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Bridget West
Government Equalities Office
Sanctuary Buildings
20 Great Smith Street
London SW1P 3BT

Sent via email: workplaceharassment@geo.gov.uk

2 October 2019

Dear Ms West

Sexual harassment in the workplace – Legal protections under the Equality Act 2010

The BMA is a professional association and trade union representing and negotiating on behalf of all doctors and medical students in the UK. It is a leading voice advocating for outstanding health care and a healthy population. It is an association providing members with excellent individual services and support throughout their lives.

The Association welcomes the opportunity to respond to the Government Equalities Office workplace sexual harassment consultation. Please find enclosed our submission.

We hope that our submission is useful – please do not hesitate to contact us for more information if required.

Yours sincerely



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Listed as a Trade Union under the Trade Union and Labour Relations Act 1974.



We strongly condemn sexual harassment in the workplace. Since 2017, the BMA has been undertaking work to address bullying and harassment in the medical profession and promote action to create a more positive culture within medicine and the NHS, including work on sexual harassment.¹

Sexual harassment is undoubtedly an issue in the medical profession, but we do not have sufficient reliable data in the UK to know exactly how widespread it is. A recent Medscape survey found that a fifth of doctors (21%) have experienced or witnessed sexual harassment in the workplace over the past three years,² and a UNISON survey found that nearly one in ten healthcare staff surveyed reported being sexual harassed in the past year.³ We would like to see the regular large-scale surveys of NHS staff and doctors ask specifically about sexual harassment.⁴

We know sexual harassment creates a hostile, intimidating and degrading environment for those who experience it. Through our bullying and harassment project, we heard about the fear, vulnerability and impact on mental health that those who have experienced it felt. Research from the United States shows that it also affects professional confidence and advancement at work.⁵

As the consultation recognises, the legal protections in the Equality Act 2010, and the traditional approach of workplace policies and procedures have a key limitation – they rely on the individuals who have experienced harassment, who are frequently in a weaker, isolated and vulnerable position, to enforce them. This is reflected in the medical profession where only a minority of doctors who say they have experience bullying or harassment at work report it to their employer. Junior doctors are among the least likely staff group in the NHS to complain according to the NHS staff survey, reflecting the impact of professional hierarchies and power imbalances on individuals' willingness to speak up.⁶ The most common reasons for not reporting behaviour are fear that it will make things worse or a lack of confidence that it will change anything. The Women and Equalities Select Committee have also recently recognised the flaws in this approach.⁷

The consultation paper outlines the advantages of a culture of respect for employers and employees. In addition, in the health sector there is clear evidence that such a culture benefits patient safety and quality of care.⁸

We particularly want to draw attention to the position of students on vocational placements. Medical students in the NHS tell us they are often unsure of the support available to them and routes for reporting harassment. We recommend that: medical students are covered by any preventative duty; any new Code of Practice explains the responsibilities of employers to vocational trainees in the workplace; and employers consider them in any policies, procedures or preventative action.

¹ British Medical Association (2018) [Tackling bullying and harassment in the NHS](#). London: British Medical Association.

² Locke T, Hicks R. [Sexual harassment of UK doctors: report 2019](#). October 2019. Medscape.

³ UNISON (2019). *It's Never Ok: a report on sexual harassment against healthcare staff*. London: UNISON.

⁴ At present the NHS Staff Survey and GMC National Training Survey only ask about incidents of bullying and harassment overall.

⁵ J Reshma, Griffith K, Jones R et al (2016) [Sexual Harassment and Discrimination Experiences of Academic Medical Faculty](#). *JAMA* **315**(19) 2120-2121.

⁶ NHS England (2016) NHS England Staff Survey.

⁷ Women and Equalities Select Committee (2019). [Enforcing the Equality Act: the law and role of the Equality and Human Rights Commission](#). London: Women and Equalities Select Committee.

⁸ Civility Saves Lives. <https://www.civilitysaveslives.com/>

In summary:

- We welcome proposals for further legislative change which are aimed at preventing sexual harassment.
- We welcome the proposals for new protection from harassment by third parties and extended time limits for bringing tribunal claims.
- We would like to see the reintroduction of wider powers for employment tribunals to make recommendations so that, as well as awarding compensation following findings of harassment or discrimination in individual cases, they can require employers to change their policies or practices to prevent others experiencing similar problems in the future.
- We recognise that legislative change alone will not be sufficient to prevent sexual harassment. Strengthening the law must be accompanied by wider campaigning, as well as the provision of support and guidance for individuals and organisations to take action that helps change the culture in their workplaces.

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

The BMA supports the introduction of a preventative duty. We believe this will reduce the burden on individuals who have experienced harassment to take enforcement action and will ensure organisations better address negative cultures in their workplaces and procedural failings.

The BMA supports the approach of mirroring existing concepts in the Equality Act 2010 and assessing whether or not the employer has taken 'all reasonable steps' to prevent harassment. This must be supported by a comprehensive statutory Code of Practice. The Code should provide more detailed guidance on what is likely to work to prevent sexual harassment and harassment at work than the current employment Code of Practice from the EHRC, which just advises having an equality policy, making staff aware of it, providing training, and acting on complaints.

For the duty to be easily enforceable, it needs to be easy to assess whether organisations are complying with it. We recommend that part of any new statutory Code of Practice on harassment at work should include a requirement for organisations to be open and transparent and report on the actions and policies they have in place to prevent harassment.

We suggest the following recommendations are included in the statutory Code of Practice as reasonable steps large employers should take:⁹

- Provide designated points of contact that people can discuss harassment concerns with in confidence and informally. It is essential that vulnerable staff feel comfortable coming forward and speaking up and that there are multiple routes to raise concerns rather than just a formal grievance procedure.

⁹ British Medical Association (2018). Bullying and harassment: how to address it and create a supportive and inclusive culture. London: British Medical Association.

- Use anonymous surveys and gather data from a range of sources (e.g. routine staff surveys, exit interviews, types of concerns raised informally), to proactively gather insights and discuss findings at Board level and share with staff-side representatives.
- Provide training to staff and managers on the most effective ways of intervening or supporting others if they see harassment happening.
- Ensure formal complaints are responded to in an appropriate and timely way in practice, including ensuring there are signposts to support for the parties involved such as trade unions or employee counselling services.
- Require organisations to regularly report on the number and nature of complaints received and action taken (provided this does not compromise confidentiality of individual cases).

The preventative steps taken also need to be regularly reviewed and evaluated and we recommend this is included in the statutory Code of Practice too.

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

Yes. The BMA believes that it would provide an incentive for employers to implement stronger protective measures. Such a duty will be most effective if it is well-publicised, accompanied by a strong awareness raising campaign and there is an adequate enforcement mechanism.

Public sector bodies already have an obligation to have due regard to the need to eliminate discrimination and harassment, including sexual harassment, under the Public Sector Equality Duty (PSED). This existing duty will need to be considered when developing this proposal. However, we believe a preventative duty – mandating that action must be taken - will add to the PSED procedural duty.

The EHRC must be adequately resourced to enforce any new preventative duty. It has experienced significant cuts to its budget since 2010 and we believe these funding constraints may have impacted the EHRC's ability to use its enforcement powers more widely. The judicial review cases seeking to enforce the Public Sector Equality Duty have not been brought by the EHRC but by individuals or other organisations such as trade unions and NGOs. The EHRC appears to have been limited in its wider enforcement action of the PSED too.

There will need to be clear routes for reporting alleged non-compliance with the new preventative duty to the EHRC and they must be easily accessible and well-publicised. The EHRC must have a clear, transparent process for how it decides to prioritise investigations or take action against an organisation.

If the EHRC did take action to enforce the proposed new preventative duty, this should be publicised, so as to act as an incentive for other organisations to comply.

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

Yes. The BMA supports dual-enforcement by the EHRC and individuals or other organisations for two reasons. We have concerns about the EHRC's capacity or willingness to investigate every case brought to its attention and to prioritise action. We also believe it would be sensible for the preventative duty to be part of an individual's harassment case under the Equality Act 2010.

Organisations with a particular interest in a case, for example recognised trade unions, should also have the power to enforce the proposed preventative duty. Trade unions are well-placed to identify if an organisation is not complying with its preventative duty, given their presence in the workplace. Failure to comply with the duty would also be a collective rather than purely individual issue as it places multiple workers at risk. Enabling trade unions to bring actions would also help reduce the onus on individuals to challenge employers and enforce the duty.

We believe parallels can be made between the rights to bring judicial review to enforce the PSED and the rights of trade unions¹⁰ to bring a claim to enforce consultation duties in situations of collective redundancy. These types of trade union claims could be models for enforcing the new preventative duty.

The consultation paper is unclear on where the preventative duty will be enforced. We believe the employment tribunal would be well-placed to hear such cases. Employment tribunal judges are experienced in hearing and deciding workplace harassment and discrimination cases, and tribunals include lay members from employer and employee sides who can advise on workplace context and what is likely to be reasonable action to prevent harassment.

Clear guidance must be provided to individuals about the differences between bringing an individual claim of unlawful harassment and a claim to enforce the preventative duty. This will be particularly important, especially if there are different time limits, different jurisdictions and different remedies.

Consideration will also have to be given to how an EHRC action interacts with an individual claim for unlawful harassment.

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?

Further consideration needs to be given to the issue of compensation and remedies for breaching the duty. We note the complexity that may arise as multiple employees will be at risk of harassment from an employer's failure to comply with the preventative duty. It is unclear whether the proposal is that only those individuals who have brought an individual enforcement action should benefit from compensation.

If compensation goes to just one individual who has brought a claim, the impact of the proposed new duty may be minimal in incentivising preventative action. At present there is the risk of much larger compensation awards in individual harassment cases under the Act.

Other options to consider may be fining the organisation based on the size of the workforce, thus reflecting those at potential risk by a failure of the employer to take all reasonable steps to protect staff. The money from fines could be used to fund further 'harassment at work' campaigns and enforcement activity, having compensated the individuals or organisations bringing the action for their costs and time in bringing it.

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

¹⁰ Under the Trade Union and Labour Relations (Consolidation Act 1992).

We support the additional transparency requirements for reporting on prevention and resolution steps that are suggested in the consultation paper. This would introduce a further incentive for strong protective measures and ensure high-level management engages with the issue.

Consideration would have to be given to the burden on small employers, like many GP practices, of complying with any such requirements and whether there should be thresholds for these transparency requirements as there is for gender pay gap reporting, or whether there should be slightly different tailored requirements for small organisations.

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

The BMA supports explicit protection from harassment by third parties like service users being reintroduced into the Equality Act 2010. Doctors, like other healthcare workers, are particularly vulnerable to harassment, abuse or assaults from third parties. For example, the total number of assaults on NHS staff has increased, and sexual assaults on ambulance staff increased by 211 percent from 2013-2017.¹¹ The recent ILO Recommendation on Violence and Harassment (206) specifically recognises healthcare as work where exposure to harassment is likely to occur.¹²

However, protection from third party harassment should be modified from the earlier version that was in the Equality Act 2010 which was only triggered after an employee experienced three instances of harassment. Our view is that a single incident could be sufficiently serious to warrant liability.

We recognise that in a healthcare setting, there may be occasions where there is tension between the duty to prevent harassment and the duty to provide care to patients. This may be particularly so when treating patients where antisocial behaviour is linked to an underlying health disorder. The test of 'all reasonable steps' in a healthcare setting must take into account the duty to provide care to patients. We suggest that sector-specific guidance is developed.

Protection for medical students

Protection from third party harassment would also need to apply to students doing vocational training. We note that the repealed s.40 in the Equality Act was only applicable to employees. We are aware that healthcare students on placement, including medical students, are particularly vulnerable and affected by harassment from third parties. For example, the BMA Medical Students Committee is currently doing work to address how medical students can be supported to deal with racist comments or racial harassment, including from patients or members of the public while on clinical placements.

Support for staff who experience third-party harassment

Some junior doctors have reported experiencing inappropriate or unsupportive responses from managers after reporting sexual harassment by patients. Organisations need to ensure they have strong support mechanisms in place to help staff who have experienced third-party harassment

¹¹ UNISON (2018). [Steep rise in reported assaults against NHS Staff](#). London: UNISON.

¹² International Labour Organisation (2019). https://www.ilo.org/ilc/ILCSessions/108/reports/texts-adopted/WCMS_711575/lang--en/index.htm

after the event, and to take action against the third party where appropriate and possible. This should be the case even where there is no evident failure of an organisation to take all reasonable steps to prevent harassment from third parties.

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, it will be easier for employers if the test is the same for the preventative duty and third party harassment. It will ensure consistency in developing case law and guidance.

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?

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

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?

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

We believe volunteers should, in principle, be entitled to the same protections from harassment as paid workers and people on vocational training placements. Regardless of legal obligations, organisations should take volunteer safety into account when planning preventative measures.

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

The BMA believes this is not sufficient and agrees with the reasoning outlined in the consultation paper. In our experience, members who experience harassment often feel anxious, isolated, and are fearful of triggering further incidents by formally complaining or reporting problems. It may take time for them to come to terms with what has happened and to seek the support and gain the confidence to take action.

We are aware of members contacting us for advice and support who have missed the deadline for bringing a claim. In one case, this was partly because a police investigation into the harassment was underway.

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?

The BMA’s view is that all time limits for claims under the Equality Act should have the same time limit and that this should be six months, with a possibility to be extended in exceptional circumstances.

Q14. If time limits are extended for Equality Act claims under the jurisdiction of the Employment Tribunal, what should the new limit be? 6 months/More than 6 months

Six months, with a possibility to be extended in exceptional circumstances.

Q15. Are there any further interventions the Government should consider to address the problem of workplace sexual harassment? Please provide evidence to support your answer.

We strongly recommend the reinstatement of wider powers for employment tribunals to make binding recommendations to an organisation that has had a successful harassment claim against it. These powers existed in s.124 of the Equality Act 2010 before being repealed in 2015. Currently, employment tribunals can only award successful claimants with compensation or make recommendations that remove the adverse effect on the claimant. In many cases, the claimant has left employment at the organisation or in cases of harassment they might have moved to a different team so the tribunal cannot make recommendations targeted at that organisation or team because it would no longer benefit the person who brought the claim. This means other employees remain at risk.

The original rationale for introducing wider powers for tribunals to make recommendations in the Equality Act was to encourage employers to learn lessons from cases and to take action to prevent discrimination or harassment happening to other employees. If a tribunal has spent days and weeks reviewing evidence, then that tribunal will be in a good position to recommend a set of preventative actions for the employer to take. The tribunal recommendations could go straight to the EHRC for monitoring and follow up compliance action.

We would also like to emphasise again, that any legislative change must be accompanied by other interventions. We support the creation of a new statutory Code of Practice on harassment at work that gives more detailed guidance to employers on what 'all reasonable steps' is likely to cover based on evidence of what works.

In addition, we would like to see the government:

- Implement the actions laid out in its Gender Equality Roadmap and maintain its commitment to promoting gender equality. Sexual harassment is both a cause and a consequence of wider gender inequity and unequal power dynamics can exacerbate cultures where sexual harassment occurs.
- Ratify the new ILO Convention on Violence and Harassment 2019 (190).
- Develop sector specific guidance or encourage, particularly in public services, employers and staff-side organisations to share evidence on effective interventions and good practice and develop their own resources. This would be especially welcome, for example, on steps that can be taken to prevent or respond to harassment by service users while also meeting duties to provide a public service.
- Gather data on the prevalence of workplace sexual harassment. In the health sector and medical profession, we suggest that specific questions on sexual harassment are included in NHS staff surveys and GMC national training surveys.

- Invest in research. We welcome the announcement in the consultation paper that the government will undertake research on the most effective interventions to prevent workplace sexual harassment, including bystander intervention programmes and anonymous reporting systems. We encourage the government to disseminate this research widely. We suggest that the government also work with the Behavioural Insights team to develop understanding of encouraging appropriate behaviours and changing workplace culture.
- Consider reinstating the statutory equality questionnaires. The questionnaires allowed claimants to ask their employer questions about before bringing a potential claim to tribunal. They may be particularly helpful for individuals considering whether to bring a preventative duty claim as they may not be aware of steps the employer has taken. Being served a questionnaire may lead to the employer recognising the need to take steps or communicate what they are doing better without the need for legal action.