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Employers' positive duty to take reasonable steps to prevent sexual harassment

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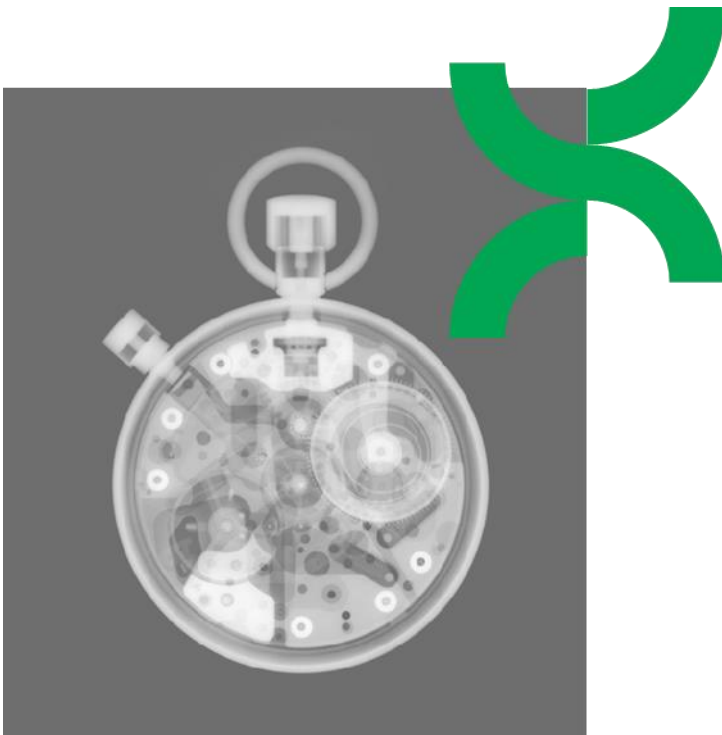
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The countdown to the new duty to prevent sexual harassment

On 26 October 2024, the duty to take reasonable steps to prevent workplace sexual harassment comes into force. Even where employers already have effective systems and controls in place, they must take action to review them in light of the new duty. For those whose policies and processes are not adequate, now is the time to get going.

The extent of the duty currently requires employers to take “reasonable steps” but there are rumours that the Government wants to strengthen it to require them to take “all reasonable steps”. This would significantly increase the burden on employers. Irrespective of how the duty may evolve, there are steps that employers should be taking now, which can be enhanced at a later point should it be necessary.



Wasn't there always a duty to take reasonable steps to prevent harassment?

Yes and no. Yes, it has always been a defence to a claim of discrimination that an employer took all reasonable steps to prevent it. If the employer was successful in arguing this defence, liability would be totally extinguished. For this reason, employers are familiar with the type of steps required to make out this defence, which would include having a comprehensive policy, and rolling out workforce and management awareness training.

The new duty differs somewhat. Rather than a defence, it is a positive duty requiring employers to take reasonable steps to prevent sexual harassment of their workers. It is being described by the regulatory body charged with enforcing the duty, the Equality and Human Rights Commission (EHRC), as “the preventative duty”.

Interestingly, the new duty will only apply to sexual harassment and not the other strands of discrimination, but, of course, employers may decide to make their policies and practices wider to align with a more joined-up approach to DE&I. This will be particularly important when considering the challenges of harassment arising from intersectionality.



The scope of the preventative duty

One of the first things to note is that the preventative duty is anticipatory in nature. Employers are required to foresee scenarios where their workers may be at risk and to take positive and reasonable action to prevent sexual harassment from occurring. If harassment has already taken place, then measures must be implemented to prevent it from happening again. The recommendations that are made following investigations into sexual harassment will be of critical importance in this regard.

In practice, the reasonable steps an employer should take will not only depend on its risk profile but also its culture and what messages the management want to roll out and embed throughout the organisation.

When considering what steps an employer may need to take, the following factors will be relevant:

- ♦ **What?** Identify specific risks associated with sexual harassment within the organisation.
- ♦ **Where?** Based on past grievances, whistleblowing, or other disclosures in, for example, exit interviews, consider whether there are any parts of the business where sexual harassment is more prevalent.
- ♦ **Who?** Identify which populations are more at risk. This could include graduate trainees, interns, or junior staff – any group which involves a power dynamic.
- ♦ **Consider** if there are any individuals against whom multiple complaints have been made, even if allegations have not been substantiated.
- ♦ **Assess** if there are third parties to which workers are exposed that may pose risks.
- ♦ **When?** Determine when incidents of sexual harassment generally take place. This could be after work events, Christmas parties, or offsite gatherings. Assess if alcohol consumption played a factor in these incidents.

What is “reasonable” will mean different things to different employers based upon factors such as, but not limited to the size of the employer, the context and the nature of the workplace, the sector in which the employer operates, and any requirement to comply with regulatory standards, such as those set by the Financial Conduct Authority (FCA). Employers should balance the time and cost of taking particular steps with the benefits it would yield in discharging their preventative duty.

By addressing these questions, employers can assess the appropriate steps needed to prevent sexual harassment in the workplace. It will also help when employers need to demonstrate that they have discharged their preventative duty.

Risk of sexual harassment by third parties

When the draft legislation was first introduced in Parliament, it contained express provisions in relation to harassment by third parties. During debate, this provision was removed. As a result, the primary legislation does not refer to third parties, but it is being interpreted as such. This is because the duty is framed as a general obligation to prevent sexual harassment of workers. It does not say by whom. The accompanying technical guidance and 8-step guide for employers, issued by the EHRC clarifies that this preventative duty does apply to third parties. Therefore, employers will be required to anticipate and mitigate the risks posed by customers, clients, contractors, service users, conference delegates, and members of the public.

This can be challenging for employers because, unlike their own workforce, they have very little control over third parties. However, this does not mean that employers are powerless; they can set expectations with third parties using appropriate communications in advance of exposure to their employees, and of course take robust action in the event of harassment to demonstrate that it will not be tolerated in the future.

Whether an employer is reviewing an existing anti-harassment policy or creating a new one, it is recommended that employers address third party harassment, including the steps they will take to prevent it, and address it if such a complaint arises.





Prevalence of sexual harassment in financial services

According to the House of Commons Treasury Committee's report on Sexism in the City, which was published in March 2024, sexual harassment is more common in financial services, relative to other sectors. The Committee was told by witnesses that forms of sexual harassment ranged from microaggressions through to criminal harassment, assault and rape.

These findings are important because they demonstrate that employers in financial services are on notice that this is a heightened risk within the sector. Senior Managers should interrogate and note what steps their firms will be taking to address this risk as the FCA has, this year, indicated that it will prioritise proposals that tighten expectations on firms to tackle misconduct, including bullying and sexual harassment.



Enforcement

Enforcement measures are twofold. If a worker has brought a successful sexual harassment claim and the employment tribunal finds that the employer is in breach of its preventative duty, it must consider whether and the extent to which the employer has failed in its duty. It then can order compensation (which of course is uncapped in discrimination cases) to be uplifted by up to 25%.

The enforcement powers of the EHRC appear extensive on paper, but much will depend on the resources allocated to it, which are unlikely to be significant in the current economic climate. It can:

- ◆ investigate an employer.
- ◆ obtain an injunction to restrain the employer from committing unlawful acts.
- ◆ issue a notice confirming that the employer is in breach of the preventative duty and requiring it to prepare an action plan of how it will remedy the breach.
- ◆ enter into an agreement with the employer to prevent future unlawful acts.

It should be noted that these powers can be exercised even on the basis of suspicion, not necessarily from an actual finding of non-compliance with the preventative duty. This suspicion may arise from whistleblowing disclosures made directly to the EHRC, as it is a Prescribed Body for the purposes of whistleblowing legislation. Reports can be made anonymously or confidentially, which may increase the likelihood of direct reports being made by individuals who fear retaliation if they raise their concerns internally.

Under the Government's proposals for employment reform, a single enforcement body will be formed with powers to inspect workplaces and litigate to enforce workers' rights. It remains to be seen how it will work with the EHRC. According to Angela Rayner, the new body will be able to inspect workplaces, levy fines and instigate prosecution.

Potential actions for employers to address risks posed by other workers

- ◆ **Conduct a risk assessment** to get a comprehensive picture of where the issues are and how resources should be targeted. In the EHRC's technical guidance, a failure to conduct a risk assessment is stated as likely to render an employer non-compliant with the preventative duty, so this step is critical for all employers to take. Any type of risk assessment like this is likely to be disclosable in subsequent litigation, so employers should either seek to conduct it under legal advice privilege or keep all the information high level/generic without referring to individuals or specific circumstances. Remember too that if this is an open document, the employer will be on notice of the risks so will have to take remedial steps in order to avoid the document, and the information contained in it, being used as a basis for arguing breach of the reasonable steps duty in any sexual harassment claim.
- ◆ **Review dignity at work (anti-harassment) policies** to ensure that it is clear to workers how to report concerns about colleagues and third parties. Communicate the refreshed policy to the workforce using management to reinforce any messages, showing how misconduct in this area will not be tolerated.
- ◆ **Review events which involve alcohol** and consider whether to have a no or limited alcohol policy. Remind attendees before events of expectations around alcohol and expected standards of behaviour.
- ◆ **Incident reporting mechanism:** establish a clear mechanism (a) for workers to report incidents and (b) to track incidents of sexual harassment and any trends. Consider whether a separate reporting channel for issues of this nature should be set up with those who receive any reports being specifically trained to address complaints of a sexual nature.
- ◆ **Workplace guardians:** in a similar vein to workplace mental health champions, consider designating specially trained managers who attend workplace social events with the primary responsibility of ensuring a safe, respectful, and enjoyable environment for all employees. These guardians could have a wider role as a point of contact to support colleagues. This could be published internally to promote the role.
- ◆ **Workforce dignity at work training** should be reviewed and refreshed so all staff are aware of expectations, how to report areas of concern, and how complaints will be handled.
- ◆ **Manager and HR dignity at work training:** roll out separate training for these populations so they understand what the new duty involves and how they should manage concerns raised with them, involving a specialist third party like the Survivors Trust to help with an analysis of what the employer currently does to prevent harassment and whether more could be done. This outside, expert view would be very helpful (if acted upon) to show the employer has sought to take reasonable steps.
- ◆ **Sexual harassment investigations:**
 - ◆ Review how these are conducted as investigations of a sexual nature are different – they are personal to both the reporter and subject, and often it is a case of “he said” “she said” where there are few witnesses and little, if any, evidence. The amount at stake for both parties means the individuals will be heavily invested in the process and it may therefore be more demanding than in other investigations.

- ◆ At some point in the investigation process ask an investigator to specifically consider whether there is more that the employer could have done to prevent the harassment (if harassment is found to have occurred) and/or whether the investigation has identified any gaps/omissions in policies/practices.
- ◆ Employers could also consider gathering feedback from others involved in investigations of sexual harassment to see whether they have any feedback on the process that may help identify areas where things could be improved.
- ◆ Ask complainants if there is anything more the employer could have done to prevent the treatment being complained of.
- ◆ Lessons learned/recommendations coming out of investigation should be built into the process to improve it.



Potential actions to address risks posed by third parties

- ◆ **Pre-engagement communications:** communicate expectations regarding behaviour and harassment policies with third parties before any engagement or event.
- ◆ Include **signage** in areas where workers are exposed to third parties stating that any form of harassment will not be tolerated.
- ◆ Consider steps to ensure that instances of an employee working alone with a third party are limited.
- ◆ **Incident reporting mechanism:** establish and set out in the employer's dignity at work policy, a clear mechanism for employees to report, and for management to track, incidents involving third parties promptly. This process should ensure that the reported behaviour is addressed with the third party.



How can employers assess the effectiveness of their reasonable steps?

The preventative duty is not a one-off exercise. Discharging the obligation will require continuous monitoring to ensure that any steps taken are effective. For example, not only reassessing fitness for purpose on a regular basis, but also upon any material events/findings of sexual harassment. Assessment should include both qualitative and quantitative measures to provide a holistic view of impact and areas for improvement.

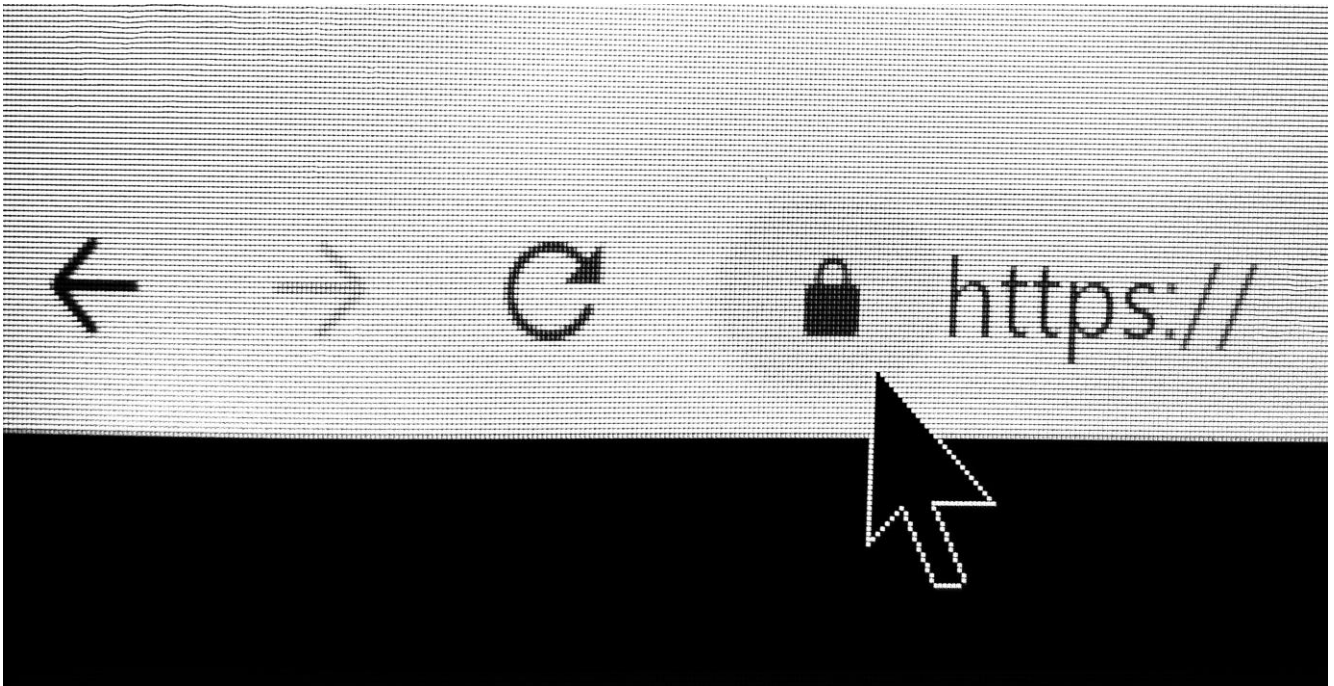
Below are some suggested steps that employers can take:

- ♦ **Anonymous worker surveys** to gather feedback about their awareness and understanding of policies, how to report, and expected standards of behaviour.
- ♦ **Manager surveys** to gather feedback on their experiences of handling complaints, their understanding of their responsibilities under the new duty, and any challenges they face.
- ♦ **Incident data analysis:** analyse data from reported incidents of sexual harassment to identify trends, such as common locations, times, or individuals involved. This can help in understanding whether certain areas or times require additional focus.
- ♦ **Track resolution times:** monitor how long it takes to resolve complaints and whether the parties have any feedback on how the process might be improved.
- ♦ **Training effectiveness evaluation:** implement assessments before and after training sessions to measure knowledge retention and understanding of key concepts.
- ♦ **Training attendance records:** ensure that all workers and managers have attended the required training sessions. Follow up with those who missed sessions to ensure they receive the necessary training.
- ♦ **Policy review:** conduct an annual review of the dignity at work policy to ensure it remains up-to-date with current laws and best practices.
- ♦ **Benchmarking:** compare policies and practices with industry standards and best practices to identify areas for improvement.
- ♦ **Management reporting:** create regular internal reports summarising the findings from surveys, incident data analysis, and other assessment methods. Share these reports with senior management and relevant stakeholders.
- ♦ **Action plans:** develop action plans based on the assessment findings to address any identified gaps or areas for improvement. Ensure that any of the gaps/areas for improvement identified from investigations are incorporated in these action plans. Assign responsibilities and timelines for implementing these actions.

By systematically assessing the effectiveness of the reasonable steps taken, employers can ensure they are meeting their obligations under the new duty to prevent sexual harassment and are fostering a safe and respectful workplace environment.

Resources

- ◆ House of Commons Treasury Committee report entitled Sexism in the City dated 5 March 2024 <https://committees.parliament.uk/publications/43731/documents/217019/default/>
- ◆ FCA's response to the Sexism in the City report <https://www.fca.org.uk/news/statements/house-commons-treasury-committees-sexism-city-report>
- ◆ EHRC technical guidance on sexual harassment <https://www.equalityhumanrights.com/guidance/sexual-harassment-and-harassment-work-technical-guidance#the-preventative-duty>
- ◆ EHRC Employer 8-step guide: Preventing sexual harassment at work [Employer 8-step guide: Preventing sexual harassment at work | EHRC \(equalityhumanrights.com\)](#)



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