. The EHRC should recommend that feedback is directly sought from workers, just as employers invite workers to suggest reasonable adjustments, and employers can record thought processes in deciding the reasonableness of suggestions.

96. The example then sets out the employer's measures to (seemingly) comply with the new duty. The measures listed mainly refer to training and/or policies to support *responding* to *reporting* (i.e. where sexual harassment has already occurred). This reveals the EHRC's continued assertion that *reporting* is a means of *prevention* and conflates the distinction between *preventing* and *responding*. As already stated, the updated guidance should state that employers should not rely on reports of sexual harassment (or lack thereof) as the sole indicator of whether it is complying with their duty. This conflation continues to place the burden on survivors. It is not conducive to obtaining justice for survivors, especially when so many can attest to how their reports did not prevent the sexual harassment of others.

97. We recommend the EHRC explain what the employer should have considered instead. For example, requirements to work in pairs, 'panic buttons', 'codewords' that trigger pre-agreed safety protocols, 'safety breaks', 'walk-throughs' of the workplace environment, checklists, and monitoring rotas and shift patterns to avoid working alone and/or in the evenings are tangible examples of preventative *reasonable steps.*

Example 2

98. Please refer to our response to Question 2 above, which questions using third-party harassment examples when there is currently no ability to enforce sexual harassment claims against third parties. The example should be modified to remove the emphasis on third-party harassment and include an employee-to-employee example, which will have more practical application for those using the guidance.

99. The example mentions the cost of determining the reasonableness of the steps (see para 32 of our response above). However, this is about third-party harassment, which is not actionable and, therefore, cannot be counterbalanced as a *reasonable step* compared to the potential (now even more onerous) financial cost the employer might now bear for breaching the new duty. It would be more beneficial to include an example that details an employer's decision that the cost of training is reasonable since so much of the operation of the new duty seems to rely on policies and training.

100. We repeat the points made about Example 1 above.

Example 3

101. We do not think this example is necessary. Firstly, it does not deal with the issue of whether the uplift relates to the entire compensation or only the compensation in respect of a sexual harassment claim. Secondly, until the Employment Tribunal has dealt with the

uplift application and there is a body of case law, it is premature and counterproductive to include an example indicating what workers may expect to receive.

102. Overall, when one compares the examples used in Chapter 3 to those in the EHRC's reasonable adjustment guidance, there are not enough examples, and the detail within each is limited.

7. Outline any other examples we could use instead?

103. Examples should:

- be drafted from a trauma-informed and survivor-centred approach;
- not confuse reporting with prevention, which are distinct concepts. *Preventing* should not and cannot rely on *reporting as reasonable steps to prevent* as the sexual harassment has already happened;
- make explicitly clear that even if an employer has not received reports of sexual harassment that it does not mean it has complied with the new duty;
- include a more comprehensive range of settings and scenarios akin to the EHRC's guidance on reasonable adjustments;
- rather than refer to "*the employer*", the examples should highlight who in leadership is accountable for the implementation and monitoring of the effectiveness of the *reasonable steps* chosen;
- include other practical and less abstract preventative measures which are not related to policies and training (as already suggested above);
- include how employers should record their thought processes and any subsequent implementations;
- suggest how often an organisation should conduct a risk assessment and when/how frequently to review;
- cover scenarios which include anonymous reports;
- cover scenarios which include the employer carrying out a staff survey and reviewing the data and what changes they would make from this data;
- give specific practical steps for workers on what steps their employer should be taking to prevent sexual harassment and how to challenge their employers if they are potentially in breach of the preventative duty, including but not limited to a standalone grievance;
- examples for each of the seven "*standards"* set out in the EHRC's guidance to prevent sexual harassment (as per the Australian Guidelines); and
- inclusion to broader issues such as the gender pay gap, workplace culture, gender equality, diversity and inclusion to recognise how more male-dominated workplaces foster the conditions for sexual harassment to occur.

104. We consider a creative industry example to be positive and reflects the calls we receive to our advice line. However, we recommend an additional example based on social care/ healthcare or education representing more women's experiences. These are the sectors where women hold the largest number of jobs[16], especially for Black and minoritised

[16] https://researchbriefings.files.parliament.uk/documents/SN06838/SN06838.pdf

women. These women are disproportionally impacted by sexual harassment and its consequences, including being more likely to leave their employment due to harassment, according to the TUC.[17]

105. Furthermore, we point out that the entire guidance, although meant to be focused on sexual harassment, has too few examples of sexual harassment. We recommend that para 2.22 would be the right place for the EHRC to acknowledge that domestic abuse not only occurs outside the workplace but exists between colleagues in workplaces by referring to its "*CIPD Domestic Abuse guidance,"*[18] The example in para 2.28 of the current guidance is somewhat far-fetched. We suggest that the EHRC uses actual Employment Tribunal cases, which would be more instructive examples for employers and workers.

Signposting

106. We recommend that RoW be included *in "Sources of Further Guidance"* as a crucial resource for survivors and that it provides the only specialist and dedicated service in England and Wales.

107. We also recommend adding signposting information on how workers can check their eligibility for discrimination legal aid by signposting to the Civil Legal Aid eligibility calculator.[19] This information is fundamental to supporting access to justice and providing rights-based information for workers as part of specific guidance explaining harassment law. The 2019 EHRC inquiry[20] detailed the shockingly low take-up of discrimination legal aid, which echoes our experience as many of our callers are unaware it is available.

[17] https://www.tuc.org.uk/research-analysis/reports/bme-women-and-work
[18] https://www.cipd.org/uk/knowledge/guides/supporting-employees-experiencing-domestic-abuse/
[19] https://www.gov.uk/check-legal-aid
[20] https://www.equalityhumanrights.com/our-work/inquiries-and-investigations/inquiry-legal-aid-victims-discrimination#:~:text=Access%20to%20legal%20aid%20for,supported%20to%20bring%20discrimination%20claims.