Consultation on Sexual Harassment in the workplace

Submission by Prospect to Government Equalities office

2 October 2019

www.prospect.org.uk

Introduction

Prospect is an independent trade union representing over 140,000 members who work in a range of jobs in both the public and private sectors in a variety of different areas including in aviation, agriculture, broadcasting, entertainment and media, defence, education, energy, environment, heritage, industry, scientific research and telecommunications.

Pre Consultation Questions

Name: Marion Scovell, Head of Legal, Prospect

Are you responding on behalf of an organisation – Yes - Prospect trade union

Are you happy for us to publish your response? – Yes

Are you responding as an employer or representative body? – Representative body

Summary

Prospect welcomes the opportunity to respond to this consultation.

We deal with many cases of sexual harassment at work, through resolving issues informally in the workplace, representing members with grievances, and where necessary pursuing claims through the tribunal process.

In 2018 Prospect surveyed members on workplace behaviours and the results from this showed that over a third of women responding said they have experienced sexual harassment at work, with this figure rising to 62% for younger women. It is shocking that sexual harassment is still so prevalent in the workplace. It is therefore extremely important that our laws are made more robust.

We know that many cases are resolved by union representatives in the workplace. If harassment occurs in the course of employment the ideal is to stop it happening. Representatives can raise issues internally and support members through grievance procedures and they often do this very successfully.

Unions are in a unique position of being able to positively influence employer practices as we can negotiate changes to workplace policies for the future arising from the lessons learnt in individual cases.

We have provided our responses to the questions presented for consultation below, but in summary:

- While the consultation is predominantly addressing issues of sexual harassment, we believe the provisions should apply in respect of harassment on the grounds of all the protected characteristics in the same way. This is particularly because we have seen a number of cases of racial harassment (including recent cases of islamophobia) and harassment on the grounds of sexual orientation.
- As trade unions play a key role in promoting equality at work - by representing members in pursuing complaints, and negotiating policies and procedures for best practice- we believe a key point to prevent sexual harassment would be to promote collective bargaining.
- We strongly believe that there should be a mandatory preventative duty on all employers, this should be in addition to the existing right for individual claimants to pursue claims of harassment.
- There should be dual enforcement provisions involving both EHRC and individuals being able to issue enforcement proceedings for a breach of the duty. Particularly we believe that the power for EHRC enforcement is important as it takes the emphasis away from the individual complaint.
- EHRC needs increased resources to enable them to meet these new duties effectively.
- Third party harassment should be expressly covered in the Act with employers being potentially liable for harassment by third parties, including for single acts.
- The preventative duty should apply to third party harassment by requiring employers to take all reasonable steps to prevent harassment from occurring.
- The employer should be under an obligation to report on the number of complaints and how they are complying with the preventative duty to the workforce and recognised trade unions.
- Interns and Volunteers, along with all other types of atypical workers, should be covered by the legislation.
- The time limit to commence proceedings under the Equality Act should be extended to at least six months.
- We also welcome the intention for the EHRC to have a statutory Code on Sexual Harassment at work.
- There are a number of other legislative changes that should be introduced; the power to make wider recommendations and the statutory questionnaire procedure should be reinstated, union equality reps should be given a statutory right to time off, the provisions on combined or dual discrimination should be put into force. The

tribunal service should report on the number of harassment claims. The tribunal service should be improved and speeded up.

We address the specific questions below.

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

Yes

Prospect feels strongly that a new mandatory preventative duty should be introduced. We believe it is important that the law places an obligation on employers to proactively work to prevent sexual harassment, as well as, and complimentary to the existing remedies for individual workers after the event of harassment.

We welcome the introduction of the proposed EHRC Code of Practice on Sexual Harassment and believe this will be an important tool. However we also believe that this needs to be strongly underpinned by having legislation requiring employers to take preventative measures.

The Code will assist employers in recognising what they should do. But this needs to be a legal requirement that is enforceable. The tribunal should have the power to apply an uplift to compensation where there has been a breach of the code (as happens with the ACAS Code on disciplinary and grievance procedures). The code should also deal with confidentiality and NDAs.

Also a failure to comply with the preventative duty should be an admissible fact in individual cases and limit the employer's current statutory defence to harassment claims in section 109 of the Equality Act, where they can defend a claim if they can show they took 'all reasonable steps' to prevent the discrimination occurring.

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

Yes

A legal obligation would, in Prospect's view, prompt employers to prioritise prevention. While some good employers would take this action in any event, and the Code of Practice will help, a legal duty would encourage many more employers to engage.

Sexual harassment is a cultural, rather than an individual problem. Trade unions play an important role in mediating a social, collective approach to prevent harassment, and negotiating policies that ensure workplaces are free of harassment and

employers apply appropriate steps. A new mandatory duty would show employers that they need to engage positively in these discussions.

Also we are aware that there will often be individuals in companies pressing for equality and harassment policies (such as HR, equality champions etc.) but such policies are not always seen as important by the key decision makers. A mandatory duty would help ensure that the debate is held and that employers take appropriate actions, including robustly following the procedures they already have.

While we recognise, of course, that the duty would not, in itself, stop harassment occurring, we do believe that it would be a positive step. A primary antecedent of sexual harassment is an organisational tolerance of sexism, or apathy about tackling it. Introducing the requirement to prevent harassment would in our view positively affect employer's attitudes to the problem, giving it higher priority. For example when the right to request flexible working was introduced, while this was a fairly weak right in itself being only a right to 'request', it did in many employer's eyes seem to legitimise flexible working and their policies and practices changed accordingly. We would hope that legislation introducing the preventative duty would have a similar effect on employer practices and attitudes.

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

Yes

We agree that there should be dual enforcement provisions.

Giving enforcement powers to the EHRC would remove the burden on individual workers, and emphasise the organisational and cultural dimensions of sexual harassment. In our experience workers are often reluctant to bring proceedings and it can be an incredibly stressful experience for the individual. We sadly have several examples where workers have raised harassment in the workplace only to face further victimisation.In two cases where we have taken legal proceedings, members raised their complaints through the grievance process with the support of the union and had their grievances up held. However despite this the issue going forward was not properly resolved by management.

For example a high flying professional woman in a very male dominated area was moved to a new role where she was subjected to sexual harassment, sexist comments, belittling and undermining by her manager. Despite up holding the grievance and finding that she should not be required to work with him, management moved her to a less desirable role which not only affected her career prospects, but also lead to a significant loss of pay. We had to bring a claim of victimisation to the

employment tribunal to resolve the matter and the case was only finally settled shortly before a 12 day hearing was due to start.

It is therefore important that workers can report a breach of the preventative to the EHRC as a regulator. Furthermore this should be done without the employer being informed of the identity of the complainant (unless the complainant is happy to be named).

Importantly the EHRC should have adequate resources to investigate and bring proceedings if necessary (though we would hope that investigation and dialogue with EHRC would be sufficient to encourage employers to take appropriate action). The EHRC is already under pressure and they require sufficient funding to be able to undertake the obligation effectively.

We believe it is important not to leave the enforcement obligations solely to individuals. Robust prevention and remedy of sexual harassment is to the benefit of the wider workforce, and of the business itself, not just the immediate targets of any incident. The EHRC role would provide a mechanism and a driver for investigation in the interests of the whole workforce, without putting reliance or responsibility on an individual victim of misconduct. The EHRC enforcement mechanism may be viewed as analogous to industrial accident investigations, contributing to both remedial and preventative measures against sexual harassment. A key output should be its recommendations to employers in how they can better protect their workers from similar incidents in future.

The dual enforcement approach is however the right one. In that there should be the right for individuals to apply to a tribunal where there is any breach of the duty.

Furthermore we believe that a group of workers should be able to raise complaints to the EHRC and/or the tribunal and that the union should be able to make a complaint on their behalf.

Q4 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?

Yes

There certainly does need to be a possible award of compensation. We largely agree that it would be appropriate to mirror the 13 weeks' pay provided for a breach of the duty to consult under TUPE.

The majority of claims raising a breach of the preventative duty are likely to be combined with an individual claim of sexual harassment, so additionaslly we contend

that where a tribunal upholds a complaint there should be an uplift in compensation, of at least 25%.

We also believe that tribunals should have the power to make specific recommendations to an employer who has been found in breach of the preventative duty. If the employer fails to comply with the recommendations the employee should be able to bring the claim back to the tribunal who will have the power to increase the compensation payment.

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

Yes

Prospect considers that transparency and reporting is important. We believe all employers should be required to make available their policy and actions taken for preventing sexual harassment to all staff. We believe it is important to ensure that all employers publish, internally, information on the number of formal complaints made to their workforce and to any recognised trade union. The reporting should not only deal with extent of the problem, but also provide an action plan for the employer, as to how they will meet the preventative duty.

It may well be that many employers would not have any formal complaints to report, but there is considerable evidence to demonstrate the many workers subjected to harassment do not raise the issue. So it needs to be accepted that a 'nil report' may be masking the extent of the issue in that workplace, so it is important that the reports detail ongoing plans to prevent harassment.

The underreporting of sexual harassment to workplaces is a major barrier to tackling the problem, It is essential that employers instil confidence in their workers to disclose sexual harassment. Mandatory, public reporting on statistics of formal complaints may actually deter employers from providing the supportive environment that encourages disclosure of harassment.

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

Yes

Prospect believes third party harassment needs to be clearly outlawed. Workers should have the right to work in situations free from harassment and that this applies as much in respect of harassment by customers and clients of the employer as it does from fellow employees.

We were very concerned to see the repeal of section 40 of the Equality Act in 2013. While the previous law was not sufficient, there was at least some statutory provision on third party harassment. As the consultation paper recognises the law around this issue is now overly complex. We believe that the Act needs to be amended to explicitly make employers liable for acts of third parties, just as they are for employees.

The liability for third party harassment should not be dependent on the three strike rule as under section 40, but should apply when there is a single act of harassment. This should give rise to a claim of harassment (just as a single act by a colleague can do).

We believe the preventative duty should apply to third party harassment, in the same way as it would apply to the employer and colleagues. We do not see that there would be any difficulty with this as there will be many steps that an employer could take (such as notices, training for staff, advising staff harassment won't be tolerated and they should report any situation where they are uncomfortable and will be given reassurances that the employer will support them should third party harassment arise). Employers already accept their legal responsibility for their workers' health and safety during the course of their work, including protection from injury by third parties. There should be no difficulty in treating the preventative duty in the same way,

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

Yes

We accept that the statutory defence of having taken all reasonable steps should apply in cases of third party harassment, as it does to other cases.

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?

Yes

We believe that all the Equality Act protections, including those on harassment, should apply to interns and volunteers.

We also believe that the rights under the Act should clearly cover all those on a-typical contracts and working patterns, including freelance workers, contractors, those on zero hours contracts etc. Along with interns and volunteers all these types

of workers are particularly vulnerable in the workplace and are often more likely to be subjected to harassment.

While often such a-typical workers will have protection under the Act it can be extremely difficult to resolve employment status in many cases. Also because of the lack of clarity in the law both the employer and employee may be acting under the erroneous premise that there is no statutory protection.

Q9 Do you know of any interns that do not meet the statutory criteria for workplace protections of the Equality Act?

Many interns are likely to be covered by the Act, as they will be performing work personally, but the difficulty is always in respect of establishing the employment status.

Q10 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?

No

Our union represents members who are volunteers in some areas (such as in the heritage sector) and we feel strongly that they should be covered by equality legislation. As people in the workplace we believe it is only right that they should have the same protection against harassment at work. Furthermore, sexual harassment is a cultural phenomenon that demands a holistic, cultural solution. Extending legal protections to volunteers, interns, students and others, is a necessary precondition for a workplace culture that best protects every worker.

Q11 If the Equality Act's workplace protections are expanded to cover volunteers, should all volunteers be included?

Yes

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

No

Three months is too short a time limit. We believe this should be extended. It often takes the individual some time to process what has happened and then to seek legal advice. This will be especially the case where the incident is extremely upsetting for the worker.

For example, in one of our recent cases, there was a serious sexual assault, the member was off work with depression. She did not seek advice from her union immediately, although she had reported the issue to the police who were investigating. She simply did not think of raising a workplace complaint immediately, and sought advice just after the three months. While we were able to apply that the case should have an extension to the time limits on the grounds that it was just and equitable to do, such an extension is discretionary and the time limits are usually applied strictly by the tribunal.

A longer limitation period, of say 6 months, would help enormously. We believe a longer period should apply to all Equality Act claims, as there will be similar concerns in respect of other types of discrimination case, particularly pregnancy and maternity discrimination.

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?

See above.

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

It should be at least six months.

Q15 Are there any further interventions the Government should consider to address the problem of workplace sexual harassment?

Yes

Legislative changes to help to address the problem of sexual harassment

There are a number of changes to the legislation that we believe would be helpful:

- Re-introduce the ability to make wider recommendations than simply in respect of the individual claimant in tribunal cases, which was repealed in 2015.
- Reinstate statutory questionnaires, which were removed in 2014.
- Strengthening rights of atypical workers, including those on zero hour contracts, freelancers, agency workers, casuals. We recognise that those in vulnerable employment are much more likely to be at risk of harassment and likely to be deterred from reporting issues. Currently issues of employment status are being considered through the outcome of the Taylor Review. Very importantly though this needs to tackle the interrelated issues of continuity of service.

- Employers should not be able to defend cases on the basis of illegality of the employment contract.
- There should be a statutory right of time off for equality reps (as opposed to the general time off rights).
- Section 14 of Equality Act on combined or dual discrimination should be brought into force. Many workers face discrimination on two or more protected characteristics and the existing law is inadequate to deal with the impact of intersectionality. Particularly there needs to be a look at the impact on other protected groups, race, transgender, religion, disability, sexual orientation.

- Tribunal service should record number of harassment cases separately, currently the breakdown is only by discrimination as a broad category, rather than breaking it down to the different types.

Tribunal process

The tribunal system needs to be significantly improved. The current delays in hearings add considerable stress to claimants. It is often taking tribunals three months or more to register a claim and send it on to the Respondent and hearing dates, in all but the most simple cases, are often more than a year after presenting the claim. These delays in the system cause increased stress for the parties. Improved and speedier procedures would help all Claimants, but particularly in cases of sexual harassment.

The Code and workplace practices

While we recognise that the EHRC will be consulting on the Code we have made a few suggestions on what should be in the code and how this should apply to the preventative duty:

- A number of key points for reducing sexual harassment are: training of managers, including at director level; awareness with all staff on acceptable behaviours; strong policies showing zero tolerance; well publicised statements and policies on sexual harassment; clear and consistently implemented disciplinary procedures; ensure workers understand the role of social media in harassment (and other electronic forms, texts, what's app, email etc); have a safe reporting process for harassment to be raised outside of the direct management chain (similar to the process many employers have on whistleblowing); a clear commitment to ensuring workers are not victimised for raising complaints.

- A crucial point is to ensure that unions are consulted and negotiate the policies and procedures.

- Also employers should be encouraged to enter into regular dialogue with unions and should take seriously complaints raised collectively by the union on behalf of unnamed staff. This would avoid the individual being exposed. In practice this does happen informally, but we would like to see greater encouragement on employers to engage in this dialogue (perhaps through a new code of practice). Prevention must be better than cure.

PROSPECT

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