Our response to the consultation on sexual harassment in the workplace

Consultation details

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Equality and Human Rights Commission

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Executive summary

The Equality and Human Rights Commission (the Commission) is a statutory body established under the Equality Act 2006. It operates independently to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights. The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. It encourages compliance with the Human Rights Act 1998 and is accredited at UN level as an 'A status' National Human Rights Institution in recognition of its independence, powers and performance.

As part of this role we are responsible for highlighting issues of concern, inform and guide good practice, engage others in solutions and influence change in employment practice. Work is an important aspect of personal fulfilment, and the right to work and fair conditions at work are fundamental human rights. However, some groups face disproportionate disadvantage and discrimination at work.

Background

In March 2018 the Commission published the report 'Turning the Tables: Ending sexual harassment in the workplace[1]', based on evidence from around 1,000 individuals and employers experiencing and dealing with complaints of sexual harassment. The evidence collected revealed the stark reality of individuals whose careers and mental and physical health have been damaged by corrosive workplace cultures, which silence individuals and normalise harassment. We also found a lack of consistent, effective action on the part of too many employers.

Our report set out a number of recommendations aimed at more effectively preventing and responding to sexual harassment and other forms of harassment in every British workplace through transforming workplace cultures, promoting transparency and strengthening protections. We believe that action is required in all three areas in order to address the current situation where individuals risk their jobs

[1] Turning the Tables: ending sexual harassment in the workplace, EHRC 2018

and health to report sexual harassment, and instead put the onus on employers to effectively prevent and resolve sexual harassment in the workplace.

Our key recommendations included:

- Introducing a mandatory duty on employers to take reasonable steps to protect workers from harassment and victimisation in the workplace and a statutory Code of Practice on sexual harassment and harassment at work.
- Extending the limitation period for harassment claims in an employment tribunal to six months from the latest of the date of:
    - the act of harassment
    - the last in a series of incidents of harassment, or
    - the exhaustion of any internal complaints procedure.
- Reinstating section 40 of the Equality Act 2010 and amending it to remove the requirement for the employer to know that the employee has been subjected to two or more instances of harassment before they become liable.

We were pleased to see that in the 100th anniversary year of the International Labour Organisation (ILO) member states adopted a new convention and recommendation to combat violence and harassment in the workplace. Member states recognised the importance of labour standards to address and stamp out violence and harassment in the workplace[2] and we believe that a mandatory duty on employers would be key to promote a "general environment of zero tolerance".

Following the publication of our report, and the Women and Equalities Select Committee inquiry report into sexual harassment in the workplace[3], we were pleased to see the Government respond with a clear commitment to ensuring the laws on sexual harassment in the workplace are fit for purpose. We welcome this consultation and are pleased to see our recommendations enshrined at the heart of the proposals set out within this consultation.

[2] ILO standard to combat violence and harassment 108th international labour Conference
[3] Sexual harassment in the workplace inquiry report, Women and Equalities Committee 2018

Summary of key recommendations

The Commission believes that the Government should:

1. Introduce a mandatory duty to take reasonable steps to prevent harassment and victimisation in the workplace. This should be enforceable by both individuals and the Commission, in line with existing work-related provisions;
2. Reintroduce section 40 provisions on third party harassment and amend to remove the requirement for two or more incidents;
3. Extend sexual harassment provisions to volunteers in organisations with paid employees, and to undertake research and consultation to assess impact of extending wider workplace discrimination provisions to volunteers;
4. Legislate to tighten the rules around internships, in line with recommendations made by the Social Mobility Commission;
5. Extend tribunal time limits to six months for all discrimination claims;
6. Extend legal aid to all discrimination cases and to amend existing Exceptional Case Funding guidance to provide clarity that discrimination cases are eligible for consideration;
7. Restore the power, under section 124 of the Equality Act 2010, of employment tribunals to make recommendations aimed at reducing the adverse effects of discrimination on the wider workforce;
8. Work with employers to increase transparency through improved governance and corporate responsibility, for example encouraging board level oversight on sexual harassment monitoring, and developing action plans to mitigate risks;
9. Implement a campaign to raise awareness of both rights and obligations.

Our consultation response

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

The Commission agrees with the proposal for a preventative duty that imposes employer liability for harassment mirroring current concepts in the Equality Act. This approach aligns with our proposal in our 'Turning the Tables'[4] report where we recommended that the UK Government should introduce a mandatory duty on employers to take reasonable steps to protect workers from harassment and victimisation in the workplace. A breach of the duty should constitute an unlawful act for the purposes of the Equality Act 2006, which would be enforceable by the Commission.

Employers owe their workers a duty of care. If a person brings a claim in an employment tribunal, the employer can currently defend the claim by saying that it took steps to prevent the harassment from occurring. We do not think that this defence is an adequate means of protecting workers as it places the onus on individuals to challenge breaches, and fails to encourage best practice on the part of employers.

Moreover, the Commission cannot currently take enforcement action for failure to take preventative steps. A breach of the mandatory duty would enable the Commission to take action. We believe that a statutory preventative duty would create a clear and enforceable legal requirement on all employers to safeguard their workers and help bring about cultural change in the workplace. Government should consider affording the Commission a power to impose penalties, such as a fine, on organisations which commit unlawful acts, including breach of the mandatory duty.

We also recommended the introduction of a statutory code of practice on sexual harassment and harassment at work, which would specify the steps that employers should take to prevent and respond to sexual harassment, as this can be considered

[4] Turning the Tables: ending sexual harassment at work, Equality and Human Rights Commission 2018

in evidence when determining whether a mandatory duty has been breached. We are pleased that the Government has agreed to this, and we are currently producing technical guidance which will form the basis of a statutory Code of Practice, setting out the steps that employers must take to prevent harassment and comply with the duty. This will be supplemented by additional technical guidance on the use of confidentiality agreements in discrimination cases.

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

Our evidence has shown that the current legal framework is inadequate and that we need to reduce the burden on individuals to report sexual harassment by requiring all employers to take effective steps to prevent and respond to sexual harassment. There are a number of barriers to reporting experiences of sexual harassment: employers do not take effective action when complaints are made, and enforcement action is reactive, relying on individuals to report when sexual harassment has taken place.

Sexual harassment is often viewed as an issue for the individual, rather than the employer to deal with. Our findings indicated that around half of respondents hadn't reported their experience of harassment to anyone in the workplace because of concerns that alleged perpetrators, particularly senior staff, would be protected, fear of victimisation, a lack of appropriate reporting procedures, or a general view that the organisation would not take the issue seriously.

Where cases were reported, employers often took no action, or attempted to minimise the complaint, or silence the complainant. One person said: '*I was called in to a meeting with the accused and his boss, and told it was a misunderstanding.'*

Respondents to our inquiry also report their complaints being dismissed as merely '*a bit of fun'* or '*laughing it off as boys being boys'*; or were blamed for 'encouraging' the sexual harassment. One individual stated: *'I was told it was my*

own fault for wearing tight clothing. I was actually dressed in a black suit and white shirt.'

In many cases where employers did take action as a result of an individual reporting sexual harassment, the response was a negative one. Some respondents described being threatened that their career could be damaged if they pursued their complaint, or said they had been disciplined or lost their job as a direct consequence of reporting. In a number of responses, people said they were blamed for the harassment taking place or felt punished by being moved to another department or role when the alleged perpetrator was left in their existing role.

The Women and Equalities (WEC) Sexual Harassment in the Workplace[5] report echoed our recommendation of introducing a mandatory duty on employers to prevent harassment. Their report set out the need for a mandatory duty with sanctions for breaches and proactive enforcement so that employers understood the serious nature of sexual harassment in the workplace.

Their report went on to say '*sexual harassment is currently being allowed to sit too far down employers' list of priorities. Unless the media spotlight happens to be on them, senior leaders simply do not have sufficient reason to worry about the consequences of failing their staff by not taking steps to prevent sexual harassment in their workplace.'*

[5] Sexual harassment in the workplace inquiry report, Women and Equalities Committee 2018

The Commission believes that a new duty would prompt employers to prioritise prevention. Currently if a person brings a claim against their employer in an employment tribunal in respect of harassment committed by a fellow worker, the employer can avoid liability if it can demonstrate to the tribunal that it took all reasonable steps to prevent the harassment from occurring. This is not an adequate means of protecting workers. As employment lawyers explained to the WEC, it is a defence to a claim which employers often only think about after harassment has occurred rather than encouraging them to take steps to prevent harassment before it occurs.[6]

The current statutory framework also places the onus on the individual to enforce their rights under the Equality Act 2010.The mandatory duty will mean the Commission can take enforcement action in relation to a failure to take preventative steps, taking the burden off individuals to pursue claims. We believe that creating a clear and enforceable legal requirement on all employers to safeguard their workers will help bring about the cultural change required to transform British workplaces into welcoming and supportive environments for all employees.

In order to support employers and employees, the Commission is producing technical guidance on sexual harassment and harassment at work and separate guidance on the use of confidentiality agreements in discrimination cases. The technical guidance on harassment will form the basis of a statutory Code of Practice, setting out the steps that employers must take to prevent harassment and comply with the duty.

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

We agree that dual-enforcement, in line with other workplace provisions in the Act, by the EHRC and individuals is appropriate. Enabling the Commission to take enforcement action should there be a breach of a preventative duty would increase the threat of adverse consequences if the employer does not take appropriate action

[6] Women and Equalities Committee: Sexual Harassment in the Workplace - Oral evidence Q183

and therefore reduce the enforcement burden on individuals. However, the Commission must be adequately resourced to take any additional enforcement action and Government needs to take steps to improve the support available to individuals who wish to challenge breaches.

As we set out in our response to the recent Women and Equalities Committee inquiry *Enforcing the Equality Act: the law and the role of the EHRC,*[7] the Commission was not established, and indeed has never been resourced, to support large numbers of individual discrimination cases or high-volume enforcement activity. Litigation by individuals remains the primary enforcement system for equality rights. The Commission can support and supplement this system, but it cannot replace it.

In our WEC submission[8] we also noted that the deterioration in individuals' ability to access justice (for example because of a lack of awareness of rights, or because of the complexity and expense of litigation) has undermined the effectiveness of our justice system in securing redress and achieving widespread change. This has led to increased calls for the Commission to take greater action to help individuals obtain remedies for discrimination.

Earlier this year we published a report into access to legal aid for discrimination cases[9]. This identified a number of flaws in the system and that very few people are getting the support they need to take legal action if they have experienced discrimination. This included concerns about legal aid for representation at employment tribunal, Exceptional Case Funding, and financial eligibility thresholds. While legal aid is available for advice and representation in certain types of discrimination case, it does not cover representation at employment tribunal. This means that individuals in workplace discrimination cases must either pay privately for representation or represent themselves, often against an opponent with more resources and professional legal representation. Discrimination cases can be complex, and vulnerable individuals, such as those who are bringing a complaint of

[7] Enforcing the Equality Act: the law and the role of the EHRC, Women and Equalities Committee 2019
[8] ibid
[9] Access to Legal Aid for discrimination cases, EHRC 2019

sexual harassment, find this particularly difficult as they must cross-examine the perpetrator themselves.

We also found that Exceptional Case Funding (ECF), which should provide a safety net for cases where legal aid is not usually available but where a victim's fundamental rights are at risk of breach, is not working as it should. Between 2013/2014 and 2017/2018 just ten applications were made for ECF for discrimination cases in a five year period and none were granted. We also found that the financial eligibility thresholds exclude people from accessing legal aid even when they cannot afford to pay for their own legal costs.

We believe that it should be a priority for Government to ensure that legal aid is available for people with complex discrimination cases who are unable to effectively represent themselves in the Employment Tribunal. However, we recognise this is a long-term aspiration requiring changes to legislation, so recommend interim measures to make it clear that employment discrimination cases can be considered.

We recommend that Government should:

- Produce specific guidance on ECF for discrimination cases, including workplace discrimination, making sure that caseworkers charged with granting funding in these cases take into account the potential complexities, the resources of the parties and any other factors that may prevent the victims being able to represent themselves
- In fulfilling its commitment to reviewing the legal aid financial eligibility requirements, ensure that the thresholds are set so that only those who can genuinely afford to pay for their own legal representation are excluded from legal aid. Any contributions people are required to make towards their legal costs should be set at a level that is genuinely affordable.

This latter recommendation is particularly important for women, who are more likely to work part-time, and receive lower pay[10] and who disproportionately experience sexual harassment in the workplace.

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

We recommend that an award should be made if an employee succeeds in a claim of harassment, and would advocate an uplift to the compensation awarded of up to 25%, depending on the severity of the breach. Otherwise the financial imperative to take action would not be significant enough to take action. This mirrors similar proposals in our *Turning the Tables* report, where we suggested that an uplift should be awarded if an employer failed to comply with our proposed code of practice.

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

While the legal and ethical case should be sufficient incentive, demonstrating the business case for preventing sexual harassment to employers is vital. Harassment at work can create serious problems, including poor performance, low morale and damage to the organisation's reputation. Eradicating these factors will mean employers attract and retain the best talent, increase morale, reduce absenteeism, reduce the gender pay gap and provide a boost to a business's public profile, which can all lead to greater productivity and an increase in profitability.

Transparency measures and improved corporate governance will also support employers in addressing sexual harassment in the workplace and enable them to attract and retain the best talent. Our recent survey[11] of employees working in firms that had published their gender pay gap data revealed that over 60% of women

[10] In 2017 provisional estimates indicated that women held 64.4% of jobs paid below the NLW or NMW. Is Britain Fairer? EHRC, 2019
[11] Gender Pay Gap Employee Poll EHRC/BMG Poll 2018

would be more likely to apply for a job with an employer with a lower pay gap. In addition, over half (56%) of women said that working at an organisation with a gender pay gap would reduce how motivated they felt in their role.

This approach to closing the gender pay gap through the use of data analysis which is signed off at board level and reported publically increases transparency and raises the visibility of the issue in the organisation. A similar approach could be taken on sexual harassment where boards and directors could provide high level leadership on these matters, communicating a zero-tolerance approach to discrimination and harassment to the workforce. However this should only be considered as an additional option and not an alternative to a mandatory duty.

6. In terms of reputation, organisations also risk damage to their public image, particularly when they attract media attention. This can affect relationships with current and future employees, as well as their customers. Do you agree that employer liability for third party harassment should be triggered without the need for an incident?

The Commission agrees with this proposal.

Our evidence found that third party harassment is a real problem for people in customer-facing roles with around a quarter of those reporting harassment saying the perpetrators were third parties. This type of sexual harassment was dealt with particularly poorly. A common theme was a lack of management support, with sexual harassment and assault apparently being viewed by some employers as a 'normal' part of the job. A number of those experiencing sexual harassment by customers felt that they had no option but to put up with this if they wanted to continue in their job. It is therefore vital that staff working in customer-facing roles are adequately protected from harassment.

As stated in the consultation paper, recent case law has clarified that the existing harassment provisions in the Equality Act 2010 do not provide protection against third party harassment. We therefore recommend that the third party harassment provisions in section 40 of the Equality Act be reintroduced.

Section 40 should also be amended to remove the requirement for two or more previous instances of harassment to have occurred. 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. As stated in relation to the proposed preventative duty, employers should be required to take reasonable steps to prevent harassment before it has occurred rather than only after one or two instances have already occurred, regardless of who commits the act of harassment, for example, by training managers to deal with challenging behaviour from customers. The reintroduction and amendment of section 40 would improve protection against third party harassment, in particular for employees in customer-facing roles.

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

The mandatory duty to take all reasonable steps to prevent harassment should also apply to all forms of harassment including third party harassment.

If a mandatory duty is not introduced, then we agree that the defence of having taken all reasonable steps to prevent harassment should apply in cases of third party harassment, for consistency with other forms of harassment.

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

The Women and Equalities (WESC) Sexual Harassment in the Workplace[12] report states there is no reason why an organisation that makes use of volunteers and interns should not be responsible for ensuring that they too can work in an environment free from harassment, especially as they can be some of the most vulnerable people in an organisation. They state everyone in the workplace should be protected from sexual harassment, regardless of whether they have a contract of employment.

If protections for volunteers and interns under the Equality Act 2010 are introduced, then potentially this should extend to all protections under Part 5, not just sexual harassment. However, we recommend that before extending other forms of protection to volunteers, the Government should carry out more detailed consultation and research on the potential impacts on employers and in particular, the likely impact on volunteering.

[12] Sexual harassment in the workplace inquiry report, Women and Equalities Committee 2018

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

Internships are an increasingly popular, and often expected, route into particular professions. However, recent research indicates that employers and individuals are often unaware of their respective obligations and rights when offering or participating in such schemes[13].

For many interns, the nature of the relationship they have with the organisation they work for means they qualify as an employee, and as such are eligible for a range of employment rights including National Minimum Wage (NMW) and protection from discrimination. However, a substantial number of employers offer unpaid internships[14], unaware that by not paying NMW they are potentially breaking the law. In addition individuals who would legally be classed as employees may not be aware that they have access to the legal protections to which they are entitled.

The Commission believes that tightening the rules around internships will provide the necessary clarity to employers and interns, both around pay but also around protection from discrimination and harassment in the workplace. We encourage the Government to consider defining internships in law, introducing a legal ban on unpaid internships, and to classify all work placements lasting longer than four weeks as internships, in line with recommendations made by the Social Mobility Commission[15]. This would ensure that interns and those undertaking work experience lasting longer than four weeks would be eligible for the National Minimum Wage and a range of other employment protections.

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

[13] Pay as you go, Sutton Trust 2018
[14] Ibid
[15] State of the Nation Report 2016, Social Mobility Commission

Volunteers make a significant contribution which organisations would not want to lose, and provide extensive benefits to those who receive their services and to the volunteers themselves. We believe this places an ethical obligation on employers to ensure that volunteers are protected against discrimination under the Equality Act 2010. However, we understand the concern from some organisations that if volunteers are protected, the threat of liability and being ordered to pay compensation to volunteers could have a negative financial and administrative impact on organisations offering volunteering opportunities.

We recognise that the threat of large awards from Employment Tribunals in particular may make organisations reluctant to use volunteers. However, in the event that volunteers were protected against discrimination under the Equality Act 2010, we anticipate that any awards made would be substantially lower than awards received by employees. This is because compensation for discrimination can be made up of several elements including financial losses, injury to feelings, aggravated damages and personal injury. The larger awards made to employees tend to include significant sums for financial loss where the discrimination has led to the loss of employment or a promotion opportunity, or withdrawal of a job offer, for example.

Volunteers would in most cases only receive an injury to feelings award which could be anywhere between £900 and £44,000. This range is split into three bands, the top band of which (£26,300 to £44,000) applies only to the most serious cases. The middle band of £8,800 to £26,300 is to be used for serious cases that do not merit an award in the highest band. The lower band of between £900 and £8,800 should be used for less serious cases, such as where the act of discrimination is an isolated occurrence. We note that large awards for injury to feelings are not very common. We also believe that relatively few numbers of volunteers would have the financial means to take forward discrimination claims to tribunal, given the current difficulties individuals experience exercising their rights to redress[16].

[16] Access to legal aid for discrimination cases, EHRC 2019

We recognise that the fear of being ordered to pay compensation to volunteers could have a potentially negative effect on some organisations. However, given the economic value of volunteers to organisations, we believe any financial risk would be comparatively low, particularly for those organisations who also employ paid staff. Organisations which employ paid employees should already have in place sufficient policies and procedures to deal with harassment and these could be easily adapted to cover volunteers. Those following good practice will already have in place appropriate policies and procedures to cover volunteers regardless of legal liability therefore the impact on these organisations will be minimal. Employers who do not have adequate preventative measures in place for employees will have to revise or introduce preventative measures in any event due to the duty, the code of practice and the reintroduction of third party harassment. This will provide the opportunity to ensure that they also cover volunteers with minimal additional cost, effort or disruption.

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

The Commission's view is that legislative protection should only be extended to formal volunteering situations with companies that have paid employees because these larger organisations are already required to protect employees from workplace discrimination and so should, as we have set out above, be able to extend those protections to volunteers with a minimum of effort.

We agree that there should be an exemption for volunteer led organisations and informal volunteering as this will help mitigate concerns about the potential 'chilling effect' in the voluntary sector which could close down smaller organisations or lead to a reduction in the number of volunteering opportunities organisations offer.

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

We do not believe a three-month time limit is sufficient for bringing an Equality Act claim to an Employment Tribunal. We recommend the time limit being increased to six months.

The UK's time limit is short in comparison to other jurisdictions. The Commission reviewed limits in a number of jurisdictions and found France has the longest, with a limitation period of 5 years from the date of the most recent act of sexual harassment. Canada and California have the second longest limitation period of 12 months to file a complaint with respective government, tribunal or statutory bodies. South Africa, Australia and the federal USA have a 6 month time limit to file complaints with equality bodies.

Our report 'Turning the Tables: ending sexual harassment in the workplace'[17] found the time limit to bring an employment tribunal claim of three months from the act of harassment is a significant barrier to people bringing such claims. For many people, three months will not give them sufficient time to recover, consider what has happened to them, make a decision to pursue the claim, seek legal advice and start the legal process, particularly when they may still be in post and reporting in to their alleged harasser. Employees are also 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.

We recommended that the limitation period for harassment claims in an employment tribunal should be amended to six months from the latest of the date of:

a. the act of harassment;
b. the last in a series of incidents of harassment; or
c. the exhaustion of any internal complaints procedure.

This recommendation was supported by the Women and Equalities Select Committee's (WESC) report on sexual harassment in the workplace[18], which noted

[17] Turning the Tables: ending sexual discrimination in the workplace
[18] Sexual Harassment in the Workplace, Women and Equalities Committee 2019

that the three-month time limit for harassment claims is not long enough to allow employers and employees to pursue alternative means of resolving cases, and places an unnecessary pressure on potential claimants to submit a claim before they know whether they want to go to tribunal. They also stated that the time limit hinders alternative approaches to resolution by requiring parties to consider early conciliation and to prepare for a tribunal hearing while internal grievance procedures may be ongoing. Requiring victims of sexual harassment to gamble on judicial discretion to extend time limits is unfair and constitutes another barrier to making a claim.

As regards the existing mitigations to the three month time limit outlined in the consultation paper, paragraphs 4.8 to 4.10 suggest that discrimination claims are rarely rejected for being out of time. However, the statistics referred to relate to claims rejected at the initial vetting stage. Claims presented out of time will rarely be rejected at the vetting stage by the employment tribunal. Following the vetting stage, in most out of time cases, the respondent will submit a response to the claim defending it (amongst any other available grounds of defence) on the basis that the claim is out of time. The tribunal will either then hold a preliminary hearing to determine whether it is just and equitable to extend the time limit and dismiss the claim if it is not, or conduct that exercise at the final hearing of the claim. It is at this stage that out of time claims are often dismissed.

See the following judgments from the online register[19], for just a few examples of claims dismissed by the tribunal in the period between January and June 2018 (using the same time period as the ET statistics cited at 4.8 to 4.10):

- Mr C Riley v Compass Group UK and Ireland Ltd: 1300783/2018. Age and race discrimination claims dismissed on 5 June 2018
- Mrs A Kendrick v Slicker Recycling Ltd: 1304451/2017. Pregnancy and maternity discrimination claim dismissed on 3 April 2018
- Mr R Grant v The Doctors Laboratory Ltd: 3325010/2017 Religion or belief discrimination and disability discrimination claims dismissed on 1 February 2018.

[19] Register of Employment Tribunal Decisions, HMCTS and Employment Tribunal accessed at 11.32am 06.09.19

The power to extend the time limit is not therefore as significant a mitigation against the three month time limit as suggested at paragraphs 4.8 to 4.10. Nor are the other suggested mitigations sufficient. In order to a stay a claim, one has to be brought within the three month time limit in the first place and an unrepresented claimant would be very unlikely to consider such a possibility. The ACAS early conciliation process still requires the worker to commence conciliation within three months of the act of discrimination and only results in a short (if any) extension to the time limit. These mitigations do not address many of the barriers to bringing a claim within the time limit as set out above.

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

Although our specific recommendations on tribunal time limits to date relate to pregnancy and maternity discrimination[20] and sexual harassment, the rationale for increasing the time limit for bringing a claim applies equally to all discrimination and harassment claims across all protected characteristics.

We also know that employment tribunals frequently hear evidence about poor employment practice, but are currently only able to make recommendations about the employer's treatment of the individual claimant. In order to achieve systemic change, it is critical that employment tribunals are able to make recommendations to improve employers' practices towards the workforce more broadly. We believe 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.

As such, we recommend that Government should:

[20] Our recommendations to tackle pregnancy and maternity discrimination. EHRC 2016

- Restore the power, under section 124 of the Equality Act 2010, of employment tribunals to make recommendations aimed at reducing the adverse effects of discrimination on the wider workforce.

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

6 months

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

We believe a mandatory duty is the most effective step in tackling sexual harassment and harassment at work. This should be accompanied by a statutory code of practice which specifies the steps that employers should take to prevent and respond to sexual harassment and harassment, which can be considered in evidence when determining whether the mandatory duty has been breached.

There are a range of other interventions the Government could implement to encourage a change in workplace culture with employers taking more responsibility for preventing harassment. This includes raising awareness of rights and responsibilities, and encouraging employers to improve transparency and increase employee confidence by encouraging board and CEO level governance in relation to sexual harassment monitoring and action planning.

The Women and Equalities Committee report noted that *"more needs to be done to raise workers' awareness of how the law on sexual harassment protects them and what behaviours are unacceptable in the workplace. Taking action to address the social attitudes that underlie and facilitate sexual harassment is a requirement for the Government under its international obligations to tackle violence against women".*

We agree with this analysis and encourage Government to work in partnership with the Commission and business leaders to develop joint communications campaigns which challenge permissive workplace cultures that enable sexual harassment,

similar to that implemented around pregnancy and maternity discrimination[21]. We also note and welcome the recent publication of the Government's Gender Equality Roadmap. This will also contribute to raising awareness of workplace rights, particularly in relation to addressing negative stereotypes in the workplace and using behavioural insights to encourage behaviour change.

We also encourage employers to keep track of complaints of sexual harassment in order to help them identify systemic issues and the measures needed to tackle them. For example, as with the use of non-disclosure agreements, an employer could assign oversight responsibility to any board of directors (or equivalent) so that managers are required and able to escalate concerns about workplace culture, systemic discrimination or repeated or highly serious acts of discrimination.

Finally, the Commission agrees with the position of the Women and Equalities Committee in relation to the role of other regulators[22], who are uniquely placed to oversee employer action to protect workers from sexual harassment. We strongly encourage Government to remind regulators of their obligations under the Public Sector Equality Duty, and encourage them to take steps to clarify with their regulated sectors the need for compliance with the sexual harassment and wider Equality Act employment provisions.

More broadly, the Commission believes that there now exists a good opportunity to strengthen the PSED to address this and other entrenched inequalities. We were pleased to see the Women and Equalities Committee endorse our long-standing position that its specific duties be refined to be more focused, strategic, and evidence-led. We are encouraged that Government is now considering accepting this recommendation.

Action must now follow in order to take this important opportunity to drive progress on the deepest and most persistent inequalities, as Government looks to its next phase of domestic policy-making. This could include Ministers and public bodies

[21] Working Forward, EHRC
[22] Sexual harassment in the workplace, Women and Equalities Committee 2018

being required to set equality objectives for their areas of responsibility. Public bodies could also be required to publish time-bound, measureable action plans showing how they will take action, with the relevant regulators and inspectorates required to monitor progress against these. This will help strengthen the PSED as a means to address underlying inequalities and so create a fairer society