UCEA UNIVERSITIES & COLLEGES EMPLOYERS ASSOCIATION

UCEA response to the government consultation on sexual harassment in the workplace

Introduction

This is the response from the Universities and Colleges Employers Association (UCEA) to the government consultation on sexual harassment in the workplace. The response is based on views provided by 41 of our member higher education (HE) employers.

UCEA represents the views of higher education institutions (HEIs) across the UK in their capacity as employers. UCEA is a membership body funded by subscriptions from 163 HEIs in the UK, in addition to eight sector associate members. Our purpose is to support our member HE employers in delivering excellent and world-leading higher education and research by representing their interests as employers and facilitating their work in delivering effective employment and workforce strategies.

HEIs are independent employers and determine their own employment policies, often in consultation with recognised trade unions; therefore, there is a variety of HR practices in place in the sector. Whilst HEIs are not public sector employers they are subject to the public sector equality duty.

Consultation questions

Preventing sexual harassment in the workplace

1. If a mandatory preventative duty were introduced do you agree with the government's approach? Would a preventative duty prompt employers to prioritise prevention?

Overall, respondent HEIs broadly supported the government's approach to tackling sexual harassment by introducing a preventative duty that requires employers to protect workers from harassment in the workplace. Respondents considered the government's aims laudable and agreed that a preventative duty would be effective as it would require employers to act. HEIs already prioritise and treat sexual harassment seriously and are committed to eliminating it through well-developed reporting frameworks, policies and action plans as well as the provision of support and guidance for students and staff.

Respondent HEIs did, however, highlight a kay caveat to their in-principle agreement to the introduction of a preventative duty. This was that it would be essential that employers are provided with guidance that defines and/or codifies what 'all reasonable steps' are in practice and whether there are any minimum standards. This was particularly important as only Employment Tribunals (ETs) may currently define what is reasonable. It was noted that the burden at ET was on employers to demonstrate the reasonable steps they had taken and that the bar was fairly high. Until 'all reasonable steps' is defined there would be a greater likelihood of allegations of harassments progressing to ET without an opportunity for internal resolution, especially where the view of the employer is that all reasonable steps have been taken. Respondents commented also that the Equality and Human Rights Commission (EHRC) should outline clearly the practical steps that it believes would prevent sexual harassment in the statutory Code of Practice (the Code) that is currently being drafted. The

Code and accompanying guidance will be essential in supporting employers to meet the preventative duty.

It was noted that that the success of the government's approach would seem to depend on the rigour with which is it enforced. The introduction of the Code with an information campaign to increase employers' work on prevention would be helpful but the preventative duty would probably only be successful if the EHRC was both allowed and able to enforce. In Scotland there is already a statutory duty in place for HEIs under the Specific Duties (2012) to demonstrate due regard to the duty by committing to eliminating harassment under the Equality Act 2010 (EA).

Overall, respondent HEIs considered that shifting the emphasis to prevention would be a positive move and would increase awareness and visibility amongst staff (and students) that sexual harassment will not be tolerated.

It is important to note, however, that some respondents did not support the introduction of a preventative duty. They believe that the fact that some employers are currently failing to abide by the legal requirements or are not aware of them means that it is unlikely that they will change their practices. The proposed new duty would not justify the significant time, cost and effort of changing primary legislation and would potentially create a hierarchy of protected characteristics. Therefore, the government should focus on enforcing the existing provisions, for example, by enforcing some level of training/guidance/information sharing by employers on sexual harassment and other forms of harassment and discrimination.

2. Do you agree that dual enforcement of a mandatory preventative duty by the EHRC and individuals would be appropriate?

HEIs mainly support dual enforcement of a mandatory preventative duty by the EHRC and individuals. This would give the EHRC greater authority to enforce and would decrease the reliance on individuals. However, they queried the ability of the EHRC to enforce the mandatory preventative duty given its limited resources and the potential increase in volume of complaints. It was also not clear how an individual would successfully be able to enforce the duty if an act of harassment had not actually taken place.

Respondents suggested that it would be preferable that an individual should only be able to enforce the duty when she or he successfully alleges that they have been subject to harassment; otherwise a free-standing right of all employees, regardless of whether they have been harassed, could potentially lead to a significant increase in cases going to tribunal. There was also concern as to whether the EHRC would be able to determine sufficient facts to enforce in the way suggested in the consultation.

Respondents noted that sexual harassment is a workplace matter therefore HEIs should work with the employee to investigate and address allegations of sexual harassment rather than with a third party such as the EHRC. An option therefore would be for the individual to contact the EHRC and for the EHRC to allow the employer to investigate the concerns in the first instance with a view to reaching resolution. It was also suggested that rather than enforcement by an individual, employers should be encouraged to consider ways for workers to report a breach of the preventative duty to them.

Overall, there was no clear consensus and the view of respondent HEIs was that further clarity of dual enforcement is needed with regard to the extent of the involvement of the EHRC, the remit of the ET service and the role of individuals. Whoever has responsibility for enforcement needs a clear mandate which is understood by employers and this requires further consideration before any changes are made.

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

There were mixed views on whether compensation for a breach of the preventative duty should mirror the existing TUPE provisions. Some supported the proposal with one respondent commenting that 13 weeks' gross pay as maximum compensation was reasonable, but that compensation should still be proportionate to the circumstances of the case. Whilst the TUPE provisions could be a useful marker there could be inconsistencies with compensation awards under the EA where there is no limit on awards. Where the 'damages' exceed 13 weeks' gross pay, putting a cap could be unfair, for example, if it was proven that the behaviour had been ongoing for some time or was very serious. Other respondents suggested that compensation should be dealt with on a case-by-case basis through ET procedures and awarded on Vento principles as appropriate or by increasing compensation by a fixed percentage, for example 25%, where an employer has failed to comply with the mandatory duty. It was also suggested that compensation should be part of a harassment claim so that an individual is not compensated twice.

Respondents noted that regardless of how compensation is set, it is essential to clarify which employee(s) would be paid compensation in cases where sexual harassment is a breach of a preventative duty rather than a specific incident.

4. Are there are any additional or alternative requirements that would incentivise employers to take measures to prevent harassment?

Respondent HEIs suggested a range of measures or requirements that would incentivise employers to take measures to prevent harassment. However, clarity is needed first on what employers need to do, and can realistically do, to meet a new preventative duty. The suggested measures or requirements include the following:

- Mandatory requirements for employers to report data such as the number of reported or found incidents of harassment and/or breaches of the code on their websites.
- Mandatory requirements for employers to publish their sexual harassment policies and action plans.
- Employers to report data and progress at Board level.
- Recognise standards of practice through a kite mark, charter mark or logo.
- The EHRC should provide practical information, support and guidance and on-line training packages.
- The EHRC and/or the government to provide other support such as free consultation, audit reviews and assistance with creating action plans.
- Leverage funding and grants from funding bodies to effect change, for example, consider the links between funding and the measures to address sexual harassment that HEIs or other employers have in place.

Third party harassment

5. Do you agree that employer liability for third party harassment should be triggered without there needing to be an incident of harassment?

Overall respondent HEIs do not agree that employer liability for third party harassment should be triggered without an incident of harassment. The main reason is that whilst an employer should act immediately and appropriately on an incident of third-party harassment

once reported, it is difficult to conceive how an employer could be held liable for an incident of harassment that has not happened.

Respondents commented that there would be a significant challenge in terms of the requirements on the employers and the level of knowledge of potential incidents that employers would be expected to have in considering all the possible scenarios where there is potential for harassment to occur. Further information is needed as to what this would mean in practice and employers would need to be clear about their legal responsibility. As stated previously it is important to define the reasonable steps that employers should take to prevent harassment.

Respondents also commented that as well as having any number of third parties on site at any one time, university campuses are usually open to the public and it would be difficult therefore to hold an HEI liable for third parties over whom it has no control without there being an incident of harassment. Nevertheless, respondents agreed that employers should work with third parties, such as contractors, to ensure that they have equality and harassment policies in place.

6. Do you agree that employers should be able to use the defence of having taken 'all reasonable steps' to prevent harassment should apply to cases of third party harassment?

The vast majority of respondent HEIs supported employers being able to use the defence of having taken 'all reasonable steps' with the proviso that the steps should be clearly defined. One respondent suggested that the duty to prevent harassment should form part of the tender process and contractual agreements for third parties.

Protections for volunteers and interns

7. When considering protections for volunteers and interns do you agree that sexual harassment should be treated the same as other forms of unlawful behaviour under the Equality Act?

Respondent HEIs were very much in support of sexual harassment being treated the same as other forms of unlawful behaviour for volunteers and interns under the EA. Anyone in the workplace should have the same protections and be treated equally. Indeed, interns and volunteers are potentially at higher risk of harassment because of the power imbalance therefore it is essential that they are protected under the EA.

8. Would there be any negative consequences to extending protections under the Equality Act to cover all volunteers e.g. for charity employers, volunteer-led organisations or businesses? Should all volunteers be included? If 'no' which groups should be excluded and why?

Overall respondent HEIs do not consider that there would be negative consequences to extending protections under the EA to cover all volunteers in the HE sector. However, respondents commented that extending the protections may have a negative impact on organisations in different sectors if they feel they are at risk of claims of harassment, and the charity and voluntary sectors were cited as examples. It was suggested that the extension of the protection should be linked to scale so that smaller charitable or voluntary organisations where the volunteering arrangements are more ad hoc are not adversely impacted. Respondents queried whether making a charity liable for volunteers helping at a jumble sale

or a fete, for example, was proportionate as voluntary organisations are often small with limited resources and extending the protection to cover all volunteer could force them out of service provision altogether. It was noted that the potential negative impact of sexual harassment referred to in Section 3 of the consultation document should be weighed against the personal and organisational impact of sexual harassment and the fulfilment of a charitable mission.

9. Are you aware of any interns that do not meet the statutory criteria for workplace protections under the Equality Act? If 'yes' how could this group be better captured under the law?

The vast majority of respondent HEIs confirmed that interns in their HEIs already meet the statutory criteria for workplace protections under the EA. A number of respondents commented additionally that interns are usually formally contracted and paid as employees and are therefore covered by existing legislation.

Employment Tribunal (ET) time limits in claims under the Equality Act

10. Is the three-month time limit sufficient to bring an ET claim under the Equality Act? If time limits are extended for Equality Act claims what should the new limit be e.g. 6 months, more than 6 months?

The majority of respondent HEIs confirmed that the three-month time limit to bring an ET claim under the EA is sufficient, noting that ETs already have the discretion to extend time limits depending on the circumstances of the case. Individuals making a claim, for example, may request an extension to the three-month limit by any period of time that the judge considers 'just and equitable'. One respondent suggested that if the law is changed to increase the time limit to six months, for example, the ability of ETs to extend time limits should be removed.

Respondents suggested increasing awareness of the current flexibility within tribunals and explaining better that ETs can consider late claims so that the maintenance of the current rules would not debar legitimate claims. There was also concern about extending the time limit in view of the current backlog and significant waiting periods before ET cases are heard. In some cases, this may mean that there may not be outcome until 18 months to two years after the incident given that individuals are likely to have been through an internal process and / or ACAS before going to ET.

Retaining the current rules is in everyone's best interests in order that issues are raised and resolved as soon as possible after the incident has taken place. The three-month time limit provides a balance which encourages early resolution whilst at the same time, the tribunal process allows for extensions where appropriate. The earlier a claim is made, the better the investigation as information and evidence can be gathered whilst the incident is fresh in witnesses' memories which improves the validity of the evidence and viability of the claim (from the employee's perspective).

A number of respondent HEIs commented that ETs are inherently emotional and challenging for all parties and suggested taking a more research-informed approach to identify the specific needs of individuals making claims relating to sexual harassment, pregnancy or maternity and reasonable and proportionate time limits which address those needs before

making any changes. People take different lengths of time to process sexual harassment and similar traumas.

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

The main reason given for setting a different time limit for claims of sexual harassment, pregnancy or maternity discrimination is that it would support psychological trauma in cases of sexual harassment where a person is not equipped, practically or emotionally, to bring a case. As suggested above, more research into this area should be undertaken before making any changes.

Whilst the arguments made in this section of the consultation for extending the time limited were noted, the majority of respondent HEIs did not consider that there were grounds for establishing a different time limit for particular types of claim. Respondents expressed the view that all characteristics under the EA should be treated equally and reiterated the point that ETs already have discretion to extend time limits. Some respondent HEIs commented that different time limits might be confusing for claimants and could result in errors with individuals mistakenly thinking they have more time to make a claim. There could also be linked claims of unfair dismissal and discrimination, for example, with different time limits which could result in confusion and delay.

Other options

12. Are there any further interventions or initiatives that the Government should consider to address the problem of sexual harassment?

Respondent HEIs suggested a range of interventions or initiatives that the government should consider to address sexual harassment. These include:

- Develop/publish materials and information that promote open discussion of sexual harassment and similar topics, for example, around the acceptability of language.
- Publish findings from research as to the most effective interventions, share best practice examples and anonymised case studies and/or provide sector-specific guidance and support.
- Run national campaigns to raise awareness and change culture.
- Advocate a whole-organisation approach to prevent harassment and emphasise that all employees have a responsibility.
- Consider mandatory training for those undertaking investigations into allegations of sexual harassment.
- Training and education around sexual harassment to be part of school education.
- Create a reporting duty that incorporates reporting into the organisational corporate governance framework.
- Make the governing body and/or senior management responsibilities explicit.
- Ensure there is a dedicated section within the EHRC with a specific focus on sexual harassment in the workplace.
- Develop a charter mark for organisations that have a robust framework for dealing with complaints of sexual harassment, for example, policies, actions plans and trained staff who can signpost staff and students.

- The government should lead by example by publicising its figures and the steps being taken to eliminate sexual harassment.

UCEA
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