Government outlines plan to change to law on sexual harassment at work

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On 21 July 2021 the Government published its long-awaited

response to the consultation on sexual harassment in the workplace. In this briefing we explain the Government's commitments and what they will mean in practice.

Background

Following the explosion of the #MeToo movement in 2017, the Women and Equalities Select Committee undertook an inquiry into sexual harassment in the workplace in the UK. In 2018 the Committee published its report, setting out wide-ranging recommendations for change. On the back of that, the Government opened a public consultation on four of those recommendations, namely:

- the introduction of a mandatory duty on employers to protect workers from harassment and victimisation;
- how to strengthen and clarify the law in relation to third party harassment;
- whether protection was needed for interns and volunteers; and
- whether the time limit for bringing discrimination claims should be extended beyond three months.

Almost two years have passed since the consultation closed, but, finally, on 21 July 2021 the Government published its response and has committed to making some changes to the law.

Mandatory duty to protect workers from harassment and victimisation

The current position is that sexual harassment in the workplace is unlawful and employers and individuals can be found liable in claims brought in the Employment Tribunal. Employers can avoid being found vicariously liable for harassment committed by their workers if they can show that they have taken reasonable steps to prevent such harassment occurring. In this context, reasonable steps include implementing an anti-harassment policy, providing good quality

and regular training to staff and dealing with complaints effectively. In practice, most employers elect to take such steps, but there is no legal obligation to do so.

The consultation proposed introducing a legal duty on employers to take proactive steps to prevent sexual harassment. In practice, this would compel employers to take the steps mentioned above and they could be held to account for failing to do so, without the need for a claim of sexual harassment to be brought before an Employment Tribunal. The consultation proposed that this duty be enforced by the Equalities and Human Rights Commission (**EHRC**). It also asked whether individuals should be able to take enforcement action.

The response confirms that the Government intends to bring forward legislation to introduce a new duty requiring employers to take all reasonable steps to prevent sexual harassment as soon as Parliamentary time allows. It is not clear from the response whether this new duty will apply to all forms of harassment under the Equality Act 2010, or whether it will be confined to sexual harassment only.

The response also confirms that the EHRC will be responsible for enforcement of this duty using their existing powers. The Government will also "discuss scope for further EHRC action in this area". It is not yet clear what such further action may entail. The EHRC will also be asked to develop a statutory code of practice that will explain the steps that employers need to take to prevent harassment. In tandem, the Government will publish guidance outlining practical steps employers can take. This will supplement the EHRC's detailed technical guidance on sexual harassment published in January 2020 (you can read our briefing on that guidance here).

As far as individuals are concerned, the response says that individuals will be able to bring legal challenges, but only when an incident of harassment has occurred. Unfortunately, the response is vague about the scope of an individual's

ability to bring a legal challenge. It is not clear whether this extends to individuals who have not themselves been the victim of harassment. It is also not clear where such legal challenges should be brought (presumably the Employment Tribunal but this is not stated) or what remedy, if any, will be available to the individual. We will need to see the legislation to understand the precise detail.

Liability for third party harassment

Until October 2013, the Equality Act 2010 contained provisions making employers liable for harassment of their staff by third parties (such as contractors or clients), although liability only arose where the worker had been harassed on at least three occasions. These provisions were repealed by the Conservative Government on 1 October 2013. This left individuals who were harassed by third parties at work in the unsatisfactory position of having to argue that their employer's inaction in the face of third-party harassment itself constituted an unlawful act. The Court of Appeal held in Unite the Union v Nailard [2018] EWCA Civ 1203 that an employee would need to show that the protected characteristic was the reason for the employer's failure to protect them against the harassment by the third party. In practice, this is a difficult hurdle to overcome.

The consultation asked whether explicit legal protection against third party harassment should be introduced (or, rather, re-introduced). It also asked whether – in a context in which harassment was likely – employers should be liable for failing to take all reasonable steps to prevent third-party harassment even where an incident had not occurred. Alternatively, should liability only arise where an incident had occurred (and, if so, one or more than one)? It also asked whether a "reasonable steps" defence should be available to employers in third-party harassment claims, as it is in existing harassment claims.

The response confirms that this will be taken forward and legislation introduced when Parliamentary time allows. The precise scope of the protection has yet to be determined. The response says that the Government will work with stakeholders to shape the protection, particularly on whether it should only apply in situations where an incident of harassment has already occurred. However, the response confirms that the reasonable steps defence will be extended to third-party harassment.

Protection of interns and volunteers

Currently, interns will often qualify as employees or workers for employment law purposes. As such, they will already be protected from discrimination and harassment in the workplace by virtue of the existing provisions of the Equality Act 2010. However, such protections do not extend to volunteers. The consultation asked whether it would be right to extend the Equality Act 2010 to cover volunteers (and, if so, whether this should be some or all volunteers). It also asked for feedback on whether there were any groups of interns who would not be covered by the existing legislation.

In relation to interns, the response said that this group of people can be understood as working for free in order gain professional experience. As such, the Government was satisfied that "in almost all cases" these groups would qualify as workers and would already be covered by the Equality Act 2010 meaning no further measures are necessary.

In relation to volunteers, the response says that the same protections should not apply to "pure" volunteers in the same way as for workers and employees. Extending protections to all volunteers could create a disproportionate level of liability and difficulties for organisations, which could outweigh the service they provide. The response draws a distinction between ad hoc, informal, small-scale volunteering and formal, large-scale volunteering. It says it would not be

right to extend the protection to the former group, but it might be appropriate to extend it to the latter group.

The response is unclear about whether the Government will make any changes in relation to protecting volunteers from harassment, save for saying that it is important that any steps that are taken do not deter individuals from volunteering or result in organisations having to deal with additional red tape. Certainly, no firm commitments have been made, suggesting that reform will not be imminent.

Increasing the time limit for bringing discrimination claims

Currently, there is a three-month time limit for bringing claims of discrimination or harassment in the Employment Tribunal (subject to the rules on extending time through Acas Early Conciliation). Employment Tribunals have the discretion to extend the time limit for bringing a discrimination claim where a Tribunal Judge considers it is just and equitable to do so.

Nevertheless, this short time limit can act as a barrier to justice, particularly in sexual harassment cases where the trauma experienced may delay an individual's efforts to pursue a legal claim. It can also be a factor in other discrimination cases, such as pregnancy and maternity discrimination claims, where the individual may have just given birth (or be about to) or is caring for a new baby and may be unable or less able to take the steps needed to pursue a claim. Relying on a Tribunal's discretion to extend time is not a failsafe option and many individuals will be reluctant to commence a claim which is already out of time.

Therefore, the consultation asked whether the time limit for such claims should be extended and, if so, whether this should be for all types of claim. It also asked what the new time limit should be. Around 60% of the respondents to the consultation felt that the time limit was too short. Of these,

roughly half thought that it should be extended to six months and the other half though it should be even longer.

The response recognises the powerful arguments for extending the time limit, particularly in sexual harassment and pregnancy and maternity discrimination cases. However, it balances this against the additional pressure placed on the Employment Tribunal service by the pandemic, pointing out that: "…restoring its existing levels of services needs to be the priority before additional loading is added." The conclusion is that the Government will commit to looking closely at extending the time limit in future. The response goes on to say that if the time limit is extended in future it will be extended:

- for all claims under the Equality Act 2010, not just a subset of claims; and
- to six months, not twelve months.

It is felt that this approach will avoid confusion and strike the right balance between ensuring access to justice for claimants, while minimising the potential negative impact on employers (on the basis that it becomes harder to answer a case the more time passes). It is not clear when a decision will be reached on this issue. The response simply says the Government will continue to engage with stakeholders as further work is carried out.

What's next?

Although these commitments are to be welcomed, closer scrutiny reveals that they are somewhat broad-brush and as usual, the devil will be in the detail. Nonetheless, in principle, these changes will provide workers with better protection from sexual harassment at work (and perhaps harassment in the wider sense).

Employers will need to benchmark the steps they already take to prevent harassment against the proposed new statutory code

of practice and guidance to ensure they are doing enough. In practice, we suspect this will involve taking some or all of the following steps:

- **Having a good suite of policies in place.** The EHRC's existing guidance recommends having separate policies for sexual harassment and other forms of harassment (or having one clearly delineated policy). The anti-harassment policies should also cohere with other relevant policies such as disciplinary and social media polices.
- **Raising awareness of the anti-harassment policies amongst the workforce.** This could mean requiring employers to provide copies to staff at regular intervals and before events where harassment has occurred in the past (e.g. Christmas parties).
- **Reviewing the anti-harassment policies every year.** Policies should have an annual health check and be updated to reflect any legal changes and trends apparent from internal complaints, staff surveys and/or exit interviews.
- **Putting in place methods to detect harassment (including third party harassment).** This could include informal one-to-ones, sickness return to work meetings, exit interviews and external reporting systems which allow anonymous reports. We have previously reported on how some employers are making use of apps which permit real time and anonymous reporting.
- **Providing high quality and regular training to staff.** As a recent decision showed, an employer won't have taken reasonable steps if the training it provides doesn't pass muster. Such training should also be tailored to the audience.
- **Dealing with harassment complaints effectively.** This includes taking appropriate disciplinary action against the perpetrator of the harassment.

While there will probably be work for all employers to do, in many cases it should not require doing anything radically different to what is already in place.

Employers and workers should watch out for further news on the possible extension of the time limit in all Equality Act 2010 claims to six months. If taken forward, this will provide victims of harassment with valuable breathing space to consider whether they wish to pursue a legal claim and mean that employers are "on the hook" for such claims for a longer period of time.

Consultation on Sexual Harassment in the Workplace: Government Response – 21 July 2021

If you need help or would like to discuss the issues raised in this news article, please contact Amanda Steadman or your usual BDBF contact.

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