



# **Close the Gap response to the UK Government consultation sexual harassment in the workplace: Legal protections under the Equality Act 2010**

**October 2019**

## **1. Introduction**

Close the Gap is Scotland's women and labour market expert, and has 18 years' experience of working with employers, policymakers and trade unions to encourage and enable action to close the gender pay gap. Gender inequality shapes women's lives, resulting in their different experiences in employment, their greater propensity to have caring roles, and their greater likelihood of being a victim-survivor of gender-based violence. Approaches to address sexual harassment must recognise that gender inequality, including the inequality and discrimination faced by women in the workplace, is the root cause of sexual harassment. Prevention of sexual harassment at work must therefore be based on tackling sexism and the structural inequality that different groups of women experience at work.

The current law on sexual harassment is not delivering justice for women, with significant under-reporting a feature of women's experiences, lack of employer action and few cases making it to employment tribunal. Close the Gap therefore welcomes this consultation on reviewing the legal protections for sexual harassment under the Equality Act.

## **2. Answers to specific questions**

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

Yes.

Close the Gap agrees that a preventative duty on employers should be introduced. Sexual harassment is a systemic problem in UK workplaces, a form of violence against women (VAW), a breach of women's rights, and a contributing factor in the UK's persistent gender pay gap. However, across the labour market sexual harassment is normalised by sexist workplace cultures, and evidence shows that employer responses do not treat women's complaints seriously<sup>1</sup>. The onus on individual women to take action after sexual harassment has occurred creates a significant barrier to women seeking redress as the burden falls on them when they are most often in a lower position of power. Evidence gathered through Close the Gap's Equally Safe at Work employer accreditation pilot has found that women also do not report because where colleagues have made similar complaints, little has changed as a result.

A key challenge in preventing sexual harassment is the lack of employer recognition of, and action to tackle, the problem. Because sexual harassment and sexism at work is normalised, many employers do not acknowledge that it is an issue in their organisation or in the wider labour market. Creating a proactive duty signals to employers that sexual harassment is a serious problem which must be addressed.

We agree with the approach set out in the consultation that the duty should mirror current concepts in the Equality Act. The Equality and Human Rights Commission (EHRC) cannot, at present, take enforcement action for failure to take preventative steps. However, a statutory preventative duty would create a clear and enforceable legal requirement on all employers to protect their workforce from sexual harassment, and in turn advance women's equality at work.

We welcome the development of a statutory code of practice by the EHRC. It is critical that the statutory code of practice has a strong focus on the prevention activities that employers should take. Key to this is the recognition that sexual harassment is a form of VAW, which is a cause and consequence of gender inequality. Acknowledging this link is core to understanding why sexual harassment happens, and how it functions in the workplace. Prevention activities must therefore focus on challenging sexist workplace cultures.

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<sup>1</sup> Equality and Human Rights Commission (2018) *Turning the Tables: Ending sexual harassment at work*; Women and Equalities Select Committee (2018) *Sexual Harassment in the Workplace*; and TUC (2016) *Still Just a Bit of Banter?*

## **Q2. Would a new duty to prevent harassment prompt employers to prioritise prevention?**

Yes.

It is clear that that existing legislation is not protecting women from sexual harassment<sup>2</sup>, nor advancing gender equality in the workplace. Evidence shows that most employers are unlikely to take action around gender equality unless legally required<sup>3</sup>, and therefore a new preventative duty has the potential to create change for working women in the UK.

Many employers do not perceive sexual harassment happening in their organisation, while other simply do not prioritise action that will tackle the problem. Close the Gap believes that introducing a preventative duty will signal to employers that sexual harassment must be prioritised. In its response<sup>4</sup> to this consultation, the EHRC notes that currently if a person brings a claim against their employer in an employment tribunal in respect of harassment committed by a colleague, the employer can avoid liability if it can demonstrate that it took all reasonable steps to prevent the harassment from occurring. The EHRC further notes that this is not an adequate means of protecting workers. The current legal provisions contribute to the significant under-reporting of sexual harassment in the workplace, and the lack of claims that make it to employment tribunal. Evidence shows that women do not report sexual harassment because of a lack of confidence in employer reporting procedures; a persistent lack of action by employers, including taking complaints of sexual harassment seriously; and fear of repercussions for their relationships with colleagues, their job, and their career<sup>5</sup>.

The proactive element is critical because it will require employers to consider the steps they need to take to prevent sexual harassment as opposed to waiting until the harassment has occurred.

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<sup>2</sup> Women and Equalities Select Committee (2018) *Sexual Harassment in the Workplace*; Equality and Human Rights Commission (2018) *Turning the Tables: Ending sexual harassment at work*

<sup>3</sup> IFF Research (2015) *Gender pay data*, Government Equalities Office

<sup>4</sup> Equality and Human Rights Commission (2019) *Response to the UK Government consultation on sexual harassment in the workplace*

<sup>5</sup> Women and Equalities Select Committee (2018) *Sexual Harassment in the Workplace*; Equality and Human Rights Commission (2018) *Turning the Tables: Ending sexual harassment at work*; and TUC (2016) *Still Just a Bit of Banter?*

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

Yes.

We agree that, in line with other workplace provisions in the Equality Act, dual enforcement by the EHRC and individuals would be appropriate. We welcome that the burden on individual women would be reduced, as this currently creates a barrier to justice and equality, and believe that enabling the EHRC to take enforcement action would communicate to employers that there are more serious consequences if they are in breach of the preventative duty.

It is, however, critical that any new requirement for the EHRC to deliver additional enforcement work is adequately resourced. The EHRC cannot be expected to deliver effective enforcement, that creates meaningful change for women at work, without having sufficient resources to do so. Similarly, if there is still a burden on individual women, it is important that additional support is available which can facilitate that. The inability to access to justice is a core issue to women's inequality, which has undermined the effectiveness of the justice system in securing redress and creating change<sup>6</sup>.

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

In Close the Gap's experience, demonstrating the business and economic cases for gender equality at work is key to influencing employers. Sexual harassment prevents women from doing their job effectively. It thrives in workplace cultures in which sexism is normalised and goes unchallenged. Women report sexual harassment as having a negative impact on their mental health, making them less confident at work, and including them to avoid certain work situations in order to avoid the perpetrator.<sup>7</sup> The impact of sexual harassment, which can include trauma, stress, depression, anxiety, fear and isolation, often results in increased absence levels, lower morale, reduced productivity, higher turnover and associated costs, and ultimately a loss of female talent to employers. The impact is not only on the victim-survivor; colleagues who witness sexual harassment are also affected, particularly where the

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<sup>6</sup> Women and Equalities Select Committee (2018) *Sexual Harassment in the Workplace*; and Equality and Human Rights Commission (2018) *Turning the Tables: Ending sexual harassment at work*

<sup>7</sup> TUC (2016) *Still Just a Bit of Banter?*

harassment goes unchallenged. The cost of sexual harassment to employers is high, manifesting in administrative costs for managing unplanned time off, increased turnover, lost wages, and sick pay.

The cost to women is also significant as the effects of, and responses to, sexual harassment, are likely to diminish their propensity to apply for and be appointed to promoted posts.<sup>8</sup> Sexual harassment therefore contributes to the 'glass ceiling', women's subordinate role in male-dominated workplace cultures, and the gender pay gap.

Leadership is core to tackling sexual harassment, and there is a clear role for increased transparency and improved corporate governance in this area. Where leaders demonstrate a strong commitment to preventing sexual harassment, and advancing gender equality at work, women are more likely to believe that their complaint will be taken seriously. Having boards sign-off organisational action plans to meet the preventative duty would enable greater transparency and oversight.

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

Yes.

Evidence shows that third party harassment is a significant problem for women across the labour market, but some groups of women are particularly vulnerable:

- younger women;
- women on zero hours and temporary contracts;
- women working in male-dominated jobs and industries; and
- women working in specific jobs and industries such as retail and hospitality.

Since the repeal of section 40 of the Equality Act, women who are sexually harassed by customers and clients are not afforded protected in law. Similarly, women working in precarious work, such as the gig economy, where there is no standard employment relationship, are also not protected from sexual harassment. Research by the EHRC found that where women report sexual harassment by third parties, this is managed particularly poorly by employers<sup>9</sup>.

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<sup>8</sup> Engender (2018) *Submission to the independent review of hate crime legislation in Scotland*

<sup>9</sup> Equality and Human Rights Commission (2018) *Turning the Tables: Ending sexual harassment at work*

A lack of management support, is a particular challenge with sexual harassment and sexual assault viewed by some employers as a 'normal' part of the job.<sup>10</sup> This in turn creates an additional barrier to reporting as complaints are unlikely to be addressed.

We therefore strongly agree that the third party harassment provisions in section 40 of the Equality Act be reintroduced. We also agree that employer liability for third party harassment should be triggered without the need for an incident. We support the EHRC in its response to this consultation that it is possible for employers to anticipate that harassment is likely to occur in the workplace without a worker having demonstrated that it has happened before<sup>11</sup>. A preventative approach to sexual harassment should identify vulnerabilities for women, and where there is a risk of third party harassment. This could include building capacity in line managers to effectively challenge sexist behaviour from clients and customers. It is critical that employers are required to preventative steps, whether the perpetrator is an employer or worker, or whether it is a client or customer.

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

Close the Gap strongly urges that the mandatory duty to take all reasonable steps to prevent sexual harassment should also apply to sexual harassment perpetrated by a third party. However, if a mandatory duty is not introduced, then we agree that the defence of having taken all reasonable steps to prevent sexual harassment should apply where the harasser is a third party.

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

Organisations that use volunteers and interns should be responsible for ensuring that they are able to work in a safe environment, free from hostility, sexual harassment and discrimination. In its inquiry report into sexual harassment, the Women and Equalities Committee also agreed that everyone

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<sup>10</sup> Equality and Human Rights Commission (2019) *Response to the UK Government consultation on sexual harassment in the workplace*

<sup>11</sup> Ibid.

in the workplace should be protected from sexual harassment, regardless of whether they have a contract of employment or similar contract for services or who the harasser is.<sup>12</sup> Volunteers and interns should be considered as vulnerable groups because they are not protected by employment law. There is a clear power imbalance between people in junior positions such as volunteers and interns, and staff, which creates a conducive context for sexual harassment.

**Q12. Is a three-month time limit sufficient for bringing an Equality Act claim to an Employment Tribunal?**

No.

We do not believe that a three-month time limit is sufficient to bring an Equality Act claim to an employment tribunal. Evidence from the EHRC shows that the existing time limit is a barrier to justice<sup>13</sup>. Sexual harassment is a form of VAW, which can cause significant and long-lasting effects on women including trauma, depression, stress and anxiety. For many women, three months is too short a period in which to process their experience, decide whether to pursue a claim, seek legal advice and begin the legal process. This is particularly true of women who are still in post, and who may have to continue to work with their perpetrator. Women are often faced with a choice of allowing the limitation period to expire while they pursue an internal grievance or issuing a claim before they have exhausted internal procedures<sup>14</sup>.

Close the Gap supports the EHRC's recommendation, that was endorsed by the Women and Equalities Committee, that the limitation period for sexual harassment claims in an employment tribunal be amended to six months from the last date of:

- The act of harassment;
- The last in a series of incidents of harassment; or
- The exhaustion of any internal complaints procedure.

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<sup>12</sup> Women and Equalities Select Committee (2018) *Sexual Harassment in the Workplace*

<sup>13</sup> Equality and Human Rights Commission (2018) *Turning the Tables: Ending sexual harassment*

<sup>14</sup> Equality and Human Rights Commission (2019) *Response to the UK Government consultation on sexual harassment in the workplace*

**Q13. Are there grounds for establishing a different time limit for particular types of claim under the Equality Act, such as sexual harassment or pregnancy and maternity discrimination?**

We believe that there are grounds for establishing a different time limit for claims under the Equality Act, and that this should apply to all forms of discrimination and harassment. Solutions to sex discrimination and sexual harassment must recognise that women's systemic inequality in the workplace requires a strategic response. We agree with the EHRC that in order for employers to fully meet their obligations under a new preventative duty, enforcement should be supplemented by the ability for employment tribunals to make wider recommendations<sup>15</sup>. Currently tribunals can only make recommendations related to the discrimination of the individual. We therefore urge that the power under section 124 of the Equality Act of employment tribunals to make recommendations aimed at reducing the adverse effects of discrimination in the wider workforce be restored.

**Q14. If time limits are extended for Equality Act claims under the jurisdiction of the Employment Tribunal, what should the new limit be?**

We believe that the time limits for Equality Act claims under jurisdiction of an employment tribunal should be extended to 6 months.

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

*a) A focus on primary prevention*

Action to tackle sexual harassment must have a strong primary prevention focus because sexual harassment, and other forms of VAW, are a cause and consequence of gender inequality. This link is recognised in Equally Safe<sup>16</sup>, Scotland's strategy to prevent and eradicate violence against women and girls. Taking steps to address women's inequality in all aspects of society is therefore necessary to prevent sexual harassment. In the workplace, approaches to

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<sup>15</sup> Equality and Human Rights Commission (2018) *Turning the Tables: Ending sexual harassment*

<sup>16</sup> Scottish Government (2016) *Equally Safe, Scotland's strategy to prevent and eradicate violence against women and girls*



address sexual harassment must focus on challenging sexist workplace cultures.

Everyday sexism is visible in formal and informal interactions, and manifests in a number of ways in the workplace, for example:

- Women's contributions being valued less; for example, their ideas being dismissed in meetings, or their contributions being initially ignored, only to be repeated by a male colleague later and received positively.
- Women being assigned to fewer higher visibility projects despite having equivalent or more skills and experience to their male colleagues.
- Women being expected or asked to make the tea or take minutes, irrespective of their role.
- Sexist jokes and remarks dismissed as "banter", including a preoccupation with a woman's physical appearance, including her clothes.
- The use of language which diminishes, infantilises or sexualises women, e.g. referring to colleagues as "the girls", or calling a colleague "darling" or "love", which creates an environment where women feel they are seen as less valuable or held in contempt.
- Stereotypical expectations around the type of work or the position a woman, or man, would hold; for example, assuming a woman is a lower grade when she is a senior manager, or a man being assumed to be the manager of a team by a visitor from another department.
- Suggesting a female colleague got a promotion because the hiring manager found her attractive, or implying she had slept with him.
- Referring to a female manager as "bossy" while male managers are seen as assertive and strong.
- The, often unspoken, assumption that women will organise collection sheets, gifts, and nights out for colleagues.

Because of the normalised and everyday nature of these occurrences, it can feel very difficult for women to challenge sexism in the workplace which in turn makes it difficult to report sexual harassment. An effective approach to sexual harassment must therefore recognise the sexist workplace cultures in which sexual harassment thrives, and take appropriate steps to challenge this and create a workplace in which women feel included and are able to participate on an equal basis with colleagues.

### *b) Improved data*

There is a lack of administrative data on women's experiences of sexual harassment at work. It is also very unusual for employers to gather data on sexual harassment in their organisation. Improved data would provide a more granular understanding of women's experiences in the labour market, and help to identify particular challenges, which is essential to developing solutions to the problem. We support the EHRC's recommendation<sup>17</sup> the UK Government should gather data from individuals every three years to determine the prevalence and nature of sexual harassment at work; and publish an action plan after each report which sets out how it will tackle sexual harassment. It is important that this gender-disaggregated data is intersectional because women are not a homogenous group. Their experiences of sexual harassment are shaped by their multiple identities, for example as Black and minority ethnic women and disabled women, which will be inflected by not only sexism but also racism and ableism.

Employers should also be encouraged to gather intersectional gender disaggregated data on sexual harassment among its workforce. Identifying patterns in an organisation is key to understanding how to tackle a problem. Furthermore, improved data collection and transparency is necessary to building women's confidence in employer reporting systems.

### *e) Equally Safe at Work*

Close the Gap is piloting an innovative employer accreditation programme in Scotland's local government. *Equally Safe at Work*<sup>18</sup> supports employers to prevent sexual harassment, and other forms of VAW, and advance gender equality at work. Seven early adopter councils are working to meet a range of criteria across six employment practice standards, namely VAW, workplace culture, flexible working, occupational segregation, leadership and data. *Equally Safe at Work* recognises that VAW is a cause and consequence of gender inequality at work, and women's wider inequality in society. It therefore has a strong focus on enabling employers to understand their role in preventing sexual harassment and other forms of VAW, and taking steps to

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<sup>17</sup> Equality and Human Rights Commission (2018) *Turning the Tables: Ending sexual harassment*

<sup>18</sup> See [www.equallysafeatwork.scot](http://www.equallysafeatwork.scot)

challenge sexism in the workplace. Activity undertaken by early adopter employers since January 2019 has included:

- delivering internal and external communications from senior leaders demonstrating the organisation's commitment to gender equality at work and preventing VAW;
- developing an action plan to guide their work through the pilot, overseen by a cross-departmental steering group;
- developing improved data gathering systems;
- delivering awareness raising campaigns;
- building capacity in line managers on VAW, and flexible working; and
- gathering quantitative and qualitative data from employees, including specific data from low-paid women, on their attitudes to, and experiences of, gender equality at work and VAW.

The pilot period will conclude in January 2020, after which an evaluation will determine key learning from the project, including employer responses and motivations for action, change that has resulted, and the impact on women working in the councils.

#### *d) Third party reporting*

Close the Gap is leading a new project<sup>19</sup> in Scotland which focuses on sexual harassment at work. Outputs will include a training resource on sexual harassment for employers involved in *Equally Safe at Work* and a new resource on sexual harassment for *Think Business, Think Equality*, Close the Gap's online self-assessment tool for SME employers. The third element of the project, which will be led by Engender, Scotland's feminist policy advocacy organisation, is scoping a best practice model of a third-party reporting and investigating mechanism.

The literature on sexual harassment identifies a number of near-ubiquitous structural failures to tackle sexual harassment on the part of employers<sup>20</sup>. Women across industrial sectors and types of organisations describe a lack of confidence in their employer to appropriately prevent, investigate, and sanction individuals responsible for sexual harassment. Women express strong

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<sup>19</sup> Funded by Rosa, the UK Fund for Women and Girls. It is part of a wider collaborate project with Fawcett Society in England, Chwarae Teg in Wales, and Women's Resource and Development Agency in Northern Ireland.

<sup>20</sup> Women and Equalities Select Committee (2018) *Sexual Harassment in the Workplace*; and Equality and Human Rights Commission (2018) *Turning the Tables: Ending sexual harassment at work*

preferences for reporting and investigation mechanisms that protect their privacy, are gender-competent, and independent of their employer.

In the United States a number of third-party services have been emerged to support institutions, and especially higher education institutions, to comply with their Title IX obligations to investigate and respond to sexual harassment and assault<sup>21</sup>.

The project in Scotland will bring together experts in the law, sexual harassment and violence against women, employment, and equality to generate possible mechanisms for third-party reporting and investigation that would align with employment law, HR practice, ACAS, and the Scottish Courts and Tribunal Service. Third party reporting could therefore be an important mechanism which enables women to report sexual harassment.

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<sup>21</sup> See <https://www.projectcallisto.org/>