

acas working
for everyone

Acas response

Sexual harassment in the workplace

Government consultation

October 2019



Sexual harassment in the workplace

Introduction

1. Acas (the Advisory, Conciliation and Arbitration Service) welcomes the opportunity to respond to the GEO consultation on sexual harassment in the workplace.
2. Acas is a statutory, non-departmental public body with a duty to improve employment relations in Great Britain. In 2018/19, Acas handled approximately 730,000 calls from individuals and employers to its national helpline and our website received over 11 million visits from individuals seeking advice and support. During the year we provided conciliation in approximately 600 collective disputes and also received around 2,500 early conciliation notifications per week. Our network of locally-based advisers also trained over 34,000 people on a wide range of workplace-related topics. Acas has considerable practical experience of the dynamics of the workplace and of issues experienced by workers and employers in situations of workplace harassment.
3. This response primarily seeks to offer some general observations on the proposals set out in the consultation. Where the response covers a question which falls within the direct remit of Acas, the relevant question is specified within the subheading.

Preventing sexual harassment in the workplace and third party harassment

4. Acas welcomes the Government's decision to consider introducing a preventative duty on employers to prevent harassment and victimisation and to reinstate s.40 of the Equality Act (third party harassment). As noted in paragraph 35 of [our response](#) to the Government's consultation on [Confidentiality clauses: measures to prevent misuse in situations of workplace harassment or discrimination](#), Acas believes that such measures should be considered to encourage organisations to take proactive action to tackle the root causes of harassment at work, and ensure that victims are not inappropriately silenced. Acas would welcome working with the Government and other stakeholders to develop appropriate guidance and on any information campaign to raise awareness of changes and best practice to employers and workers.
5. Promoting transparency in the form outlined at paragraph 1.21 of the consultation document is something that Acas agrees that the Government should explore. Policies and procedures have an important role to play in the workplace, but they form only one part of the solution. In Acas' experience, creating the right workplace culture which encourages positive behaviours, and allows for open dialogue is crucial. As such, our view is that the monitoring of the number of cases or complaints involving harassment and/or discrimination would enable organisations to more effectively understand and act appropriately on any patterns. Further, such a requirement would place a greater onus on an organisation to take proactive action and help foster trust amongst their workers that these issues are taken seriously.

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Volunteers and interns

6. Acas believes that everyone should feel safe at work and that no one, irrespective of employment status, should be subjected to discrimination, harassment or victimisation in the workplace.

7. However, as noted in the consultation, there are uncertainties around the protections for interns and volunteers within the Equality Act. As it stands, an individual who is considered to be a volunteer or intern and who wishes to make a claim under the Equality Act (or indeed, for any other employment matter), would be required to firstly prove their employment status as a 'worker' or 'employee' in an Employment Tribunal, before it can turn to the complaint at hand. In Acas' experience, there is a great deal of confusion and uncertainty around employment status among both individuals and employers, which can deter individuals from speaking up or bringing a claim.

8. As such, should the Government legislate to extend and/or clarify Equality Act workplace protections for volunteers and interns, it may facilitate access to justice, as well as incentivise employers to prioritise prevention. Acas would welcome working with the Government and others as part of any awareness-raising campaign which may follow any legislative change.

9. Acas currently provides [online guidance on volunteers and interns](#), which has received over 60,000 visits since it was created in January 2012. As per the guidance, while volunteers do not have a contract of employment, we believe that it is good practice to have in place a written volunteering agreement. A written agreement should likewise be provided to interns. Acas considers that it would be beneficial for such a document to include the organisation's policies around discrimination and harassment. This would help demonstrate their commitment to tackling these issues, and make clear the options available to the volunteer or intern. Acas would welcome working with users and stakeholders to expand our guidance to reflect this, along with any legal changes.

Tribunal time limits for Equality Act cases

10. As outlined in the consultation document, Acas must be notified (with some exceptions) via Early Conciliation before a claim can be presented to an Employment Tribunal. Provided that the notification to Acas is submitted within the Tribunal time limit (three months for the majority of claims), the clock stops ticking on the limitation period. Once Early Conciliation ends, the clock starts again and individuals have at least one calendar month in which to lodge a Tribunal claim.

11. The sensitive and serious nature of claims brought under the Equality Act means that such cases can cause considerable stress and challenge for all parties involved. [Research commissioned by Acas](#) (October 2017) found that claimants who cited stress as their *main* reason not to proceed to a full Tribunal claim had cases in the more complex 'open' (which cover those involving harassment and discrimination) and 'standard' (such as unfair dismissal) jurisdictional tracks. Those who felt too vulnerable to continue through to Tribunal were also bringing claims involving these more complex jurisdictions.

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12. Acas' advice is always to encourage early resolution where possible, including through the use of internal workplace grievance procedures. However, our experience, particularly in discrimination and/or harassment cases, is that these procedures can become protracted for a number of reasons, including:

- Individuals need time to come to terms with what has happened, and therefore may not be in a position to raise a grievance immediately or decide how they wish to proceed;
- In particularly serious cases, including those involving criminal proceedings, or those concerning a number of individuals, employers may need more time to carry out an investigation and due process before reaching an outcome.

13. An extended time limit may therefore be beneficial to parties, allowing them sufficient time to process the incident(s), complete internal procedures and seek relevant advice. It may also allow more opportunity for early resolution, alleviating the pressures of making decisions around Tribunal proceedings.

14. At the same time, Acas shares the concerns outlined in the consultation document that there are risks to an extended time limit that should be considered. For instance, extending time limits for some, but not all claims (subject to the recent Law Commission consultation¹), could increase confusion amongst individuals, particularly if they are presenting multi-jurisdictional claims. This could increase the likelihood of out-of-time claims being submitted. Acas statistics for 2018-19 show that the large majority of multi-jurisdictional claims contain a combination of Equality Act and non-Equality Act jurisdictions:

- 40 per cent of Acas Early Conciliation cases allocated to a conciliator were multi-jurisdictional, of which 82 per cent contained at least one jurisdiction relating to the Equality Act and at least one non-Equality Act jurisdiction;
- 63 per cent of Tribunal claims received were multi-jurisdictional, of which 91 per cent contained at least one jurisdiction relating to the Equality Act and at least one non-Equality Act jurisdiction².

15. Acas further notes that in the event of an extended time limit, parties may find themselves dealing with claims for a lengthier period of time, which may have negative financial and emotional impacts, and affect their ability to recall events in question. There could additionally be an impact on costs associated with the Tribunal system.

¹ The Law Commission's consultation on [Employment Law Hearing Structures](#), which closed on 31 January 2019, sought views on whether Employment Tribunal time limits for *all* jurisdictions should be extended.

² The jurisdictions reported against Early Conciliation notifications differ from those reported in cases received for conciliation from the Employment Tribunal Service in that they are assigned by Acas officers on an indicative basis only and do not necessarily represent the jurisdictions a claimant might record when submitting an ET1.

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16. While Tribunals have power to extend time limits and to stay proceedings, extensions of time are in the discretion of the Tribunal and are not always granted. Raising awareness of the Tribunals' power to extend time may be helpful, as long as individuals are reminded that there is no guarantee that such extensions will be granted. Indeed, as the consultation notes, legal advisors tend to advise their clients against submitting a late claim.

17. Should the Government decide to legislate to extend time limits, Acas agrees that clear guidance would be necessary to raise awareness of the changes and to mitigate the risk of people bringing out-of-time claims, as outlined in paragraph 14 above. We would welcome working with the Government along with other stakeholders as part of an awareness-raising campaign, and ensure that changes are reflected in our own guidance.

Other options (Question 15)

18. One area which has placed organisational failure in the spotlight is the use of non-disclosure agreements (NDAs) to cover up harassment, discrimination and victimisation in the workplace. Acas welcomes the Government's commitments to tackle the unethical use of confidentiality clauses, as outlined in its [response](#) to its consultation on [Confidentiality clauses: measures to prevent misuse in situations of workplace harassment or discrimination](#).

19. Whilst legal reforms are an important part of tackling the issue of workplace sexual harassment and other forms of discrimination and harassment, in Acas' experience changing behaviours and reinventing workplace cultures are also important.

20. Acas believes that there are a number of measures that the Government may wish to consider to help address toxic workplace environments and power imbalances which give rise to incidents of harassment and misconduct. Reflecting paragraph 37 in [our response](#) to the consultation referenced above (paragraph 18), these include:

- ensuring that workers have access to independent advice and support in the workplace, including where appropriate through independent trade unions or other workplace representatives;
- promoting the importance of fairness, respect and agreement on acceptable and unacceptable conduct in the workplace, so that more individuals feel confident and empowered to raise concerns without fear of reprisal;
- promoting the value that managers and worker representatives, such as trade unions, can play in identifying and highlighting patterns of behaviour through their involvement in handling concerns raised in the workplace. As highlighted in paragraph 35 of Acas' [response](#) to the consultation referenced above, the Government may wish to consider introducing the statutory right to time off for equalities representatives;
- ensuring that managers and leaders understand the importance and have the confidence to effectively deal with the aftermath of an allegation and its

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subsequent outcome, not only on those immediately involved, but the organisation more widely;

- improving the quality of leadership and people management skills in workplaces across the UK, so that leaders and managers feel empowered to deal effectively with any issues about wrongdoing that are brought to their attention, and to challenge any inappropriate conduct they may observe in their workplaces;
- developing and promoting principles of good governance that can help organisations achieve and maintain transparency around the number of cases involving harassment and/or discrimination, so that organisations can understand how to identify and act on any patterns.

21. Acas recognises the growing demand for constructive solutions, and is therefore in the process of updating and strengthening its [guidance on sexual harassment](#) to focus more on creating a positive culture around gendered behaviours and further clarify the role and responsibilities of management and employers in dealing with sexual harassment in the workplace.

22. Acas will also be publishing standalone guidance on NDAs more broadly, which will outline their limitations, common issues that can arise, and good practice in proposing, drafting and negotiating such clauses.

23. We will be seeking stakeholder input over the course of the next few months, including from both the Government Equalities Office (GEO) and the EHRC, with whom we have been liaising closely to carry out awareness-raising work to prevent and address sexual harassment at work. Acas notes that the EHRC is currently developing a statutory code of guidance on sexual harassment and other forms of harassment at work, as well as technical guidance on NDAs. We will continue to collaborate to ensure that our messages are consistent and promoted to encourage best practice and legal compliance.

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