



ENOUGH IS ENOUGH: TACKLING WORKPLACE SEXUAL HARASSMENT IN SCOTLAND



Engender is Scotland's feminist policy and advocacy organisation. We work for women's economic, political, and social equality with men.

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1. INTRODUCTION

The incidence of sexual and sexist harassment in the workplace is endemic.¹

Overwhelmingly perpetrated by men against women, sexual harassment occurs when a worker is subjected to unwanted conduct of a sexual nature and incorporates a spectrum of behaviours, ranging from suggestive looks or gestures to sexual assault. Sexist harassment is unwanted non-sexual behaviour related to a person's sex, such as women being assigned different tasks from male colleagues in line with gender stereotyping, or being spoken over in meetings. There are clear overlaps between the two, and both sexual and sexist harassment are underpinned by the pervasive sexism and misogyny that serve as the backdrop to women's lives.

Sexual and sexist harassment are forms of violence against women and a violation of women's human rights. This means that they are perpetrated, experienced and enabled within the context of women's economic, social and political inequality with men, and the unequal power dynamics that stem from this. Women have less access to resources across their lifetimes, are more likely to live in poverty and experience financial insecurity, undertake the majority of unpaid care across society, and experience high levels of men's violence and day-to-day misogyny. Meanwhile men are overrepresented in decision-making circles and positions of authority. In the labour market, women still earn less than men, women's work is clustered in undervalued, underpaid and under-protected sectors, and women are more likely to be in precarious or insecure work.²

All groups of women are impacted by systemic sexual and sexist harassment, both directly and indirectly in terms of constraints on our freedom to navigate public space. However, for further oppressed and minoritised groups sexual and sexist harassment intersects with other forms of discrimination, stereotyping and prejudice. As such the nature of harassment inflicted is different for women of colour, Muslim women, disabled women, LGBTI women, older and younger women, and women on low incomes, amongst other marginalised communities. It is especially prevalent in workplaces where power inequalities are particularly stark, including within male-dominated sectors and across forms of precarious employment. This further fuels precarity and occupational segregation.

¹ Over half of women surveyed reported experiencing sexual harassment at work in research conducted by the TUC. See: TUC (2016) Still Just a Bit of Banter? Sexual Harassment in the workplace in 2016. Available at: <https://www.tuc.org.uk/sites/default/files/SexualHarassmentreport2016.pdf>.

² Engender (2017) Gender Matters Roadmap: Towards Women's Equality in Scotland. Available at: <https://gendermatters.engender.org.uk/content/resources/Gender-Matters-Roadmap---towards-womens-equality-in-Scotland.pdf>.

These are the conditions responsible for the casual, commonplace and utterly normalised sexual and sexist harassment that we see in Scotland's workplaces.

Although yet to be recognised as such in Scottish or UK policymaking, sexist and sexual harassment is also a significant public health and safety issue. The impact of sexual harassment on women's lives is both insidious and far-reaching, with implications for women's health and wellbeing, earning potential, financial stability, income inequality with men, career progression and, ultimately, for gender equality across all spheres. A specific, gendered approach to tackling workplace sexual harassment and the sexist behaviours that underpin it is therefore crucial. Such an approach must be rooted in analysis of women's inequality with men, within the labour market, in terms of income inequality and financial insecurity, and in the context of men's endemic violence against women and girls.

In recent years, the #MeToo and #TimesUp movements have focused public and policy attention on sexual and sexist abuse, including sexual harassment, within institutions. After decades in which individual women have borne the risk for stopping sexual harassment, we must take this moment of focus to retool our systems of reporting, investigation, remedies and accountability to redistribute the risk away from victim-survivors and on to perpetrators and employers. This report develops the case for Scottish Government to take urgent action to address workplace sexual harassment, as part of its mandate to tackle violence against women, its ambitions to improve workplace health and safety, and its well-established gender equality and human rights agendas.

This is the final report of a project funded by Rosa, the UK fund for women and girls³, which brought together experts and experts by experience to think about how systems around sexual and sexist harassment in the workplace in Scotland currently work and how they might be changed for the better.

In doing so Engender convened focus groups and conducted interviews to document women's experiences of SSH in Scotland, with disabled women, women of colour, Muslim women, LB+ women, trans women, young women, and women on low incomes and in precarious employment. This was done in partnership with advocacy groups that represent these respective communities: Inclusion Scotland, Pass the Mic, Amina Muslim

³ ROSA (2019) The UK Fund For Women and Girls. Available at: <https://rosauk.org/>.

Women’s Resource Centre, Equality Network, Scottish Trans Alliance, the Young Women’s Movement and the Scottish Trades Union Congress. Additionally, we ran a survey calling for women to share their experiences of workplace sexual harassment and their views on how the response by employers and scrutiny systems could have been improved. Anonymous quotes from these focus groups and survey are included throughout the report.

This project also included convening a working group of experts from the fields of academia, employment and discrimination law, human resources, and women’s equality and human rights. Prof. Nicole Busby, Professor in Human Rights, Equality and Justice at the University of Glasgow’s School of Law, was commissioned to conduct a literature review on anonymised reporting mechanisms for sexual harassment and Engender undertook secondary research on the current systems in place regarding sexual harassment in the workplace including prevention, reporting, investigation and remedies, tribunals and regulation.



I’ve been told that certain shifts would not allow me to go on nights out with them because they can’t trust one of their shift members and they don’t want me to be exposed to that individual when they’ve had a drink. So, that’s not them saying to him: ‘you cannot come out with us’. It’s them saying to me: ‘you can’t come out with us because we can’t trust him’.

**FOCUS GROUP WITH WOMEN IN LOW PAID AND/
OR PRECARIOUS WORK**

TERMINOLOGY

Sexual harassment occurs when a worker is subjected to unwanted conduct of a sexual nature which has the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that worker.

Sexist harassment refers to unwanted non-sexual conduct relating to a person's sex.

Both sexual and sexist harassment are forms of sex-based discrimination under the Equality Act 2010. Sexual and sexist harassment are fundamentally interlinked. At points in the text we refer to both sexual and sexist harassment (SSH), as well as to the sexism and sexist behaviour(s) that underpin sexual harassment. This is because a preventative approach to sexual harassment must be cognisant of this structural inequality at the core of its pervasive perpetuation.

Elsewhere we refer exclusively to sexual harassment. This is primarily in Chapter 4 on 'what needs to happen' where we examine the systems and specific procedures around dealing with sexual harassment, or with regards to studies and research that have focused on sexual harassment.



I think it's important everyone is aware of the meaning of sexual harassment especially for young people starting their first jobs. It takes knowledge, courage and support to identify and report an incident.

ENGENDER SURVEY RESPONSE

2. SEXUAL AND SEXIST HARASSMENT IN THE WORKPLACE

Sexual harassment occurs when a worker is subjected to unwanted conduct of a sexual nature which has the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that worker. It is prohibited under the Equality Act 2010 and under international law. The Equality and Human Rights Commission's guidance on 'Sexual harassment and harassment at work' sets out a broad range of behaviours that constitute sexual and sexist harassment.⁴ Conduct 'of a sexual nature' includes suggestive looks, staring or leering, sexual gestures, intrusive questions about a person's private life, a person discussing their own sex life, and unwelcome touching or hugging, as well as more overt sexual comments, messages, or behaviours. At the extreme end of the spectrum sexual harassment includes criminal behaviour in the form of sexual assault. Harassment relating to age, disability, gender reassignment, race, religion or belief, sex, and sexual orientation can include written and spoken words, gestures, facial expressions, imagery, 'banter', posts and other activity on social media, jokes and pranks.

Sexist harassment often underpins and overlaps with sexual harassment. It constitutes the non-sexual but sexist and misogynistic behaviours that women contend with on a daily basis. For instance, sexist attitudes and stereotyping manifest in women being expected to modify their appearance in certain ways or to perform voluntary tasks like taking minutes more routinely than men.



I think with regards to sexual harassment it's not always physical but it can also be what is said. I find that, I can't speak for everyone, but I think that's a wee bit more common now because you feel that you can make the wee sly comments and get away with it and sometimes but I know personally with me I'd be like "did that happen or am I just imagining that" or "am I reading that the wrong way?" So that's probably one of the things that comes to mind when it comes to sexual harassment in the workplace, that is not always physical I think.

ENGENDER SURVEY RESPONSE

⁴ EHRC (2020) Sexual harassment and harassment at work: Technical guidance. Equality and Human Rights Commission. Available at: https://www.equalityhumanrights.com/sites/default/files/sexual_harassment_and_harassment_at_work.pdf.

Sexual and sexist harassment are forms of violence against women, which is both a cause and consequence of women's inequality. Likewise, sexual and sexist harassment, as part of the continuum of violence against women and girls,⁵ is both enabled by gender inequality in the labour market and works to sustain men's privileges in the workplace. This is recognised by Equally Safe, Scotland's national strategy to prevent and tackle violence against women⁶ and the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). CEDAW General Recommendation 19 on violence against women states that equality in employment is seriously impaired by workplace sexual harassment.⁷



Unfortunately, sexually harassing women is socially acceptable at the moment and that needs to change.

**FOCUS GROUP WITH WOMEN IN LOW PAID AND/
OR PRECARIOUS WORK**

2.1 THE EXTENT AND NATURE OF SEXUAL HARASSMENT IN THE WORKPLACE

For decades, attention to the scale of sexual harassment experienced by women and girls - as underpinned by sexist behaviours and attitudes - has been steadily growing in academic circles and more broadly.⁸ This momentum has focused both on the workplace and across societies at large. In 2006, the 'me too' movement to support survivors of sexual violence was founded by Tarana Burke. In 2017, the #MeToo hashtag went viral,⁹ as millions of women from all walks of life shared their experiences of sexual harassment and abuse, often at the hands of men demonstrably and considerably more privileged than themselves. Race, age and class were and continue to be prominent factors within this.¹⁰ In 2018, TIME'S UP, a high-

⁵ Kelly L (1987) The Continuum of Sexual Violence. In: Women, Violence and Social Control (Hanmer J, Maynard M, eds), pp 46–60. London: Palgrave Macmillan UK. Available at: https://doi.org/10.1007/978-1-349-18592-4_4.

⁶ Scottish Government and COSLA (2018) Equally Safe: Scotland's strategy for preventing and eradicating violence against women and girls. Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2018/04/equally-safe-scotlands-strategy-prevent-eradicate-violence-against-women-girls/documents/00534791-pdf/00534791-pdf/govscot%3Adocument/00534791.pdf>.

⁷ UN Committee on the Elimination of Discrimination Against Women (1992) CEDAW General Recommendation No. 19: Violence against women. United Nations. Available at: <https://www.refworld.org/docid/52d920c54.html>.

⁸ Berman H, McKenna K, Arnold CT, Taylor G, MacQuarrie B (2000) Sexual harassment: everyday violence in the lives of girls and women. *Advances in Nursing Science* 22:32–46.

⁹ The hashtag had been used over 19 million times within a year of the first tweet.

¹⁰ me too. (2022) Get to Know Us: History and Inception. Available at: <https://metoomvmt.org/get-to-know-us/history-inception/>.

profile campaign focused on ‘safe, fair and dignified work for women of all kinds’ was launched by 300 women working in entertainment industries. The organisation works to prevent sexual harassment in the workplace, as well as to support women that are affected.

In recent years, a number of important studies and reports have highlighted the grave reality for women in workplaces across the UK,¹¹ and the Women and Equalities Committee of the UK Parliament conducted an inquiry into workplace sexual harassment.¹²

These movements and research pieces, along with the activism of countless women and the advocacy of women’s organisations, have been a proliferation of voices on sexual and sexist harassment over the last five years. This is bringing the scale of SSH in the workplace, anecdotally known to be endemic, into focus; shining a real spotlight on the issues and forcing decision makers to look at policy solutions.

2.1.1 The overall incidence of sexual harassment

According to the TUC, “dealing with cases of sexual harassment in the workplace is the bread and butter work of many union reps”.¹³ Their research found that more than half of women consulted had experienced sexual harassment at work. Almost a quarter of women had experienced unwanted touching, over ten percent of which was unwanted sexual touching or attempted kissing, and 32% of women have been subject to unwelcome jokes of a sexual nature. The overwhelming majority of perpetrators were men (nine out of ten), with nearly one in five women reporting that their line manager or someone else with direct authority over them was responsible. Four out of five women did not report the sexual harassment to their employer.

Since the move to online working at the onset of the Covid pandemic, women have continued to be subjected to systemic sexual harassment and sexist behaviours. Research by the employment law firm Slater Gordon found that over 35% of women had experienced at least one sexist workplace demand during the first lockdown in

¹¹ See: TUC (2016) Still Just a Bit of Banter? Sexual Harassment in the workplace in 2016. Available at: <https://www.tuc.org.uk/sites/default/files/SexualHarassmentreport2016.pdf>; TUC (2021) Sexual harassment of disabled women in the workplace. Trades Union Congress. Available at: <https://www.tuc.org.uk/sites/default/files/2021-07/DisabledWomenSexual%20harassmentReport.pdf>; TUC (2019) Sexual harassment of LGBT people in the workplace. Trades Union Congress. Available at: https://www.tuc.org.uk/sites/default/files/LGBT_Sexual_Harassment_Report_0.pdf; and EHRC (2018) Turning the tables: Ending sexual harassment at work. Equality and Human Rights Commission. Available at: <https://www.equalityhumanrights.com/sites/default/files/ending-sexual-harassment-at-work.pdf>.

¹² Women and Equalities Committee (2018) Sexual harassment in the workplace. House of Commons. Available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf>.

¹³ TUC (2016) Still Just a Bit of Banter? Sexual Harassment in the workplace in 2016. Available at: <https://www.tuc.org.uk/sites/default/files/SexualHarassmentreport2016.pdf>.

2020.¹⁴ Being asked to dress ‘sexier’ or to wear make-up in order to ‘win new business’, ‘look nice for the team’ or to be ‘pleasing to a client’ was a common theme to emerge. Half of those surveyed had been warned to expect inappropriate behaviour from particular colleagues when they started the job. A recent report by the Fawcett Society found that sexual harassment had increased or escalated since working remotely for almost a quarter of women who had been harassed.¹⁵ This is particularly worrying given that women’s economic security has worsened throughout the pandemic compared with men’s,¹⁶ with clear implications for their capacity to pursue action or remedy in cases of sexual or sexist harassment.

Sexual and sexist harassment has certain universal impacts on all women that constrain the way we navigate workplaces, and wider opportunities for social, economic and leisure activities. It does so regardless of whether we have been directly or recently targeted by sexual harassment by communicating to women and girls the risks and consequences for upending gendered norms. Sexual and sexist harassment, like all forms of sexism and misogyny, fundamentally intersect in specific ways with structural inequalities regarding race, disability, sexual orientation, gender identity, age, class, faith, migration status and other forms of oppression, shaping the incidence and nature of harassment at work.¹⁷ Equality characteristics, and attendant biases, can also privilege certain perpetrators, due in particular to ableism, racism and ageism, undermining efforts at accountability even where behaviours are reported, as well as access to justice for victim-survivors.¹⁸

2.1.2 Ableism and sexual harassment

Disabled women experience sexual harassment, and sexual violence more generally, at a significantly greater rate than non-disabled women.¹⁹ The TUC found “shocking levels of sexual harassment” in its engagement with 1,100 disabled women in the UK, with almost 70% of respondents having been sexually harassed at work.²⁰ The

¹⁴ Slater Gordon (2020) Bosses tell women to be “sexier” on video meetings. Available at: <https://www.slatergordon.co.uk/newsroom/bosses-tell-women-to-be-sexier-on-video-meetings/>.

¹⁵ Fawcett Society (2020) Tackling Sexual Harassment in the Workplace: Report on Employer Actions to Prevent and Respond to Workplace Sexual Harassment. Available at: <https://www.fawcettsociety.org.uk/Handlers/Download.ashx?IDMF=8eabc7f1-07c0-4d7e-9206-de431524301e>.

¹⁶ Engender, Close the Gap (2021) Joint briefing on the impact of COVID-19 on women’s wellbeing, mental health, and financial security. Available at: <https://www.engender.org.uk/content/publications/Close-the-Gap-and-Engender-Joint-briefing-on-the-impact-of-COVID-19-on-womens-wellbeing-mental-health-and-financial-security.pdf>.

¹⁷ UN Women (2020) Sexual Harassment Against Women with Disabilities in the World of Work and on Campus. United Nations. Available at: <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2020/Discussion-paper-Sexual-harassment-against-women-with-disabilities-en.pdf>.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ TUC (2021) Sexual harassment of disabled women in the workplace. Trades Union Congress. Available at: <https://www.tuc.org.uk/sites/default/files/2021-07/DisabledWomenSexual%20harassmentReport.pdf>.

research found that disabled women experience higher levels of every type of sexually harassing behaviour, reflecting the discrimination, inequalities and stereotyping that disabled women encounter at work and in wider society. Disabled women were around twice as likely to have experienced unwanted touching as compared with non-disabled women, and two thirds of disabled women who were sexually harassed at work did not report it to their employer.

Engender's 2018 report on disabled women's reproductive rights in Scotland found that deeply ingrained stereotyping and negative assumptions about disabled women continue to play a significant role in the denial of disabled women's reproductive rights.²¹ Disabled women in Scotland lack autonomy over their bodies, sexual activities, relationships and parenting, and are often perceived as hypo-sexual or hyper-sexual. Similarly, UN Women's consultations with disabled women "repeatedly highlighted the general culture of disbelief in women is sharper for women with disabilities, as credibility diminishes when social structures of inequality intersect".²²



There's a belief that disabled women are inherently kind of asexualised. So, someone showing an interest in you is a compliment, and that [disabled women] should be really grateful for anyone who does show an interest in them.

FOCUS GROUP WITH DISABLED WOMEN

In 2021, Engender conducted a focus group with disabled women in partnership with Inclusion Scotland. Similar themes emerged, with women reporting dehumanising attitudes including the perception that unwanted sexual conduct should be taken as a compliment, that disabled women are asexual, or that disabled women should be grateful for the unwanted sexual advances that they experience. They highlighted that disabled women's access to justice is undermined by systemic factors and reported a lack of confidence in employers, having been routinely let down over basic needs and rights, such as reasonable adjustments. This undermines their capacity for reporting sexual harassment. Similarly, reporting is often not accessible for people with particular health conditions, due to the implications of stress and related pain, and employers and processes do not understand or account

²¹ Engender (2018) Our Bodies, Our Rights: Identifying and removing barriers to disabled women's reproductive rights in Scotland. Available at: <https://www.engender.org.uk/files/our-bodies,-our-rights-identifying-and-removing-barriers-to-disabled-womens-reproductive-rights-in-scotland.pdf>.

²² UN Women (2020) Sexual Harassment Against Women with Disabilities in the World of Work and on Campus. United Nations. Available at: <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2020/Discussion-paper-Sexual-harassment-against-women-with-disabilities-en.pdf>.

for neurodiversity. Meanwhile, women felt that the practicalities of needing support with certain tasks creates a power dynamic that can make it very difficult to lodge a sexual harassment complaint. Women spoke about how ableism, which underpins these circumstances, also shapes disabled women's experiences of sexual harassment and capacity to report it, especially the widespread ableism of people in positions of authority.

2.1.3 Racism and sexual harassment

Research shows that Black and minoritised women's experience of sexual harassment is often bound up with racial harassment.²³ In a survey by the TUC, 37% of women of colour who had received verbal abuse reported that this was based on both race and gender.²⁴ This can compound trauma and other impacts on wellbeing for many women, and further complicates the prospects for redress. Workplace harassment policies cannot comprehensively cover combined forms of harassment, meaning that the harassment experienced by women of colour tends to be inadequately understood, with either the racialised or sexualised element emphasised to the exclusion of the other during handling of the complaint.²⁵ However, power imbalances that enable sexual harassment are inextricably interwoven with race inequality. This means there is a crucial role for other elements of a preventative approach to workplace sexual harassment, including training and broader anti-sexist and anti-racist practices. We recommend that organisations develop both a sexual harassment policy and broader strategic interventions to address systemic discrimination in the workplace (see Chapter 4.1).



Many of the things I have reported have been dismissed as “banter” and I have been told that I have not understood, because I am a foreigner.

FOCUS GROUP WITH WOMEN OF COLOUR

The extent to which Black and minoritised women experience workplace sexual harassment is unknown, with little targeted research focusing on their experiences. If at least 40% of women experience sexual harassment at some point during their

²³ TUC (2016) Still Just a Bit of Banter? Sexual Harassment in the workplace in 2016. Available at: <https://www.tuc.org.uk/sites/default/files/SexualHarassmentreport2016.pdf>.

²⁴ TUC (2020) BME women and work. Trades Union Congress. Available at: <https://www.tuc.org.uk/sites/default/files/2020-10/BMEwomenandwork.pdf>.

²⁵ Fielden et al (2009) A model of racialized sexual harassment of women in the UK workplace. Available at:

https://www.researchgate.net/publication/226345687_A_Model_of_Racialized_Sexual_Harassment_of_Women_in_the_UK_Workplace.

working lives,²⁶ however, this figure is likely to be greater for women of colour. In the context of widespread racial discrimination and bullying more broadly, we also know that sexual harassment predominates where power disparity is particularly acute and that Black and minority ethnic women are twice as likely as white women to be in insecure work.²⁷ Meanwhile 31% of BME women report being unfairly passed over for promotion - a statistic that rises to 45% for disabled BME women - and 34% of BME women have experienced racialised 'banter' or jokes in the workplace.²⁸

Within this, women of colour's racialised experiences of sexual harassment will not be homogenised across communities. Issues such as subjection to particular forms of culturally pervasive sexual stereotyping,²⁹ or migrant women's poorer access to recourse due to immigration status or a lack of culturally competent support³⁰ are likely to shape their experience of SSH.

Meanwhile, figures from the TUC's research on LGBT workers highlights the increased danger that women belonging to multiple oppressed groups are exposed to. BME LGBT women were more than twice as likely to report being sexually assaulted at work than white women and almost three times more likely to experience serious sexual assault or rape at work than white women.³¹

In 2022, Engender worked with Pass the Mic to run a focus group with women of colour on their experiences of sexual harassment in the workplace. Women described the need for education around consent and respect, and the vital importance of culturally competent training on sexual harassment in workplaces. Likewise, mental health and wider support must take stock of the different forms of sexual

²⁶ Fawcett Society (2020) Tackling Sexual Harassment in the Workplace: Report on Employer Actions to Prevent and Respond to Workplace Sexual Harassment. Available at: <https://www.fawcettsociety.org.uk/Handlers/Download.ashx?IDMF=8eabc7f1-07c0-4d7e-9206-de431524301e>.

²⁷ TUC (2020) BME women and work. Trades Union Congress. Available at: <https://www.tuc.org.uk/sites/default/files/2020-10/BMEwomenandwork.pdf>.

²⁸ Ibid.

²⁹ See: Rosenthal L, Lobel M (2016) Stereotypes of Black American Women related to Sexuality and Motherhood. *Psychology of Women Quarterly* 40:414–427; Kaur H, Hu C (2021) Fetishized, sexualized and marginalized, Asian women are uniquely vulnerable to violence. CNN Available at: <https://edition.cnn.com/2021/03/17/us/asian-women-misogyny-spa-shootings-trnd/index.html>; and Green H Disparity in Discrimination: A Study on the Experience of Minority Women in the Workplace. Available at: https://www.csustan.edu/sites/default/files/groups/University%20Honors%20Program/Journals/hanna_h_green.pdf.

³⁰ Scottish Government Social Research (2013) Scottish Government Equality Outcomes: Lesbian, Gay Bisexual and Transgender (LGBT) Evidence Review. Scottish Government. Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2013/04/scottish-government-equality-outcomes-lesbian-gay-bisexual-transgender-lgbt-evidence-review/documents/social-research-report-scottish-government-equality-outcomes-lesbian-gay-bisexual-transgender-lgbt-evidence-review/social-research-report-scottish-government-equality-outcomes-lesbian-gay-bisexual-transgender-lgbt-evidence-review/govscot%3Adocument?inline=true>.

³¹ TUC (2019) Sexual harassment of LGBT people in the workplace. Trades Union Congress. Available at: https://www.tuc.org.uk/sites/default/files/LGBT_Sexual_Harassment_Report_0.pdf.

harassment that women of colour and white women experience, be culturally informed, and rooted in understanding of racism and sexism. Women discussed colleagues characterising and dismissing their complaints as “cultural gaps” and as a lack of understanding on the part of the woman being harassed, shifting blame and responsibility away from the perpetrator and on to the woman of colour. Linked to this, it is harder for women of colour to come forward due to the overrepresentation of white people in decision-making positions and positions of authority. A final theme to emerge was fears around reporting due to prospective impacts on immigration status and harm to livelihoods.

Other than our own work as part of this project, there has been no targeted research that we are aware of into Muslim women’s experiences of sexual harassment in the workplace. However, it is likely that the racialised sexual harassment that Muslim women experience will be further influenced by faith-based stereotyping and assumptions, including overt forms of Islamophobia.

CASE STUDY

One interview with a Muslim woman (Participant A), undertaken on Engender’s behalf by Amina Muslim Women’s Resource Centre, highlights both links between sexist and sexual harassment and layers of intersecting discrimination. She describes being asked to make tea by a male colleague when both were project managers, being treated as less capable than male colleagues, and being repeatedly asked in different organisations whether she was married, had children, and subsequently why not. As a volunteer youth worker, she was not allowed to be involved in sessions with certain boys’ groups, due to being ‘pretty’ and ‘attracting the wrong sort of attention’. She was told to wear baggy clothes and to make sure she was covered by older male colleagues, incurring the expense of buying a new wardrobe, and to pretend to be married or engaged. As a young woman being told to do so by older colleagues, it was only later that she became aware of the inappropriateness of these requests. A colleague expressed having feelings for her - a man that was married and a practising Muslim - and she worried she was to blame for this as a Muslim woman who was not wearing a scarf.

Participant A was subsequently sexually harassed by her manager, during a period of providing intensive care for her mother and feeling particularly powerless and alone. The man told her that he had raped

someone and got away with it. She speaks of not knowing who to turn to and fear of being blamed for encouraging the man because she was a young woman. In her community the older generation would tend to believe it was the woman's fault and dismiss such situations as 'that's what men are like'. She left her post and was profoundly affected by the experience. Over time it emerged that this man was a serial sexual harasser. A formal process was instigated when a white woman made a complaint against him. Colleagues felt that it was investigated because the complainer was white. Participant A believes that had she come forward, she would have been blamed for the harassment she was subjected to whilst the white woman was taken seriously due to her race. Although the perpetrator lost his job following the investigation he continues to work in the sector and Participant A continues to worry about what he might be doing.

She experiences ongoing guilt and anxiety over not having reported the incident and whether she should come forward in retrospect. Having been referred to a non-Muslim and non-Pakistani counsellor, which was not effective, she highlights the importance of culturally appropriate mental health support. She speaks of how policy is geared towards white people and the urgent need for Muslim women and Pakistani women in decision-making positions and on organisational boards.

2.1.4 Homophobia, transphobia and sexual harassment

Research by the Trades Union Congress into LGBT people's experiences of workplace sexual harassment found that 68% of LGBT workers experienced at least one type of sexual harassment at work.³² Within this over 20% of LGBT women reported having experienced sexual assault in the workplace, with one in eight LGBT women having been seriously sexually assaulted or raped at work.³³ Trans women were even more likely to experience sexual assault and rape at work, with 32% reporting sexual assault and 22% having experienced serious sexual assault or rape. More than half of LGBT BME women (54%) had experienced unwanted touching compared to around one third of white women. Many of these incidents appeared to be linked to the sexualisation of LGBT identities and "the misconception that these identities solely focus on sexual activity". Access to justice for LGBT women, including those from

³² The research polled 1001 LGBT workers.

³³ TUC (2019) Sexual harassment of LGBT people in the workplace. Trades Union Congress. Available at: https://www.tuc.org.uk/sites/default/files/LGBT_Sexual_Harassment_Report_0.pdf.

certain minority ethnic groups or faith backgrounds, is compromised by additional barriers to reporting sexual harassment, such as fear of being 'outed' in the process.³⁴

These high rates of workplace sexual harassment are consistent with wider homophobia and transphobia across the labour market and more broadly. LGBT women, and trans women in particular, still face anti-LGBT discrimination and bullying in the workplace, with 35% of LGBT staff hiding or disguising their identity at work for fear of discrimination.³⁵ Trans women are subjected to high levels of transphobic hate crime, domestic abuse and other forms of violence against women,³⁶ and may experience higher levels of economic insecurity than non trans women. These inequalities shape the risk and nature of workplace sexual harassment for LGBT women, as well as possibilities for lodging complaints.



Just constant questioning about it. And of course “can I watch?”.

FOCUS GROUP WITH LESBIAN AND BISEXUAL WOMEN

In 2022, Engender held a focus group and interview with LB+ women in partnership with the Equality Network. Participants discussed the challenges of being seen as 'one of the guys' in certain circumstances, yet still excluded and sexualised in others. One participant stated “you can't fit in with other women at work, but you also can't fit in with the boys”. In male-dominated industries, participants described the double threat of being in a minority as a woman, and minoritised further by being a queer woman. Many participants raised the pressure they felt to disclose information about their personal lives and relationship statuses, as well as facing assumptions about their private lives and ability to, for example, work late because of a belief that a lesbian employee would not have childcare responsibilities. “Old-school homophobia” was described such as questions relating to genitalia and asking women to 'prove' they are a lesbian, along with a belief from participants that homophobia directed toward bisexual and lesbian women was not taken as seriously by HR departments and managers as homophobia towards gay or bisexual men. Reporting was raised as a particular issue as it can involve revealing a previously undisclosed sexuality to more people and “prolonging the process”. Participants also discussed the additional, often misguided or offensive, questions which arise once they do disclose their sexuality including one participant who, upon HR finding out

³⁴ 25% of those who did not report their sexual harassment cited fear of being outed as a reason.

³⁵ Stonewall (2018) LGBT in Britain: Work Report. Available at: https://www.stonewall.org.uk/system/files/lgbt_in_britain_work_report.pdf.

³⁶ Scottish Trans Alliance (2010) Out of sight, out of mind? Transgender People's Experiences of Domestic Abuse. Available at: https://www.scottishtrans.org/wp-content/uploads/2013/03/trans_domestic_abuse.pdf.

they were gay, was asked if they would like to switch changing rooms. As with all focus groups conducted, participants raised the importance of representation at higher levels so they would have somebody to turn to who they could relate to.

2.1.5 Ageism and sexual harassment

The TUC found that nearly two-thirds of women aged 18-24 had experienced sexual harassment in the workplace, compared with 52% of women of all ages.³⁷ Meanwhile, one in four young women say that they would be reluctant to report sexual harassment in the workplace for fear of losing their job, with this figure rising to 30% for young women of colour and 37% for young disabled women.³⁸ This is perhaps unsurprising given that 16% of young women have witnessed sexual harassment cases being handled inadequately, and that one in 20 young women have had to change jobs due to sexual harassment, assault or abuse.³⁹

This forms part of a wider picture of inequality for young women. In 2021, 97% of 18-24 year old women consulted had been sexually harassed in public places,⁴⁰ and 80% of girls aged 13-18 did not feel safe going outside on their own.⁴¹ The latter research, conducted by Girlguiding UK, found that girls of colour and LGBTQ girls were more likely to experience unwanted attention in public, resulting in even greater impacts on freedoms, opportunities and wellbeing – 68% of girls of colour and 63% of LGBTQ girls avoid going out after dark compared with 46% of white girls. Meanwhile 34% of girls experienced sexual harassment for the first time when they were under 14 years old. This culturally accepted misogynistic behaviour is woven into the fabric of our society and underpins the epidemic levels of workplace sexual harassment that we see in Scotland.

A further crucial element of the bigger picture is the impact of the Covid pandemic on young women.⁴² The crisis has had particularly stark impacts on young women's employment, financial security and health, with young BME women and young disabled women reporting even greater levels of financial precarity than young white

³⁷ TUC (2016) Still Just a Bit of Banter? Sexual Harassment in the workplace in 2016. Available at: <https://www.tuc.org.uk/sites/default/files/SexualHarassmentreport2016.pdf>.

³⁸ Young Women's Trust (2019) 1 in 4 young women fear being fired for reporting sexual harassment. Available at: <https://www.youngwomenstrust.org/media-centre/1-in-4-young-women-fear-being-fired-for-reporting-sexual-harassment/>.

³⁹ Ibid.

⁴⁰ UN Women UK (2022) Public spaces need to be safe and inclusive for all. Now. Available at: <https://www.unwomenuk.org/safe-spaces-now>.

⁴¹ Girlguiding UK (2021) New research reveals 80% of girls don't feel safe outside. Available at: <https://www.girlguiding.org.uk/about-us/press-releases/80-of-girls-dont-feel-safe-outside-alone-with-over-half-receiving-unwanted-sexual-comments-and-attention-reveals-girlguiding-research/>.

⁴² Young women aged 18-30. See: Engender, Close the Gap (2021) Joint Briefing on the Impact of Covid-19 on Young Women's Employment, Financial Security and Mental Health. Available at: <https://www.engender.org.uk/content/publications/Close-the-Gap-and-Engender-Joint-briefing-on-the-impact-of-Covid-19-on-young-women.pdf>.

women. Young women's physical health has deteriorated since the onset of the pandemic, particularly for young disabled women. All of this has clear implications for young women experiencing workplace sexual harassment and their freedom to report it.



When you're in a workplace it's more common to...you have everyone on social media, it's kind of moved it to a whole new space so now, like, you can be also sexually harassed or receive sexist comments and stuff like that and this new scope through messages and even like bosses having their staff who are maybe two or three ranks below them like on Instagram, commenting on the photos and stuff like that, there's just...especially if it's men higher up, there's something not quite right about it but it's just dead normal now.

FOCUS GROUP WITH YOUNG WOMEN

In 2021, Engender ran a focus group with young women in partnership with the Young Women's Movement.⁴³ Participants discussed sexism and gendered stereotyping in the workplace, such as women being asked or expected to take on more voluntary admin work at meetings and in group projects, and how this is linked to sexual harassment that occurs. There was a lot of discussion about sexual harassment in hospitality roles - from colleagues and customers - and how young women are expected to put up with harassment in order to receive tips or be seen as giving good service. Women described the additional pressure of trying to avoid physical contact during the pandemic when this was not a problem faced by male colleagues. This echoes research by the EHRC, which found that sexual harassment is routinely considered part of the job in hospitality, leading to employees feeling responsibility for managing incidents of sexual harassment themselves.⁴⁴ The focus group also discussed blurred lines when it comes to social media use, where it is now commonplace for managers to have contact with their staff online, leading to 'liking' or posting inappropriate comments on their pictures. Finally, it was felt that if there were more opportunities for women in workplaces, women may be less hesitant to report sexual harassment, and that addressing occupational segregation would contribute to tackling the issue of sexual harassment within the workplace.

⁴³ A focus group was also planned with older women, but interest was very limited. Instead, paid advertisements were used to target women over 55 to fill out the general survey.

⁴⁴ EHRC (2018) Turning the tables: Ending sexual harassment at work. Equality and Human Rights Commission. Available at: <https://www.equalityhumanrights.com/sites/default/files/ending-sexual-harassment-at-work.pdf>.

2.1.6 Women's labour market inequality and sexual harassment

Sexual and sexist harassment is especially prevalent and tolerated in male-dominated work environments and is perpetrated most often by men in positions of power. Of those who responded to our survey on workplace sexual harassment, 72% were harassed by someone more senior than themselves. Many of the stories that women told us involved sexual harassment by a direct line manager, and this was cited as a major barrier to reporting the incident. One woman was specifically advised by a union rep not to report the sexual harassment she had experienced as the perpetrator was the CEO of the organisation. In Scotland, men are still overwhelmingly overrepresented in positions of power, grotesquely so in certain sectors. For instance, only four percent of Scotland's biggest businesses are headed by women, only six percent of Scotland's major newspapers are edited by women and just 13% of senior officials in Police Scotland are women.⁴⁵

This drives the climate of underreporting that we see (see Chapter 4.2), as women often feel they have nowhere to turn when sexual harassment occurs. As such, vertical and horizontal occupational segregation⁴⁶ can be seen as both a cause and consequence of sexual harassment; women's career progression and access to opportunities are undermined by sexist harassment, and men perpetrate these forms of behaviour - consciously and unconsciously - as a way of preserving power.⁴⁷

Women are also more likely to be in precarious work than men,⁴⁸ with BME women twice as likely to be on zero hours contracts as white men.⁴⁹ Women on temporary or zero hours, or in agency work, have particular risks to weigh when deciding whether to report sexual or sexist harassment. These women are especially exposed to the risk of losing their jobs, and are less likely to belong to a trade union and to have access to protection and support mechanisms. These issues also apply for self-employed workers, who are at increased exposure to the ramifications of reporting

⁴⁵ Engender (2020) Sex & Power in Scotland 2020. Available at:

<https://www.engender.org.uk/content/publications/Engenders-Sex-and-Power-2020.pdf>.

⁴⁶ Vertical segregation refers to the under-representation of women in management positions, sometimes referred to as the 'glass-ceiling'. Horizontal segregation occurs where men and women are clustered into occupations traditionally associated with their gender.

⁴⁷ Schultz V (2018) Reconceptualizing Sexual Harassment. Again. The Yale Law Journal Forum 128:22–66.

⁴⁸ Women and Equalities Committee (2021) Unequal impact? Coronavirus and the gendered economic impact. Available at:

<https://publications.parliament.uk/pa/cm5801/cmselect/cmwomeq/385/38505.htm>.

⁴⁹ TUC (2022) BME women twice as likely to be on zero-hours contracts as white men. See Trades

Union Congress Available at: <https://www.tuc.org.uk/news/tuc-bme-women-twice-likely-be-zero-hours-contracts-white-men>

ISM (2018) Dignity at work: a survey of discrimination in the music sector. Incorporated Society of Musicians. Available at: https://www.ism.org/images/images/ISM_Dignity-at-work-April-2018.pdf.

(see Chapters 2.3 and 4.2). A survey from the Incorporated Society of Musicians, for instance, found that many self-employed women that had been sexually harassed were afraid of being 'blacklisted' from future work.⁵⁰



You know if you reject somebody's advances or, the way they're behaving, then that can have a massive impact on your career. Or in terms of work that involves temporary contracts and things, your renewal of contracts.

FOCUS GROUP WITH WOMEN IN LOW PAID AND/ OR PRECARIOUS WORK

In 2021, Engender ran a focus group with women on low incomes and/or in precarious employment, in partnership with the Scottish Trades Union Congress. Themes to emerge included the heightened inconsistency of responses to sexual harassment for women in insecure employment; powerful men acting as gatekeepers in industries with high rates of self-employment and taking advantage of younger women; the reliance on relationship building and the lack of accountability in sectors where temporary contracts are common, including academia and the creative industries; rejection of men's advances having an impact on career progression or contract renewal; the fear of being stigmatised for speaking up about sexual harassment with the expected thing being 'to manoeuvre yourself out of the situation'; lack of understanding and support from employers regarding third party harassment and the fact that women simultaneously face sexual harassment on two fronts, from colleagues and customers/clients; lack of follow-up and aftercare for victim-survivors having made a sexual harassment complaint; 'a culture of fear' amongst women on zero-hours contracts in hospitality; the downplaying of 'lesser' forms of sexual harassment and disbelief that serious sexual assault takes place at work; the treatment of sexual harassment as isolated incidents; and emotional work being left to individual women who are made responsible for reporting it. Women at this focus group concluded that there is a clear need for structural solutions that do not risk retraumatising victim-survivors, including the need for women in positions of power across organisations and for women to be supported by female colleagues in reporting and investigation, and the importance of external accountability measures, including potential roles for trades unions.

⁵⁰ ISM (2018) Dignity at work: a survey of discrimination in the music sector. Incorporated Society of Musicians. Available at: https://www.ism.org/images/images/ISM_Dignity-at-work-April-2018.pdf.

2.2 THE IMPACT OF WORKPLACE SEXUAL AND SEXIST HARASSMENT

Sexual harassment has significant consequences on the health, professional lives and financial security of victim-survivors. Whilst it is difficult to ascertain the extent of this impact, in part due to chronic underreporting, it is clear that an incidence of sexual harassment often has resounding implications for women long after the fact. Workplace sexual harassment is associated with physical and mental health impacts that include ongoing anxiety, depression, PTSD, clinically poor sleep, high blood pressure,⁵¹ emotional problems, and stress-related headaches, muscle pain and nausea.⁵² A large number of victim-survivors are thought to experience PTSD, including those living with ongoing psychological impacts that do not meet the established criteria of actual bodily threat or injury. These impacts are not yet well understood, but are recognised as having a lasting impact on quality of life with many women seeing symptoms persist over time.⁵³ Negative psychological outcomes as a result of indirect sexual harassment are also experienced by colleagues who witness and/or live in fear of being directly targeted.⁵⁴

Sexual harassment is clearly a significant health and safety concern for women and should be treated as such by employers. In 2010, a TUC survey of safety reps found that harassment and bullying was the second most common health and safety concern,⁵⁵ whilst the International Labour Organization affirms that “the employer’s duty of care may be interpreted as implicitly covering also the threats to workers’ health and safety deriving from the occurrence of violence and harassment at the workplace.”⁵⁶ While the Health and Safety Executive has thus far resisted assuming responsibility over sexual harassment in the UK, it has noted that harassment can cause psychological and physical health problems for victim-survivors and for witnesses.

Many women link sexual harassment with reduced confidence at work and report modifying their behaviour to avoid certain work situations. This is linked to feelings

⁵¹ Thurston R C, Chang Y, Matthews K A, Kanel R, Koenen K (2019) Association of Sexual Harassment and Sexual Assault With Midlife Women’s Mental and Physical Health. *JAMA Internal Medicine* 179:48–53.

⁵² Pina, A (2018) Parliamentary Enquiry Into Sexual Harassment in the Workplace: Written Evidence. University of Kent. Available at: <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Women%20and%20Equalities/Sexual%20harassment%20in%20the%20workplace/written/80286.html>.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ TUC (2010) Focus on health and safety: trade union trends survey. Trades Union Congress. Available at: <https://www.tuc.org.uk/sites/default/files/extras/safetyrepssurvey2010.pdf>.

⁵⁶ ILO (2020) Safe and healthy working environments free from violence and harassment. International Labour Organization. Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/publication/wcms_751832.pdf.

of embarrassment and shame,⁵⁷ and can have detrimental impacts on women's professional development and future employment prospects. Indeed, it is common for women to take time off work or change jobs following an incidence of sexual harassment, resulting in periods of unemployment with attendant financial ramifications, and significant strain on physical and mental health. A large-scale Australian study into the economic costs of sexual harassment found that 17% of victim-survivors that reported sexual harassment went on to resign and a further eight percent were fired, compared with 11% and five percent of perpetrators respectively.⁵⁸ Many women, both those directly and indirectly affected by sexual and sexist harassment, are pushed to leave male-dominated sectors, further exacerbating occupational segregation and the gender pay gap.⁵⁹ Longer-term impacts can therefore include loss of earnings over time, strain on personal relationships, and the debt, stress and costs associated with retraining and entering a new professional field.⁶⁰



And there is a huge emotional tax for these women who are up against dominant businesses, journalists, powerful figures. We need more aftercare and need to know where to go.

FOCUS GROUP WITH WOMEN IN LOW PAID AND/ OR PRECARIOUS WORK

Whilst these costs to women's lives clearly demand urgent attention from employers and policymakers, there is also a strong business case for tackling sexual harassment in the workplace. Research by the firm Deloitte calculates the economic costs of sexual harassment, in terms of lost productivity,⁶¹ health (e.g. mental health support), investigation, legal fees and compensation, costs to the policing and justice system, and social security entitlements for those forced out of the labour market. It also models a cost for lost wellbeing for victim-survivors of sexual assault or attempted sexual assault. In total, the study estimates an annual loss of 3.5 billion Australian

⁵⁷ TUC (2016) Still Just a Bit of Banter? Sexual Harassment in the workplace in 2016. Available at: <https://www.tuc.org.uk/sites/default/files/SexualHarassmentreport2016.pdf>.

⁵⁸ Deloitte (2019) The economic costs of sexual harassment in the workplace. Available at: <https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-economic-costs-sexual-harassment-workplace-240320.pdf>.

⁵⁹ Close the Gap (2018) Close the Gap submission to the UK Government Women and Equalities Committee inquiry on sexual harassment in the workplace. Available at: <https://www.closesthegap.org.uk/content/resources/UK-WEC-sexual-harassment-inquiry.pdf>.

⁶⁰ Ro C (2021) The long-lasting effects of sexual harassment. BBC Worklife Available at: <https://www.bbc.com/worklife/article/20211113-the-long-lasting-effects-of-workplace-sexual-harassment>.

⁶¹ Defined as absences from work, reduced performance, increased job turnover, and time out of the labour market.

dollars (£1.85 billion) as a result of sexual harassment in Australian workplaces, of which 2.6 billion (£1.45 billion) is due to lost productivity.⁶² Similarly, a recent report by the Fawcett Society highlights the need for action to tackle sexual harassment by employers to ensure strong organisational performance,⁶³ indicating that reputational damage, staff turnover and an unattractive workplace culture further undermine organisational efficiency. Failure to address workplace sexual harassment can also lead to detrimental impacts on targets, colleagues, job satisfaction, and staff commitment and loyalty to the employer.

2.3 THE CURRENT RESPONSE

There are several critical challenges to tackling sexual and sexist harassment in workplaces. Women across economic sectors and institutional settings describe very low levels of confidence in their employer's ability to appropriately prevent, investigate, and sanction individuals responsible for sexual harassment. Alongside the cultural normalisation of sexual and sexist harassment, this lack of faith is key to understanding the chronic underreporting of SSSH. Other crucial issues include women's legitimate fears of being blamed for the incident, of experiencing retaliation for reporting, and of negative consequences for their job, career or relationships at work and more widely. Victim-survivors often do not want to relive distressing events, may feel too embarrassed, and may doubt that what they have experienced was serious enough to report or happened at all. This theme of not being believed or taken seriously emerged again and again in our survey and lived experience focus groups. For respondents to Engender's survey who did not report the sexual harassment they experienced, 43% said they did not think they would be believed or taken seriously.

As such, current responses to workplace sexual harassment see women shouldering the majority of risk. Whilst reporting SSH often compromises women's wellbeing, relationships and job prospects, perpetrators are routinely protected in the interests of avoiding reputational damage. With regard to 'the neoliberal university' for instance, Alison Phipps writes that "the impact of disclosures on the future value of the institution is more troubling than the acts of harassment and violence they may reveal" and "privileged men e.g. senior academic staff are viewed as valuable/indispensable to the organisation and so are protected."⁶⁴ In such a system, complainants are often treated as the problem.

⁶² Deloitte (2019) The economic costs of sexual harassment in the workplace. Available at: <https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-economic-costs-sexual-harassment-workplace-240320.pdf>.

⁶³ Fawcett Society (2020) Tackling Sexual Harassment in the Workplace: Report on Employer Actions to Prevent and Respond to Workplace Sexual Harassment. Available at: <https://www.fawcettsociety.org.uk/Handlers/Download.ashx?IDMF=8eabc7f1-07c0-4d7e-9206-de431524301e>.

⁶⁴ Phipps A (2018) Reckoning up: sexual harassment and violence in the neoliberal university. *Gender and Education* 32:227–243.



If it was happening to me I probably wouldn't report it because of the sheer amount of stress that would cause for me. I have fibromyalgia which is a chronic pain condition which for some people can be rooted in trauma and stress is a particular trigger for me. So for me, not only would the mental stress of it be too much for me - physically it would also hurt me much more so than either putting up with it or, to be honest, if I was in the financial position to leave the job I would just do so.

FOCUS GROUP WITH DISABLED WOMEN

Participants in our focus groups told us that sexual and sexist harassment at work is minimised, and women are advised to resolve it amicably, putting the onus back onto victim-survivors to find a solution. In part, input from our expert working group suggests, this is because employers are extremely mindful of liability when disciplinary action is taken against an employee accused of perpetrating harassment. This includes the potential for subsequent unfair dismissal claims where perpetrators are usually more senior, better paid employees than those instigating a complaint and concern on the part of employers that action in support of the victim-survivor may be perceived as a procedural unfairness towards the accused. In this context, women often find themselves dissuaded from making a complaint or locked out of the process. There is a real need to rebalance this risk and responsibility away from women to elsewhere in the system.

This chimes with the work of Sara Ahmed in her book *Complaint!*.⁶⁵ In it, she describes a context where complaints are seen as secretive, considered behind closed doors as if the complainer has something to be ashamed of, and complaint procedures are difficult to find, use and understand. Furthermore, responses to Engender's survey and focus groups show that many complaints go no further than an initial, informal stage, with women warned by those in positions of authority that to pursue an investigation would be damaging to themselves and others, including in terms of career progression.

The current response to workplace sexist and sexual harassment, by employers and policymakers, is woefully inadequate (see Chapter 4 for further detail). Ambitious and urgent action is needed by public sector bodies to address this, along with a programme of work to tackle the scale, nature and impact of SSH at work.

⁶⁵ Ahmed S (2021) *Complaint!* Durham: Duke University Press.

3. THE POLICY CONTEXT

3.1 LEGISLATION

3.1.1 Domestic law

Sexual harassment is prohibited under the Equality Act 2010. It occurs when a worker is subjected to unwanted conduct of a sexual nature which has the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that worker.⁶⁶ The Equality Act understands sexual harassment as sex discrimination. This reflects the intimate relationship between sexual harassment, gender inequality and the institutional sexism that gives rise to unequal power dynamics between women and men.

Sexist harassment - also a form of sex discrimination under the Equality Act - refers to unwanted non-sexual conduct relating to a person's sex. This provision also covers the protected characteristics of age, disability, gender reassignment, race, religion or belief, sex, and sexual orientation.⁶⁷ However, the law does not explicitly recognise that women are subjected to harassment that relates to multiple marginalised identities.

Harassment does not need to be deliberate to be unlawful and does not necessarily need to be targeted at a particular employee. It may occur between people of the same sex or gender identity. Sexual or sexist harassment can also occur when a worker is treated less favourably having submitted to or rejected unwanted conduct. At present it is not unlawful under the Equality Act for an employee to be harassed at work by a third party, such as a client or service user, this provision having been repealed in 2013. However, the UK Government recently committed to reinstating this in response to a long-awaited consultation.⁶⁸

Under the Equality Act 2010, employers must take 'reasonable steps' to prevent the harassment and victimisation of individuals who work for them.⁶⁹ Employers are liable for harassment committed by workers in the course of their employment unless they can demonstrate that they took all reasonable steps available to them to prevent it.

⁶⁶ The Equality Act 2010. Available at: <https://www.legislation.gov.uk/ukpga/2010/15/contents>.

⁶⁷ Pregnancy and maternity is not included in the harassment provision, but would be covered by harassment related to sex.

⁶⁸ UK Government Equalities Office (2021) Consultation on sexual harassment in the workplace: Government response. UK Government. Available at: <https://www.gov.uk/government/consultations/consultation-on-sexual-harassment-in-the-workplace/outcome/consultation-on-sexual-harassment-in-the-workplace-government-response>.

⁶⁹ The Equality Act 2010 Section 109(4). Available at: <https://www.legislation.gov.uk/ukpga/2010/15/contents>.

According to EHRC technical guidance, there is no prescribed minimum for what constitutes ‘reasonable steps’ to prevent sexual harassment.⁷⁰ An employment tribunal would judge this based on the size and nature of the employer, its available resources, and specific risk factors pertaining to the employer or sector. However, EHRC’s ‘Turning the tables’ report states that reasonable steps should include holding an available anti-harassment policy within the organisation and ensuring “appropriate procedures for reporting harassment and taking action” are in place.⁷¹ They also recommend that employers take proactive steps to prevent harassment by addressing power imbalances within institutions.

In response to the UK Parliament Women and Equalities Committee inquiry,⁷² the UK Government has agreed to introduce a statutory Code of Practice for employers to prevent and respond to sexual harassment. This will complement the EHRC’s technical guidance, published in 2020, which sets out obligations and liabilities under the Equality Act but lacks legal status.⁷³ In the absence of a statutory underpinning, specified prevention work and enforcement mechanisms that ensure employers are addressing sexual harassment in the workplace, best practice primary and secondary prevention efforts (see Chapter 4.1) are essentially voluntary. It is essential that the new Code of Practice is clear on the preventative steps that different employers must take and situates sexual harassment as an issue of intersectional gender inequality and violence against women.

Employers across Britain are also required to provide a safe working environment under the Health and Safety at Work Act 1974. Where health and safety risks are identified by the employer, action must be taken to remove or minimise these risks. However, the Health and Safety Executive (HSE), the body responsible for regulating this legislation, does not consider sexual harassment to fall within its remit.⁷⁴ Responding to HSE’s evidence to its inquiry into workplace sexual harassment, the Women and Equalities Committee of the UK Parliament said it was ‘astonished’ at this position and stated “we cannot accept that sexual harassment is not sufficiently serious to be worthy of its attention”.⁷⁵ At present, however, health and safety

⁷⁰ EHRC (2020) Sexual harassment and harassment at work: Technical guidance. Equality and Human Rights Commission. Available at: https://www.equalityhumanrights.com/sites/default/files/sexual_harassment_and_harassment_at_work.pdf.

⁷¹ EHRC (2018) Turning the tables: Ending sexual harassment at work. Equality and Human Rights Commission. Available at: <https://www.equalityhumanrights.com/sites/default/files/ending-sexual-harassment-at-work.pdf>.

⁷² Women and Equalities Committee (2018) Sexual harassment in the workplace. House of Commons. Available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf>.

⁷³ EHRC (2020) Sexual harassment and harassment at work: Technical guidance. Equality and Human Rights Commission. Available at: https://www.equalityhumanrights.com/sites/default/files/sexual_harassment_and_harassment_at_work.pdf.

⁷⁴ Women and Equalities Committee (2018) Sexual harassment in the workplace. House of Commons. Available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72502.htm>.

⁷⁵ Ibid.

legislation in Scotland offers no protection against the most common form of violence against women at work.

Workplace sexual and sexist harassment is generally treated under civil rather than criminal law, although egregious instances are sometimes reported to Police Scotland by individual women and employers. This can mean that behaviour that might be treated by criminal law in the home or public spaces is perceived to be a private employment matter in the workplace. As noted in the Working Group on Misogyny and Criminal Justice report of March 2022, “[t]oo often, conduct in the workplace which is essentially criminal, such as sexual assault, Communication Act offences (involving offensive material sent to computers), sexual harassment and stalking, are considered the domain of employment law”.⁷⁶ The report proposes new criminal law to respond to public sexual and misogynistic harassment. If this legislation is implemented by Scottish Government, this may help to cover the current gap in protection regarding third party sexual harassment in the workplace. However, there is a need for further consideration of the overlap between any new criminal law provisions and existing workplace protections extended by the Equality Act, including guidance on when criminal law is a more appropriate response. We recommend this is incorporated in a gendered strategy on preventing workplace sexual harassment (see Chapter 4.1).



It’s just taken a lot more like twists and turns and paths of what can be considered harassment and it’s not so black and white and it’s really hard to like approach HR and say I feel like this happened but you know where’s the proof, where’s the evidence?

FOCUS GROUP WITH YOUNG WOMEN

3.1.2 International law

As part of the UK, Scotland is committed to international standards that require action to respond to violence against women, wherever it occurs. The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee’s General Recommendation 19 explicitly situates gender-based violence within Article 1 of the Convention’s definition of “discrimination against women.”⁷⁷

⁷⁶ Kennedy QC H (2022) Misogyny - A Human Rights Issue. Scottish Government. Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2022/03/misogyny-human-rights-issue/documents/misogyny-human-rights-issue/misogyny-human-rights-issue/govscot%3Adocument/misogyny-human-rights-issue.pdf>.

⁷⁷ UN Committee on the Elimination of Discrimination Against Women (1992) CEDAW General Recommendation No. 19: Violence against women. United Nations. Available at: <https://www.refworld.org/docid/52d920c54.html>.

General Recommendation 19 further states that “States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment” and “Equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.” The Committee further defines sexual harassment as:

“Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.”

The recommendations make clear that state parties to the Convention must take all “effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including...sexual harassment in the workplace.” The Committee’s framing of sexual harassment as a discrimination issue was heavily influenced by feminist advocacy, including the work of Catharine MacKinnon to define sexual harassment as sex discrimination because it reinforces the social inequality of women to men.⁷⁸ In doing so, the CEDAW committee underscores the integral links between sexual harassment and sexist behaviours.



I worry about reporting and it harming my immigration status or livelihood.

FOCUS GROUP WITH WOMEN OF COLOUR

The Council of Europe Convention on preventing and combating violence against women and domestic violence (the ‘Istanbul Convention’) includes explicit protection for women from sexual harassment at Article 40.⁷⁹ The UK has committed to ratification of the Istanbul Convention, however action to do so has been extremely

⁷⁸ MacKinnon C A (1979) *Sexual Harassment of Working Women: A Case of Sex Discrimination*. New Haven: Yale University Press.

⁷⁹ “[State] Parties shall take the necessary legislative or other measures to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating, or offensive environment, is subject to criminal or other legal sanction.”

slow.⁸⁰ The International Labour Organization has further clarified state obligations to eliminate sexual harassment as a form of sex discrimination, for example the Discrimination (Employment and Occupation) Convention (No. 111) of 1958 and the Indigenous and Tribal Peoples Convention (No. 169).

As such, international human rights law clearly demarks sexual harassment as an issue of violence against women, sex discrimination, and health and safety, with direct relevance to women's wider economic, social and political rights. These include the right to work, education and participation in public life, among others.⁸¹

3.2 DEVOLUTION: THE POLICY LANDSCAPE AND SPACE FOR ACTION IN SCOTLAND

Employment law and equality law are both reserved to Westminster, but there is some space for action for Scottish Government to tackle sexual harassment in the workplace and to improve outcomes for women. The Scotland-specific regulations of the public sector equality duty, which forms part of the Equality Act 2010, are devolved. So too is violence against women policy, and Scotland has a distinct criminal justice system. Devolution of the employment tribunal, under the Scottish Courts and Tribunal Service, has been anticipated for a number of years and is now expected in 2024.

3.2.1 Violence against women and misogyny

Equally Safe is Scottish Government and COSLA's joint strategy for preventing and eradicating violence against women and girls.⁸² It has a strong focus on prevention and situates sexual harassment within the spectrum of men's violence against women. The Scottish Government has also recently welcomed⁸³ the report of the Working Group on Misogyny and Criminal Justice in Scotland, which calls for new

⁸⁰ Home Office (2021) Implementation of the Council of Europe Convention on Combating Violence Against Women and Girls and Domestic Violence (Istanbul Convention) – 2021 Report on Progress. UK Government. Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1030018/E02686085_Istanbul_Conv_Progress_Report_Accessible.pdf.

⁸¹ See also: UN General Assembly (1993) Declaration on the Elimination of Violence Against Women Resolution 48/104 Article 2. United Nations. Available at:

https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.21_declaration%20elimination%20vaw.pdf.

⁸² Scottish Government and COSLA (2018) Equally Safe: Scotland's strategy for preventing and eradicating violence against women and girls. Available at:

<https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2018/04/equally-safe-scotlands-strategy-prevent-eradicate-violence-against-women-girls/documents/00534791-pdf/00534791-pdf/govscot%3Adocument/00534791.pdf>.

⁸³ Scottish Government (2022) Working Group on Misogyny and Criminal Justice in Scotland. Available at: <https://www.gov.scot/news/working-group-on-misogyny-and-criminal-justice-in-scotland/>.

criminal law to protect women from misogynistic harassment in public spaces.⁸⁴ The report explicitly frames misogyny as a human rights issue, and states that “the experiences of misogynistic harassment, particularly of a sexual nature, place limits on women’s lives. They create a climate of fear and barriers to women and girls fully participating in society and realising their human rights.” Should a new offence of misogynistic harassment to protect women from sexist behaviours in public spaces be taken forward by Scottish Government, this would clearly fall within the definition of sexual harassment in the workplace. However, there thus far appears to be a reluctance by employers to treat it as such. As this work is developed, Scottish Government should ensure that overlap with civil law that governs workplace sexual harassment is considered in a way that centres the women that are targeted.



Sexism is sometimes very open, they will refuse to use my name they use girl or wee lass, it is frustrating and honestly, it takes a high toll on my mental health on a daily basis.

FOCUS GROUP WITH WOMEN OF COLOUR

3.2.2 Health and safety

Health and safety legislation⁸⁵ operates across Britain and is regulated by the Health and Safety Executive (HSE). The Partnership on Health and Safety in Scotland (PHASS) is a collaboration between HSE, Scottish Government, NHS Health Scotland, local authorities, trades unions and other stakeholders, which reflects the impact of health and safety on devolved areas of competence. Neither the HSE nor PHASS has developed a focus on workplace sexual harassment. Public Health Scotland is the national public health body for Scotland and is jointly accountable to Scottish Government and COSLA. It describes public health as “not just mean[ing] the absence of disease. In public health we define health very broadly as a resource for everyday life. This includes physical, mental, and social wellbeing and resilience.” Clearly prevention of sexual and sexist harassment falls under this conceptualisation. At present, however, neither SSH, or bullying and harassment more broadly, feature within Public Health Scotland’s Healthier Working Lives programme - specifically in its guidance on ‘Disputes in the workplace’.⁸⁶ New health and safety initiatives, such

⁸⁴ Kennedy QC H (2022) Misogyny - A Human Rights Issue. Scottish Government. Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2022/03/misogyny-human-rights-issue/documents/misogyny-human-rights-issue/misogyny-human-rights-issue/govscot%3Adocument/misogyny-human-rights-issue.pdf>.

⁸⁵ Health and Safety at Work etc. Act 1974. Available at: <https://www.legislation.gov.uk/ukpga/1974/37/contents>.

⁸⁶ Healthy Working Lives (2022) Fair Treatment. Public Health Scotland Available at: <https://www.healthyworkinglives.scot/Pages/default.aspx>.

as the Scottish Employment Injuries Advisory Council Bill proposed by Mark Griffin MSP⁸⁷ offer an opportunity to re-imagine workplace health and safety such that violence against women and other aspects of women's experiences are recognised, and the damage caused by workplace sexual and sexist harassment is reflected.

3.2.3 Public sector equality duty

Public sector employers in Scotland are also subject to the public sector equality duty (PSED), which sits within the Equality Act. PSED obliges all public authorities in Scotland to act, including with regards to employment, in a way that will proactively reduce discrimination, advance equality, and promote good relations between different groups across nine protected characteristics, including sex. Further legal accountability is possible for listed public sector employers in Scotland, under the PSED regulations that are specific to Scotland (SSDs). Although sexual harassment is clearly an issue that falls within the ambit of the public sector equality duty, this is not apparent in public bodies' performance of PSED in Scotland. Of a sample of public bodies' equality outcomes set in 2017, only eight percent mentioned gender or sex as a target protected characteristic, and none proposed concrete action on sexual harassment. The SSDs are currently under review and there is scope for the Scottish Government to introduce a duty regarding the prevention of sexual harassment as part of a suite of reforms. This discussion is also taking place at UK level, with the Women and Equalities Committee of the UK Parliament recommending a specific duty requiring relevant public employers to conduct risk assessments for workplace sexual harassment and put in place an action plan to mitigate those risks⁸⁸ (also see Chapter 3.3).

Scottish Government should:

- Introduce a duty to prevent sexual harassment under the Scotland-specific regulations of the public sector equality duty, including the requirement to develop a standalone policy on sexual harassment.

⁸⁷ Engender (2021) Engender response to Mark Griffin MSP's consultation on a Proposed Scottish Employment Injuries Advisory Council Bill. Available at: <https://www.engender.org.uk/content/publications/Engender-response-to-Mark-Griffin-MSP-consultation-on-Proposed-Scottish-Employment-Injuries-Advisory-Council-Bill-consultation.pdf>.

⁸⁸ Women and Equalities Committee (2018) Sexual harassment in the workplace. House of Commons. Available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72502.htm>.

3.3 DEVELOPMENTS IN POLICY AND PRACTICE: 2018-2021

In 2013, the UK Government repealed provisions in the Equality Act that make employers liable for the harassment of their staff by third parties. This was despite 71% of consultation responses opposing the repeal.⁸⁹ Widespread calls to reinstate protection against third party harassment has included support from the CBI, trades unions and many individual employers,⁹⁰ as well as the Women and Equalities Committee (WEC).⁹¹ The final report of the Committee's inquiry into workplace sexual harassment also called for protection against harassment to be extended to interns and volunteers, as did many of the organisations that submitted evidence.⁹²

As a result of the WEC inquiry, the increasing body of evidence and growing public concern, the UK Government ran a consultation on sexual harassment in the workplace in 2019, finally publishing its response in July 2021.⁹³ It has committed to:

- Reinstate protections from third-party harassment as repealed in 2013;
- Introduce a new proactive duty requiring employers to 'take all reasonable steps' to prevent sexual harassment, with the aim of shifting responsibility onto employers and to move away from the current focus on avoiding liability after the event;
- 'Look closely' at extending the time limit for bringing cases based on the Equality Act to employment tribunal from three to six months.

However, calls to extend employers' obligations to interns or volunteers have been rejected, on grounds that many of the former will already be protected and that protecting volunteers may have "undesirable consequences", such as administrative burden for smaller charities.⁹⁴

Whilst we welcome the commitments that have been made, it is our view that everyone should be protected from sexual harassment, and that women should feel safe to pursue volunteer activities on an equal basis with men. We also believe that

⁸⁹ Equally Ours (2012) Government response to consultation on employer liability for harassment. Available at: <https://www.equallyours.org.uk/government-response-to-consultation-on-repeal-of-two-enforcement-provisions-2/>.

⁹⁰ Prospect (2018) Reinstate protection against harassment by third parties, say employers. Available at: https://library.prospect.org.uk/id/2018/01852?display=article&revision=1&_ts=18959.

⁹¹ Women and Equalities Committee (2018) Sexual harassment in the workplace. House of Commons. Available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72502.htm>.

⁹² Ibid.

⁹³ UK Government Equalities Office (2021) Consultation on sexual harassment in the workplace: Government response. UK Government. Available at:

<https://www.gov.uk/government/consultations/consultation-on-sexual-harassment-in-the-workplace/outcome/consultation-on-sexual-harassment-in-the-workplace-government-response>.

⁹⁴ Ibid.

the timeline for bringing harassment cases to the employment tribunal should be extended to at least one year (see also Chapter 4.5). Although elements requiring legislative change are to be brought forward “as soon as parliamentary time allows”, no further progress had been made by March 2022.

In 2018, the Scottish Parliament established a Joint Working Group on Sexual Harassment and Sexist Behaviour to examine its internal procedures. The group reported with a suite of recommendations, including amendments to the Code of Conduct for Members of the Scottish Parliament and a proposed new sexual harassment policy.⁹⁵ In parallel, the Standards, Procedures and Public Appointments Committee of the Scottish Parliament conducted an inquiry on sexual harassment and inappropriate conduct.⁹⁶ These processes led to a new policy on sexual harassment,⁹⁷ the introduction of an independent support service and the introduction of the Scottish Parliamentary Standards (Sexual Harassment and Complaints Process) Act 2021,⁹⁸ and revisions to the Code of Conduct. The report from the Joint Working Group is particularly useful for the dual focus on sexual harassment and sexist behaviour, firmly rooting its approach in imbalances of power, sexism and other social inequalities.

Scottish Government should:

- Explore whether and how it can legislate to ensure legal protection for volunteers from sexual harassment, through devolved powers relating to justice and violence against women.

⁹⁵ Scottish Parliament (2018) Report of the Joint Working Group on Sexual Harassment. Scottish Parliament. Available at: https://archive2021.parliament.scot/TrainingAndDevelopment/Joint_Working_Group_Final_Harassment_Report_December_2018_2.pdf.

⁹⁶ Standards, Procedures and Public Appointments Committee (2018) Sexual harassment and inappropriate conduct. Scottish Parliament. Available at: <https://sp-bpr-en-prod-cdnep.azureedge.net/published/SPPA/2018/6/5/Sexual-harassment-and-inappropriate-conduct-1/SPPAS052018R04.pdf>.

⁹⁷ Scottish Parliament (2021) Sexual Harassment Policy. Scottish Parliament. Available at: https://archive2021.parliament.scot/images/Human%20Resources/Sexual_Harassment_Policy_20200126.pdf.

⁹⁸ The Act provides for key changes regarding historic sexual harassment complaints.

4. WHAT NEEDS TO HAPPEN

Our analysis of what further action is needed to tackle workplace SSH in Scotland is focused across six areas:

- prevention,
- reporting,
- investigation and response,
- the employment tribunal, and
- regulation.

In this chapter we make recommendations for Scottish Government and other public bodies in each of these fields.

4.1 PREVENTION

It is vital that sexual and sexist harassment is accurately conceptualised as both a gendered issue - as a cause and consequence of women's inequality - and as a pressing health and safety concern. In the last decade or so it has become increasingly common to see a public health model of prevention applied to violence against women (VAW).⁹⁹ This allows policymakers and practitioners to consider what interventions, processes, remedies and practices are required to prevent violence against women, such as sexual harassment, from occurring in the first place, and to respond to it early and well when it does take place. The prevention of VAW is usually framed in a model that includes primary, secondary and tertiary prevention.

Primary prevention is particularly relevant to Scotland's distinct policy approach to violence against women and girls. This requires changing the social and structural conditions that enable VAW to occur and is rooted in the understanding that VAW is caused by women's inequality. In practice, therefore, primary prevention is any activity to advance women's equality and rights, including across representation and participation in politics and the public sphere, and all aspects of economic, social and cultural life.

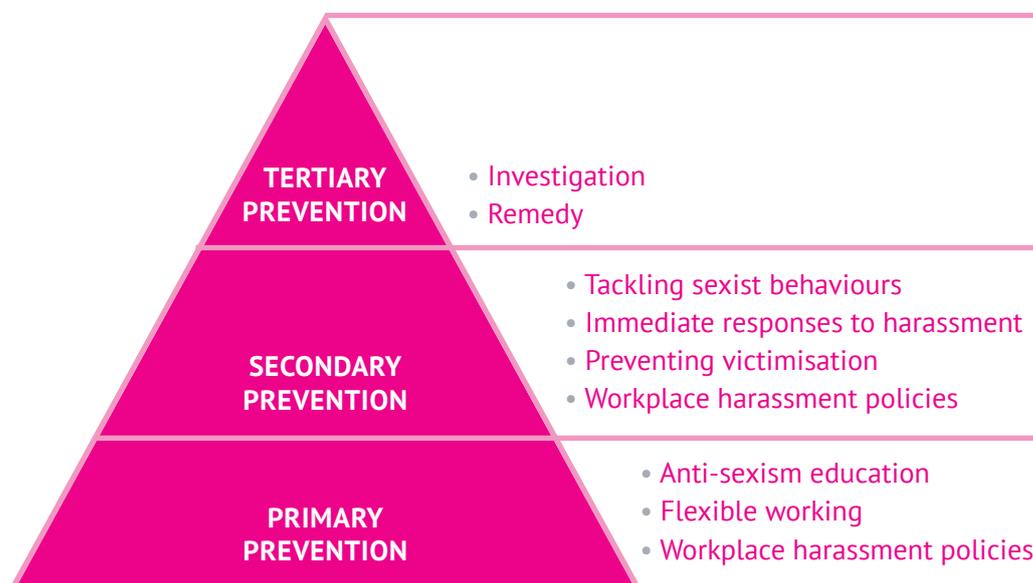
Secondary prevention occurs either immediately before or after VAW has taken place. This typically aims to prevent sexist attitudes or norms from translating into egregious forms of violence and may also involve responding to VAW in the first instance. An effective workplace sexual harassment policy is an example of both primary and secondary prevention because it conveys a strong organisational

⁹⁹ Scottish Government Social Research (2020) What Works to Prevent Violence Against Women and Girls: A Summary of the Evidence. Scottish Government. Available at: <https://www.gov.scot/publications/works-prevent-violence-against-women-girls-summary-evidence/documents/>.

opposition to harassment, but also outlines short-term responses should it occur. Tackling sexist behaviours, preventing victimisation and initial responses to sexual harassment are further examples of secondary prevention.

Tertiary prevention aims to prevent violence from reoccurring by supporting victim-survivors and holding perpetrators to account, including through investigation and remedy.

The practice of employers, employment tribunals, and regulators regarding sexual harassment is not usually considered using a prevention framework. However, most existing action maps broadly on to secondary and tertiary prevention. Some workplace equality agendas also fit within the primary prevention of sexual harassment.



In the absence of strong regulatory drivers, sexual harassment prevention work in the UK currently varies significantly across employers; it is unsystematic and largely ineffective. In 2017, the EHRC wrote to Britain's largest employers across a wide range of sectors to gather evidence on the systems, processes and safeguards in place to prevent sexual harassment and victimisation.¹⁰⁰ They found that:

- Harassment was frequently covered by a wider policy (e.g. diversity and inclusion), with sporadic and minimal reference to sexual harassment.

¹⁰⁰ EHRC (2018) Turning the tables: Ending sexual harassment at work. Equality and Human Rights Commission. Available at: <https://www.equalityhumanrights.com/sites/default/files/ending-sexual-harassment-at-work.pdf>.

- Only two-fifths of employers included information about acceptable behaviours and how to report instances where behaviour falls short of this, as part of their induction process.
- Less than a third of employers evaluated the effectiveness of their harassment policies.
- Only a quarter of employers provided information for customers or service users on appropriate behaviour towards staff.

These findings, though from a relatively small sample,¹⁰¹ appear consistent with work by Close the Gap on employer responses to statutory equality requirements, which describes a high degree of complacency, lack of concrete outcomes, and inefficient approaches.¹⁰² There is an urgent need for employers to take more, and more consistent, actions to prevent sexual harassment and effectively respond to it.

However, sexual harassment is substantially under-researched, and it is possible that innovative approaches to sexual harassment may be more effective than what is currently advised.¹⁰³ For instance, an explicitly anti-sexist management practice, coupled with mainstreaming¹⁰⁴ innovations such as embedding equalities work into performance management targets, may be a more effective primary prevention approach than a strictly applied harassment policy. We need a shift to proactive anti-sexism work and to develop an evidence base for solutions.

Scottish Government, COSLA, Public Health Scotland and regulatory bodies should work to ensure a conceptual understanding of workplace sexual harassment as both a form of men's violence against women that must be addressed through a primary prevention lens, and as a pressing public health and safety concern. Scottish Government should take urgent action to address workplace sexual harassment, as part of its mandate to tackle violence against women, ambitions to improve workplace health and safety, and its well-established gender equality and human rights agendas.

¹⁰¹ 234 employers responded – the report does not state how many were contacted.

¹⁰² See: Close the Gap (2013) Missing out on the benefits? Summary of research on the reporting of the gender pay gap in Scotland. Available at: https://www.closesthegap.org.uk/content/resources/1376469709_Missingoutonthebenefits-CTG.pdf; and Close the Gap (2015) Making Progress? An assessment of public sector employers' compliance with the public sector equality duty. Available at: <https://www.closesthegap.org.uk/content/resources/Making-Progress---An-assessment-of-employers-compliance-with-PSED-November-2015.pdf>.

¹⁰³ This advice is referenced throughout Section 4 of our report, and largely covered here: EHRC (2020) Sexual harassment and harassment at work: Technical guidance. Equality and Human Rights Commission. Available at: https://www.equalityhumanrights.com/sites/default/files/sexual_harassment_and_harassment_at_work.pdf.

¹⁰⁴ Gender mainstreaming involves the integration of a gender perspective into the preparation, design, implementation, monitoring and evaluation of statistics, policies, regulatory measures and spending programmes, with a view to promoting equality between women and men, and combating discrimination.

Scottish Government should:

- Develop a gendered strategy on working with public bodies and other employers to prevent workplace sexual and sexist harassment, in co-production with women's organisations.

4.1.1 Sexual harassment policy

A strong organisational anti-sexual harassment policy plays a key part in primary prevention and significantly increases the extent to which victim-survivors report having been harassed.¹⁰⁵ To achieve this, employers must develop a standalone sexual harassment policy, which is distinct from anti-harassment and bullying interventions that cover other forms of discrimination under the Equality Act. EHRC technical guidance clearly states that employers should ensure different forms of harassment are not conflated in broad anti-harassment policy. Such codes of conduct do not adequately reflect or address the gendered dynamics and specific realities of sexual harassment.

While a standalone sexual harassment policy is essential, employers must also clearly define sexual harassment as a form of gender-based discrimination that intersects with other structural inequalities and set out the integral links with sexist harassment and behaviours.¹⁰⁶ In practice, it should be considered in concert with other policy/ies covering harassment and bullying¹⁰⁷ to ensure that intersecting harms (for instance racist sexual harassment) are captured and that women are not in some way asked to prioritise an aspect of their identity when reporting sexual harassment. Examples that illustrate forms of sexual harassment should be included and “reflect the diverse range of people that harassment may affect”, along with examples that are relevant to the workplace in question.¹⁰⁸ The policy should be developed or adapted from a best practice model in consultation with

¹⁰⁵ Busby N (forthcoming) Anonymous reporting of sexual harassment: A literature review. Engender.

¹⁰⁶ UN Women (2018) Towards an End to Sexual Harassment: The Urgency and Nature of Change in the Era of #MeToo. United Nations. Available at: <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2018/Towards-an-end-to-sexual-harassment-en.pdf>.

¹⁰⁷ It is beyond the scope of this report to go into detail on other harassment and bullying policies. However, organisations should follow best practice in developing anti-racist policy and anti-discrimination policy across all other equality strands.

¹⁰⁸ EHRC (2020) Sexual harassment and harassment at work: Technical guidance. Equality and Human Rights Commission. Available at: https://www.equalityhumanrights.com/sites/default/files/sexual_harassment_and_harassment_at_work.pdf.

recognised trade unions and worker representatives that are expert in the given professional field.¹⁰⁹



I think it would be a good idea to have the rules on the wall in work where everyone can see it every day as I think that could help remind people that the behaviour is unacceptable and will NOT be tolerated.

ENGENDER SURVEY RESPONSE

Several further core components of a best practice sexual harassment policy are recommended by the EHRC, trade unions and other relevant bodies. The policy should:

- State that sexual harassment and sexist behaviours will not be tolerated, are unlawful, and may lead to disciplinary action including summary dismissal.
- Be clear on who is covered and clarify the situations in which it applies (for example social events with colleagues).
- Ensure that third-party harassment is addressed.
- Explain that aggravating factors such as abuse of power over a more junior colleague will be considered when deciding on disciplinary action.
- Make clear that workers will not be subjected to disciplinary action or to any other detriment simply because their complaint is not upheld.
- Set out processes for different options for reporting, both informally and formally, with clear timelines and detail on what complainants can expect.
- Be available in versions that meet best practice standards for accessibility for all users, easily accessible online - such that workers can access them when not logged into internal systems - and be communicated to all staff during induction processes.

Engender has worked with specialists in academia and employment law to develop model policy that meets these criteria as an annex to this report.¹¹⁰

¹⁰⁹ Unison (2020) Sexual harassment is a workplace issue: Guidance and model policy. Available at: <https://www.unison.org.uk/content/uploads/2020/02/25965-1.pdf>.

¹¹⁰ N. Busby et al (forthcoming) Model Sexual Harassment Prevention and Action Policy. Engender.

HARASSMENT AND INTERSECTIONALITY

Throughout the two years of this project, we have grappled with the question of how to ensure that all women are protected from SSH and how to plug gaps for minoritised women within the confines of an economic model and justice system designed by men, for men. In the workplace, this means developing interventions to ensure employers understand the intersecting oppressions faced by women and take action to prevent and respond to intersecting forms of harassment and the range of SSH experienced by women.

A standalone sexual harassment policy is vital within an organisation, however this is not the place to address intersections with wider forms of harassment under the Equality Act in detail. As such, the model sexual harassment policy produced as an annex to this report does not attempt to robustly deal with the issue of intersectionality. Rather, it requires that any SH policy form part of an intersectional anti-sexism strategy and be read in tandem with the broader bullying and harassment policies that employers will have in place. In turn, such policies should be integrated with targeted interventions around anti-racism, LGBTI inclusion etc.

Effective responses to sexual harassment for women of colour, disabled women, LGBT women, younger and older women and women from minority faith backgrounds may therefore depend on employers adopting best practice standards that are outwith the scope of this report.

As such, we are particularly conscious of the potential for some aspects of women's experiences of SSH to be overlooked during the practical application of harassment policies, and recommend Scottish Government undertakes research on the gaps between policy and practice regarding current workplace sexual and sexist harassment policy that includes a focus on gaps in coverage for minoritised women.

Other recommendations in this report include development of intersectional training and best practice standards around the reporting and investigation of sexual harassment cases, as well as a public awareness campaign highlighting different forms of sexual and sexist harassment.

Zero tolerance approach

Participants in our lived experience focus groups spoke in favour of a zero tolerance approach towards sexual and sexist harassment in workplace policies. Such a framework can be effective in driving employers to commit to the prevention of SSH, when accompanied with clear processes to deliver the statement of intent. However, a zero tolerance policy can be in conflict with other priorities around preserving anonymity, multiple reporting processes (discussed in Chapter 4.2) and employment protections regarding unfair dismissal. In our view, the key focus for employers should be proactive prevention measures, which account for reporting and investigatory practices that can disincentivise women from making a complaint.



Absolutely 100% I want people to make complaints and challenge situations that have arisen. However, in the bigger picture, it's very hard to be confident that that person is going to end up in a better position than if they just move on.

**FOCUS GROUP WITH WOMEN IN LOW PAID AND/
OR PRECARIOUS WORK**

Monitoring and evaluation

Monitoring and evaluation of anti-harassment policies is vital, both in terms of effective implementation and more broadly, in order to help plug the significant knowledge gaps that exist around what works. Implementation data on sexual harassment policies should be monitored quarterly and policies should be reviewed regularly with staff and input from trades unions. Anonymous surveying of staff regarding their experiences is a useful tool in this regard. Other workplace policies should be subject to regular review to ensure they are consistent with the sexual harassment policy. There is also a need to evaluate current gaps between policy and practice with regard to sexist and sexual harassment, and within this a specific focus on the intersectional sexual harassment of minoritised women.

Scottish Government should:

- Endorse and implement our model sexual harassment policy, and encourage take up by employers by all possible means, including through procurement policy.

- Undertake rigorous evaluation of the gaps between policy and practice regarding current workplace sexual and sexist harassment policy, including a focus on gaps in coverage for minoritised women.

4.1.2 Sexual and sexist harassment training

A sexual harassment policy must be part of a package of measures that create an enabling environment for its implementation and that aim to prevent the need for its use. Quality training, alongside broader initiatives to advance women's equality (see Chapter 4.1.3) are key parts of this. EHRC guidance suggests training should cover issues such as un/acceptable behaviour, recognising harassment and what to do should employees experience or witness it.¹¹¹

However, a review of sexual harassment training conducted by UN Women showed that current training provisions are largely generic, 'one-off' and delivered online, untailored to specific workplace settings, overly focussed on disseminating policy, and crucially tend not to root harassment within a context of sexism and other inequalities.¹¹² Most evaluations show limited impact for this type of training and note that it frequently becomes a tick-box exercise for employers.¹¹³ The effectiveness of training has also been questioned by feminist scholars, who argue that because harassment is done to reinforce power, status and social identity, harassers already know their behaviour is unacceptable and are unlikely to be sensitised to it in this way.¹¹⁴

To increase the effectiveness of workplace training in fostering cultural change and complementing other prevention work, our expert group raised the following issues that should be taken into account in the development and delivery of training:

- Training must situate sexual and sexist harassment as forms of violence against women that are rooted in sexism and other structural inequalities, as a breach of human rights, and as a significant health and safety issue.

¹¹¹ EHRC (2020) Sexual harassment and harassment at work: Technical guidance. Equality and Human Rights Commission. Available at: https://www.equalityhumanrights.com/sites/default/files/sexual_harassment_and_harassment_at_work.pdf.

¹¹² UN Women (2019) What will it take? Promoting cultural change to end sexual harassment. United Nations. Available at: <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publication%20s/2019/Discussion-paper-What-will-it-take-Promoting-cultural-change-to-end-sexual-harassment-en.pdf>.

¹¹³ Ibid.

¹¹⁴ See: Schultz V (2018) Reconceptualizing Sexual Harassment. Again. The Yale Law Journal Forum 128:22–66.

- Training must be culturally competent and address the needs of different members of an organisation, including a focus on identity and intersectionality.
- Awareness raising and training tends to focus on newer employees, whereas it should be top-down and equally target senior and long-standing employees.
- Training is often minimal and one-off, meaning that knowledge becomes static, despite circumstances (power and seniority) regularly changing for employees.
- Targeted training can be effective after sexual harassment has occurred. For example, the distribution of case studies relevant to the work environment to senior staff.
- Bystander training, designed to empower employees to recognise, intervene and show empathy when witnessing sexual harassment, can help to create safer workplaces.
- Measurement and evaluation of anti-sexual harassment training needs to be developed.
- Mentoring programmes can be beneficial but can lead to more labour, including emotional labour, for women. Recognition within performance appraisals may help with this.
- There is scope to build intersectional anti-sexual harassment and anti-sexism training into management qualifications, induction processes and general training.

Targeted training is also essential for all staff potentially responsible for investigation and decision-making in relation to sexual harassment complaints and disciplinary processes. This should include a focus on recognising sexual and sexist harassment, understanding that (by definition) harassment is experienced in a spectrum of ways, and on how to assess whether sexual harassment that has occurred constitutes gross misconduct (see Chapter 4.3.3).

The devolution settlement in Scotland means that levers to compel action from employers in relation to mandatory training are limited. Meanwhile employers state that sexual harassment is one of many things related to protected characteristics that they need to juggle.¹¹⁵ However, it is vital that the risk of sexual and sexist harassment is rebalanced from individual women on to employers, and that prevention is widely understood as the employer's responsibility. The development of quality and ongoing training is one building block towards achieving this. Scottish

¹¹⁵ Raised at Engender Expert Group on Sexual and Sexist Harassment 2021-2022.

Government should fund an existing public body or third sector organisation/s equipped to develop and deliver high-quality gender competent¹¹⁶ training for employers on intersectional sexism and sexual harassment. This external training should aim to fill gaps in provision for large private sector employers and include a targeted focus on management level staff. It must complement the Equally Safe at Work programme and Close the Gap's suite of resources for SMEs on understanding and preventing sexual harassment in the workplace,¹¹⁷ and should ultimately be integrated throughout Scottish Government's fair work agenda, including Fair Work First.¹¹⁸

Scottish Government should:

- Fund development and delivery of training for employers on sexism and sexual harassment by a specialist body or bodies.



A good workplace for me, is one that takes these issues seriously, that does something about the concerns you have...I am a Muslim, I wear a hijab, too often employers don't realise the impact of abuse, they don't realise the unsafe situations you can find yourself in. There's no training or education.

FOCUS GROUP WITH WOMEN OF COLOUR

4.1.3 Broader anti-sexist practices in the workplace

Anti-sexist practice and clear organisational commitments to equality are at the core of preventing sexual harassment. Employers can act by introducing flexible working and other policies that support unpaid carers, recognising a trade union, addressing the overrepresentation of men and white women in positions of power, and ensuring

¹¹⁶ Gender competence refers to the skills, knowledge and analytical capability to develop statistics, data, policy, or programmes that are well-gendered; that take account of the socially constructed difference between men's and women's lives and experiences.

¹¹⁷ These resources are not yet published but incorporate four papers that cover: 1) What your business needs to know about workplace sexual harassment 2) How to: develop a sexual harassment policy for your business 3) How to: Deal with reports of sexual harassment, and 4) How to: Create a workplace culture that prevents sexual harassment.

¹¹⁸ Scottish Government (2021) Fair Work First: guidance to support implementation. Scottish Government. Available at: <https://www.gov.scot/publications/fair-work-first-guidance-support-implementation/documents/>.

organisational leaders set positive examples about commitment to equality and work-life balance.¹¹⁹ Other primary prevention approaches include embedding anti-sexist and equalities ambitions across workplaces - from organisational values and high-level objectives, through management and staff performance reviews, to specific initiatives, such as developing anti-sexist management frameworks¹²⁰ - ensuring that women enjoy equal participation in meetings, awareness-raising on sexist micro-aggressions and internal audits on issues such as the allocation of tasks. Some of these are the types of activity that are recommended within generalist programmes of support for women's workplace equality. However, such interventions are highly contingent on voluntary participation by employers, and there are questions about what adequate, good, and best practice looks like.

The extent to which sexism is ingrained in society and across our workplaces means that men's sexual harassment of women is largely invisibilised and women often doubt their experiences are serious enough to report or that they happened at all. This cultural acceptance transcends the capacity of employers alone to develop effective solutions. A public awareness campaign addressing different forms of sexual and sexist harassment, including in the workplace, designed with violence against women organisations, would help to shine a spotlight on this, challenge men's behaviours and enable more victim-survivors to come forward to access support services.

Scottish Government should:

- Develop best-practice guidance on anti-sexist practices and primary prevention of sexual and sexist harassment in the workplace, and integrate this into its work on the labour market, including the Fair Work Framework and Fair Work First.
- Produce a public awareness campaign addressing different forms of sexual and sexist harassment, including in the workplace.

¹¹⁹ EHRC (2020) Sexual harassment and harassment at work: Technical guidance. Equality and Human Rights Commission. Available at: https://www.equalityhumanrights.com/sites/default/files/sexual_harassment_and_harassment_at_work.pdf

¹²⁰ HR policies should rely on objective criteria to lessen the impact of gender stereotypes and other biases when evaluating candidates and employees. See: Starnowski CS, Son Hing LS (2015) Gender inequalities in the workplace: the effects of organizational structures, processes, practices, and decision makers' sexism. *Frontiers in Psychology* 6:1400.



Yeah, so just to sort of maybe add on the sexism side, I think representation is a big thing as well. I used to work for an organisation in the private sector and if you looked at not just the national leadership team, but also the international leadership team, I think there was one woman in like a sea of 25 men - so I think that was like a manifestation of the sexist sort of morals of the organisation and it kind of filtered down.

FOCUS GROUP WITH YOUNG WOMEN

4.1.4 Broader gender equality policy coherence

The Scottish Government is committed to advancing women's equality and human rights, with notable progress being made over recent years. The commitments to emerge from the First Minister's National Advisory Council on Women and Girls, the gender pay gap action plan, Equally Safe and the Domestic Abuse (Scotland) Act 2018, and the forthcoming incorporation of the international bill of women's rights (CEDAW) into Scots law are all flagstones of a better and more coherent public policy for gender equality in Scotland. Failure to address the endemic sexual and sexist harassment that women experience in the workplace is inconsistent with these commitments and ambitions, and risks undermining the investment and efforts made across these and other pillars of work.

Eradicating sexual harassment and sexist behaviours requires coordinated action across policy areas. Scottish Government should consider how it can make fuller use of existing strategy and policy frameworks to fulfil a primary prevention approach as outlined in Equally Safe, taking account of how sexual harassment intersects with multiple structural discriminations, including racism, islamophobia, ableism, homophobia, transphobia and ageism.

Scottish Government should

- Undertake a review of national policy frameworks to consider how they can be utilised to prevent sexual harassment and sexist behaviours.

4.2 REPORTING

Most sexual harassment in the workplace is never reported.¹²¹ Data from the TUC shows that four out of five women who experienced sexual harassment did not report this to their employer.¹²² Clearly, current systems and procedures are not working and fundamental change is needed. The barriers that are preventing women from reporting at present must be well understood and addressed in designing new systems that work for all groups of women.

4.2.1 Barriers to reporting

The systemic normalisation of sexual harassment in workplaces, and more widely, is a huge factor in this chronic underreporting. As a result, women do not expect to be taken seriously and can be unsure whether sexual harassment has occurred. These issues emerged as key themes in all of our focus groups - with young women, women of colour, Muslim women, disabled women, women in precarious work and LGBT women - and in our survey, where 43% percent of respondents said that fear of not being believed or taken seriously was a factor that prevented them from reporting. Victim-survivors state that they fear being blamed for incidents of sexual harassment or of experiencing retaliation at work. This is known as victimisation under the Equality Act and is prohibited by law. However, women are fundamentally worried about negative consequences of making a complaint for their job, career and professional relationships.¹²³ These fears are grounded in reality - one study found that, in Australia, 25% of women who reported being sexually harassed at work went on to resign or be fired from their job,¹²⁴ and women's experiences are frequently minimised when they do file a sexual harassment complaint.¹²⁵

Poor institutional handling of other harassment cases is another key issue, with a widespread belief that reporting is futile if perpetrators are unlikely to be sufficiently reprimanded. Women often find it difficult to relive distressing events or disclose personal information, particularly within the context of unequal power dynamics

¹²¹ Women and Equalities Committee (2018) Sexual harassment in the workplace. House of Commons. Available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72502.htm>.

¹²² TUC (2016) Still Just a Bit of Banter? Sexual Harassment in the workplace in 2016. Available at: <https://www.tuc.org.uk/sites/default/files/SexualHarassmentreport2016.pdf>.

¹²³ Women and Equalities Committee (2018) Sexual harassment in the workplace. House of Commons. Available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72502.htm>.

¹²⁴ Deloitte (2019) The economic costs of sexual harassment in the workplace. Available at: <https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-economic-costs-sexual-harassment-workplace-240320.pdf>.

¹²⁵ Close the Gap (2019) Close the Gap response to the UK Government consultation sexual harassment in the workplace: Legal protections under the Equality Act 2010. Available at: <https://www.closesthegap.org.uk/content/resources/Response-to-UK-Govt-consultation-on-sexual-harassment-.pdf>.

and with people that are known to them.¹²⁶ It is common for victim-survivors to be repeatedly asked to retell traumatic events to different people. Employers' reporting procedures may thus place women at risk of re-traumatisation.

Focus group participants and respondents to our survey told us repeatedly that the potential monetary cost of reporting is too high for most women, especially for women with multiple oppressed identities, women experiencing financial precarity¹²⁷ and those who have health conditions that could be exacerbated by the stress of reporting.¹²⁸ Women often consider it simpler to leave their job rather than report SSH – at great financial risk to themselves and with manifest implications for future opportunities, security and wellbeing. Women who are self-employed or agency workers are more likely to have limited options for reporting sexual and sexist harassment, and to be unaware of how to do so, whilst in some sectors reporting may lead to 'blacklisting' from future work.¹²⁹



And it's very, it can be really hard to speak up when you're always in the minority. And that happens in our workplaces as well in theatres, it's usually, I mean it is changing slightly but it's still, you know, mainly men that are running the shop, and that can make it very difficult to speak up.

**FOCUS GROUP WITH WOMEN IN LOW PAID AND/
OR PRECARIOUS WORK**

Reporting mechanisms

Reporting mechanisms themselves can act as barriers to women coming forward. Reporting systems or procedural policy should include several different methods of complaint, including the ability to be anonymous and confidential, and options for third-party or external reporting (see Chapter 4.2.2). However, to the extent that employers provide more than one route to reporting SSH, this is often the

¹²⁶ For example, survey data from the TUC suggests that ¼ of LGBT people did not report sexual harassment because they were scared of 'outing' themselves at work. See: TUC (2019) Sexual harassment of LGBT people in the workplace. Trades Union Congress. Available at: https://www.tuc.org.uk/sites/default/files/LGBT_Sexual_Harassment_Report_0.pdf.

¹²⁷ Good L, Cooper R (2016) 'But It's Your Job To Be Friendly': Employees Coping With and Contesting Sexual Harassment from Customers in the Service Sector. *Gender Work and Organization* 23:6.

¹²⁸ This emerged as a key theme at our focus group with disabled women.

¹²⁹ See: ISM (2018) Dignity at work: a survey of discrimination in the music sector. Incorporated Society of Musicians. Available at: https://www.ism.org/images/images/ISM_Dignity-at-work-April-2018.pdf.

designation of more than one possible recipient for a complaint.¹³⁰ Whilst this is essential, particularly to account for instances where a manager or designated recipient is the person harassing, it does little to allay women's general aversions to formal reporting. This chimes with discussion at our focus group with young women, who discussed the importance of safe spaces in reporting sexual harassment to their employers, including the rights to request phone calls as opposed to face to face meetings, and to be accompanied by trusted colleagues or union representatives to relevant appointments (see Chapter 4.3.1).

Time constraints

Time constraints on reporting sexual harassment are a significant barrier to women's ability to report it. At present, there is an expectation – whether explicit or implicit – that sexual harassment should be reported around the time of the incident. This is shaped by the current limit of three months for bringing a discrimination case to the employment tribunal (see Chapter 4.5). This is a clear barrier to justice, with many women simply unable to consider reporting sexist or sexual harassment in the immediate term, due to trauma, fear of victimisation or other significant impacts on physical and mental health, or whilst in the same employment as the perpetrator. EHRC guidance is clear that employers should set no time limit in which complaints must be made and avoid assuming that it will not be possible to find evidence relating to an alleged incident that took place some time before.¹³¹



The reaction, the way it is treated, it is just not taken seriously - that's why women don't report. Especially as a Black woman - we are seen as hyper strong or aggressive, it is a way to negate our pain the idea that "she can take it". These negative things, these expectations as a Black woman...our worries are not taken as seriously enough. There are many times things have happened, and I haven't reported it, because I didn't act in a way they thought of as distress they just don't think I am telling the truth - but I didn't feel safe to be like that in front of them. I don't feel safe to share my emotions or vulnerability, so a lack of safety means I don't report.

FOCUS GROUP WITH WOMEN OF COLOUR

¹³⁰ Tuerkheimer D (2019) Unofficial Reporting in the #MeToo Era. University of Chicago Legal Forum 2019:10 273-298. Available at:

<https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1653&context=ucf>.

¹³¹ EHRC (2020) Sexual harassment and harassment at work: Technical guidance. Equality and Human Rights Commission. Available at:

https://www.equalityhumanrights.com/sites/default/files/sexual_harassment_and_harassment_at_work.pdf

4.2.2 Good practice in reporting sexual harassment

A range of mechanisms for reporting sexual harassment and tools to gather evidence have emerged over recent years. Some of these receive and support complaints about individuals, with others capturing data about the prevalence of sexual harassment within an organisation where this is not directly actionable. Staff surveys, for instance, can gather information about the incidence and nature of harassment within an organisation, using this to improve policies and preventative efforts.

Best practice models of both these types of reporting are needed. We lack nuanced information on the needs of victim-survivors after experiencing sexual harassment, in terms of what women want from employers and what they hope to achieve from reporting. Women of colour, disabled women, women of different ages, sexual orientations, gender identities and faith backgrounds, women across the pay bands of an organisation, and women in different workplace contexts all have different needs and experiences that should feed into these best practice models.

Notwithstanding this need for intersectional data and evidence, our expert working group considered that the following key elements should be embedded in the development of reporting mechanisms that work for women. Procedures should:

- Protect women's privacy and right to anonymity where appropriate, and store data securely.
- Prioritise survivors' empowerment and control over when, if and how they report. Time constraints for survivors to report should be avoided.
- Allow all relevant evidence to be gathered and investigated, including bringing together evidence from elsewhere to better respond to incidents.
- Be gender competent and informed by an understanding of sexual and sexist harassment as rooted in power and structural inequality.
- Be culturally competent, trauma-informed, accessible and user-friendly.
- Be impartial and focused on survivors' needs rather than alleviating an employer's liability.
- Signpost to support services.
- Be designed to hold perpetrators to account, including perpetrators who are senior within an organisation.
- Seek to bring more sexual harassment allegations into the reporting system.

Where allegations of sexual harassment amount to a criminal offence, employers should support survivors in their decision-making about reporting this to the police.¹³² Employers should make it clear within their policies if there are any circumstances where they would report allegations to the police against a survivor's wishes.¹³³

Design of best practice reporting of sexual and sexist harassment should also incorporate latest developments and thinking regarding emergent technologies, third-party helplines and support, and anonymous reporting.



But I think people are still scared just because it gets round the whole office, whenever you're working, it gets around to everybody, you know, what problem somebody's got, sometimes just seems to get out, and you don't want other people knowing?

FOCUS GROUP WITH MUSLIM WOMEN

Reporting technologies

Since the #MeToo movement gained widespread momentum, there has been a rapid growth in the development of technologies for reporting and investigating sexual harassment and assault. Callisto is a platform created in 2016 'by survivors, for survivors',¹³⁴ which enables users to input a time-stamped record of an incident to be stored confidentially until if or when they decide to report. It also alerts the user if someone else makes a complaint about the same perpetrator, providing an option to report at this point. Callisto has been adopted widely by universities in the United States and is in early stages of application to workplaces. It has been praised for its trauma-informed approach and early evaluations suggest that it is leading to an upswing of women reporting incidents of sexual harassment.¹³⁵ There has, however,

¹³² Acas (2021) If you've been sexually harassed at work. Available at: <https://www.acas.org.uk/sexual-harassment/if-youve-been-sexually-harassed-at-work>.

¹³³ Dunlop QC L (2021) Review of the Scottish Government procedure for handling harassment complaints involving current or former Ministers. Scottish Government. Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/corporate-report/2021/03/review-of-the-scottish-government-procedure-for-handling-harassment-complaints-involving-current-or-former-ministers/documents/review-of-the-scottish-government-procedure-for-handling-harassment-complaints-involving-current-or-former-ministers/govscot%3Adocument/ReportLauraDunlopQC.pdf>.

¹³⁴ Tuerkheimer D (2019) Unofficial Reporting in the #MeToo Era. University of Chicago Legal Forum 2019:10 273-298. Available at: <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1653&context=uclf>.

¹³⁵ EHRC (2018) Turning the tables: Ending sexual harassment at work. Equality and Human Rights Commission. Available at: <https://www.equalityhumanrights.com/sites/default/files/ending-sexual-harassment-at-work.pdf>.

been some concern that this approach minimalises cases that do not involve a known serial offender or feeds into the perception that one woman's account alone is not sufficient to be believed.

A number of similar applications, such as Vault Platform, Valla and StopIt, allow individuals to collect and store multimedia evidence on their phones create timelines of harassment, and to report harassment directly to HR departments respectively.¹³⁶ These act as collators of evidence and also allow for different methodologies, such as anonymous and joint reporting. The application Spot allows women to interact anonymously, answering questions using cognitive interview techniques.¹³⁷ Users can then be sent a document of the interview and submit it to their employer if they become ready to do so. Some third-party applications will also investigate sexual harassment complaints. However, many of these technologies have been created by profitmaking businesses that have no expertise in gender-based violence, with some of them advertised as addressing all workplace disputes. This commercialisation of external reporting systems is a cause for concern. Expert and not-for-profit organisations are best placed to provide this service.

For a third-party reporting mechanism to work optimally for women, it must be underpinned by an understanding of men's violence against women (VAW). Relevant best practice from the broader VAW sector include the United States-based Hollaback! App, which allowed people to share their stories of public sexual harassment with other survivors, and record when and where it occurred.¹³⁸ The main intended outcome of this was catharsis for survivors and information-gathering, rather than a specific response to the incident.

In Scotland, the FollowIt App, launched by the Scottish Women's Rights Centre (SWRC), helps women to record stalking incidents and to report this to the police, if wanted.¹³⁹ This enables women to securely record and store details of stalking, building up a picture of events and their impact, and can serve as evidence within the police and justice system. It was designed with input from victim-survivors, violence against women experts, Police Scotland and the Crown Office and Procurator Fiscal Service (COPFS). It allows data to be stored for 15 years, allowing reporting to occur at a later date, and feedback from users shows that it has helped them to gain clarity and control over their experience. The SWRC is exploring how

¹³⁶ Liu H (2018) When whispers enter the cloud: Evaluating technology to prevent and report sexual assault. *Harvard Journal of Law & Technology* 31:2 939–963.

¹³⁷ Bearne S (2019) Meet the tech entrepreneurs tackling sexual harassment. BBC News Available at: <https://www.bbc.co.uk/news/business-47224682>.

¹³⁸ Hollaback! was founded in 2010 in response to street harassment. It has since changed its name to 'Right to Be' offering bystander training and digital resilience, and its harassment-tracking app is no longer operational.

¹³⁹ FollowIt App (2021) A simple and safe way to record incidents of stalking. Available at: <https://followitapp.org.uk/>.

the tool could be tailored to support women to record experiences of sexual and sexist harassment in public places including the workplace, and to report it to the appropriate body if desired.

A clear theme emerging from Engender's engagement with women through our focus groups and survey was the need for independent, anonymous reporting mechanisms (see below), and technological solutions can play a part in this. Digital exclusion, including for women on low incomes and women with insecure immigration status, and surveillance of technology used in or provided by workplaces should be considered by those developing and using any such digital tools.

Scottish Government should:

- Resource the Scottish Women's Rights Centre to develop and deliver FollowIt App as a tool for women to record experiences of sexual harassment.

Helplines and support

Helplines with trained advisors can provide survivors with confidential support and/or to handle sexual harassment complaints. In most cases this would be most appropriately managed by a third-party, expert organisation. Most employers do not have the capacity and gender competence to effectively undertake such a scheme and the size of many organisations would compromise anonymity in an internally run process. Such external mechanisms would also guarantee an independence that is more likely to better centre the needs of complainants.



Just the name Rape Crisis was enough for them to say 'oh I don't think we need anything as serious as that - I think that's a bit much. We're not talking about rape'. They thought it was putting a message out that if you join [this organisation] you're going to get raped, which of course it's not, we're just looking for guidance from Rape Crisis to work out how we then deal with those.

**FOCUS GROUP WITH WOMEN IN LOW PAID AND/
OR PRECARIOUS WORK**

For instance, in response to widespread sexual abuse allegations, the GMB Union introduced a 'safe space' telephone facility run by the Survivor's Trust where employees, ex-employees and members can record incidents of sexual harassment anonymously and receive support and guidance on how to formally complain if they wish to do so.¹⁴⁰ Such initiatives also enable employers to monitor incidents that have not been formally reported with a view to feeding into their prevention and broader anti-sexism work. One key limitation of this model is that the anonymity of the perpetrator is also often necessitated, compromising the extent to which an investigation can take place¹⁴¹ (see below on anonymous reporting). It is also vital that these responses are rooted in a trauma-informed approach. Scotland's Domestic Abuse and Forced Marriage helpline, run by Scottish Women's Aid, is an example of one such service.

Unison's guidance and model policy on sexual harassment recommends that employers fund external counselling as part of their occupational health scheme,¹⁴² with allotted time not counted as sickness absence. Support from employers tends to be clustered around the timeline of a report and investigation, however it's vital that this extends beyond the formal process, particularly if victim-survivors are in regular contact with the perpetrator. The EHRC technical guidance also recommends appointed workers are trained as harassment 'champions' to offer support and information throughout the process of reporting and investigation as required.¹⁴³ This could operate similarly to the role of trade union representatives, albeit without their protections and not necessarily covered by a recognition agreement. Support for such a system was echoed in research by Close the Gap with women on low incomes, who raised the desire for a designated point of contact with experience relevant to workplace sexual harassment. Similar initiatives, such as North Lanarkshire Council's system of gender-based violence support officers and helpline, may provide useful learning. As a bare minimum, the people responsible for enforcing anti-harassment policy must be trained in gender competence and have adequate understanding of sexual harassment as an intersectional women's equality issue, in order to recognise which processes to apply.

Victim-survivors should also have well signposted access to advice, support and advocacy through an external expert organisation, such as Rape Crisis Scotland or the Scottish Women's Rights Centre, and employers should allow independent

¹⁴⁰ Monaghan QC K (2020) Investigation into Sexual Harassment and the Management of Sexual Harassment Complaints Within the GMB. Available at: https://www.gmb.org.uk/sites/default/files/gmb_investigation_report_2020.pdf.

¹⁴¹ Busby (forthcoming) Anonymous Reporting of Sexual Harassment: A Literature Review. Engender

¹⁴² Unison (2020) Sexual harassment is a workplace issue: Guidance and model policy. Available at: <https://www.unison.org.uk/content/uploads/2020/02/25965-1.pdf>.

¹⁴³ EHRC (2020) Sexual harassment and harassment at work: Technical guidance. Equality and Human Rights Commission. Available at: https://www.equalityhumanrights.com/sites/default/files/sexual_harassment_and_harassment_at_work.pdf.

advocacy officers to assist survivors through a formal report or investigation (see Chapter 4.3.1). There may be scope to draw on the VAW sector more formally, through the funding of external sexual harassment advocacy and support, based within VAW services.

Scottish Government should:

- Explore sustainable funding for and with violence against women organisations to provide specialist advocacy support for women that experience sexual harassment in the workplace.

Anonymous reporting

The case for anonymised reporting of sexual harassment has been gaining prominence since studies began revealing the climate of chronic underreporting in the UK (see Chapter 2.1). The demand for anonymised options came through strongly from women who took part in the lived experience elements of this research. Such approaches include phonedlines, online systems and anonymity within HR processes, and are envisaged as part of a suite of reporting channels that centre the varied needs and desires of victim-survivors. The Women and Equalities Committee of the UK Parliament recommended that guidance on anonymous reporting should be included in a new statutory Code of Practice on sexual harassment¹⁴⁴ and the EHRC technical guidance – although not binding – states that employers should consider providing anonymised options within a package of routes to reporting.

Engender commissioned a literature review of anonymous reporting as part of this project.¹⁴⁵ It found that, despite references to an increase in the use of anonymised systems, there is little evidence of where and how this is taking place in the UK at present, with the exception of commercial providers or ‘consultancies’.¹⁴⁶ Evaluation of the impact of anonymous reporting specifically in relation to sexual harassment is currently scarce. However, data from initiatives that cover broader forms of harassment and discrimination, such as the University of Cambridge’s anonymous reporting system,¹⁴⁷ provide useful insights.

¹⁴⁴ Women and Equalities Committee (2018) Sexual harassment in the workplace. House of Commons. Available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72502.htm>.

¹⁴⁵ Busby (forthcoming) Anonymous Reporting of Sexual Harassment: A Literature Review. Engender.

¹⁴⁶ For instance, Tell Jane, which describes itself as ‘an HR consultancy that partners with your organisation to tackle toxic workplace behaviour and enhance your company culture.’ See: Tell Jane (2022) Supporting you to support your people. Available at: <https://www.telljane.co.uk/about/>.

¹⁴⁷ University of Cambridge (2022) Anonymous reporting for students and staff. Available at: <https://www.studentcomplaints.admin.cam.ac.uk/anonymous-reporting-students-and-staff>.

The literature review concludes that anonymised reporting appears to encourage complainants to come forward, facilitates signposting to advice and support (when done well), may increase the likelihood of subsequent formal reporting, and enables employers to collect data that informs targeted actions. The clear limitation of anonymous reporting is that formal investigation requires both the perpetrator and the victim-survivor to be identified, meaning that recourse to justice is not available as an outcome. There may also be issues with the association of anonymity with shame or “a secret to be kept”, and steps should be taken to ensure that reporting tools frame sexual harassment as an act of violence against women. The management of expectations for complainants, GDPR with regard to data held where no investigation is being brought forward, and drawbacks with the lack of human interaction within automated systems all need further consideration.

Full details can be found in the literature review published with this paper.¹⁴⁸

We recommend that Scottish Government develop an independent, specialist body that receives sexual harassment complaints, including anonymous complaints, from workers. This would be commensurate with the colossal issues related to reporting sexual harassment and the views of women who have experienced them. Internal reporting options threaten the safety and privacy of victim-survivors, and employers often have a vested interest in minimising complaints. The body should be empowered, with women’s consent, to subsequently pass on information to personnel responsible for investigating complaints. The body might also publish anonymised findings for use in improving public policy and employer responses to sexual harassment and make targeted recommendations to specific employers with a view to improving their practices and strengthening prevention. It should collect intersectional gender-sensitive data¹⁴⁹ to enable deeper understanding of issues around SSH. The work of this body should be rooted in gender competent, intersectional and trauma informed approaches.

Scottish Government should:

- Explore sustainable funding for and with violence against women organisations to provide specialist advocacy support for women that experience sexual harassment in the workplace.

¹⁴⁸ Busby (forthcoming) Anonymous Reporting of Sexual Harassment: A Literature Review. Engender.

¹⁴⁹ Gender-sensitive data are statistics and other information that adequately reflect gendered differences and inequalities in the situation of women and men in all areas of life. Sex-disaggregated data are data that is broken down by sex, so that it is possible to compare and contrast differences between men and women.



The only way I would have reported is if I could have been anonymous and [the perpetrator] identified and my complaint investigated externally. I was fearful that I would be investigated and my reputation ruined further. I was scared he would tell lies about me.

ENGENDER SURVEY RESPONSE

4.3 INVESTIGATION AND DECISION-MAKING

This section of our report considers employers' responses to complaints of sexual and sexist harassment. This incorporates informal resolution, conducting investigations into complaints, preventing victimisation,¹⁵⁰ making determinations, and applying appropriate sanctions and remedies. As elsewhere in the system, however, there is very limited evidence to draw upon in terms of good practice, particularly regarding how sexual harassment is handled after an investigation.

4.3.1 Informal resolution

Informal responses to sexual harassment complaints sometimes take place in lieu of a formal investigation, hearing and determination process. The complainant may decline to raise the issue through a formal process but wish to have the incident noted or seek a 'soft' outcome, or the employer may not perceive a formal complaint in information that comes to them due to lack of clarity around process. According to the EHRC, informal resolution to sexual, sexist and other forms of harassment includes providing the complainant with support to raise the issue directly with the alleged harasser, raising the matter informally with the harasser on their behalf, arranging mediation between the complainant and harasser, and signposting to advice and access to counselling or specialist assistance.¹⁵¹ The EHRC also recommends that employers keep a record of such informal complaints or information-sharing to be kept under review. We envisage that the external body we are proposing could analyse such information and offer advice to employers based on the cumulative and specific circumstances experienced within an organisation.

¹⁵⁰ Victimisation is detrimental treatment experienced by a worker that has made claim or complaint under the Equality Act, including a sexual harassment complaint. Employers must take all reasonable steps to prevent victimisation. We do not cover this in detail here, but employers should be aware that preventing victimisation is a core element of their obligations. Guidance is included in the EHRC Technical Guidance referenced throughout this report.

¹⁵¹ EHRC (2020) Sexual harassment and harassment at work: Technical guidance. Equality and Human Rights Commission. Available at: https://www.equalityhumanrights.com/sites/default/files/sexual_harassment_and_harassment_at_work.pdf.

Close the Gap's Equally Safe at Work project¹⁵² found that local authorities in Scotland are very unclear on what can and cannot be done without a formal complaint, and have developed a 'how to' guide on dealing with reports of sexual harassment,¹⁵³ as part of a package of resources to support SMEs.

Mediation between the complainant and perpetrator is a particularly sensitive and contested option for informal resolution to sexual harassment. According to the Advisory, Conciliation and Arbitration Service (Acas),¹⁵⁴ "mediation is a way to mend relationships when there has been a disagreement at work" and to find ways to work together in the future.¹⁵⁵ However, Acas guidance on mediation is gender-neutral and non-intersectional, the process is unlikely to account for power imbalances between parties, and mediation is often deeply inappropriate in cases of sexual harassment. Given that sexual harassment is a form of violence against women that is poorly recognised and understood, the framing of 'mending relationships' may be damaging for women experiencing ongoing trauma and other impacts, and for broader attempts to tackle the fundamental normalisation of sexist and sexual harassment. Mediation also suggests that both parties are partially to blame, which is never the case regarding sexual harassment, and involves victim-survivors coming face to face with perpetrators. One participant in our focus group with young women chose to leave her role within a large organisation rather than be in the same room as her harasser.

The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) recommends that where alternative dispute resolution procedures (such as mediation and conciliation) are used in cases of violence against women, this should be strictly regulated, with free and informed consent ensured, and be provided by professionals trained to understand and adequately intervene in cases of gender-based violence, avoiding re-victimisation or unhelpful stereotyping.¹⁵⁶ Gender-sensitive mediation that is led by practitioners with expertise in VAW and trauma may be appropriate in some cases of workplace sexual harassment, but only if this has been requested by the complainant.

Other informal resolutions can include a formal apology, re-deployment or financial pay-out,¹⁵⁷ in line with the range of unlawful behaviours that constitute sexual and sexist harassment. It is essential that the victim-survivor is supported to pursue the

¹⁵² Close the Gap (forthcoming) How to: Deal with reports of sexual harassment

¹⁵³ Ibid.

¹⁵⁴ Acas is a non-departmental public body working at UK level.

¹⁵⁵ Acas (2022) Mediation at work. Available at: <https://www.acas.org.uk/mediation>.

¹⁵⁶ UN Committee on the Elimination of Discrimination Against Women (2017) General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19. United Nations. Available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf

¹⁵⁷ Expert working group discussion on investigation and decision-making.

option/s that work best for them and to identify the outcome they hope to see. Certain sanctions or risk management may also be applied where there has not been a formal report, investigation or hearing. For instance, targeted anti-sexist and anti-sexual harassment training for particular staff members or teams, and capacity building, including bystander training, across the organisation.

NHS Highland's Healing Process, an independent service that supports workers who have suffered bullying or harassment in the workplace,¹⁵⁸ provides examples of such informal responses. This initiative supports individuals to discuss their experiences with qualified practitioners and identify a course of action, including seeking formal apology, access to independent psychological therapies or financial compensation through further engagement with an independent review panel.¹⁵⁹ Whilst the project does not include an explicit focus on sexual harassment or gender equality, evaluation of the project may raise some relevant learning for best practice related to SSH.

Scottish Government should:

- Undertake research to build the evidence base on best practice around employer responses to sexist and sexual harassment complaints, including informal responses, investigations, preventing victimisation and decision-making.



Half the time when you want to report something you don't know what the company process is, having this clear and explained when you start a job. Processes need to be led by what victims need, you shouldn't have to put yourself in a vulnerable position again when reporting it, like when they do reconciliation meetings. You should ask victim; what is the outcome you want from this; do you want an apology? Do you want to move department? Do you want them moved?

FOCUS GROUP WITH WOMEN OF COLOUR

¹⁵⁸ The Healing Process (2022) Welcome to The Healing Process. NHS Highland Available at: <https://www.healing-process.co.uk/>.

¹⁵⁹ Wilde M, Hogg F (2020) Healing Process Plan. NHS Highland. Available at: <https://www.nhshighland.scot.nhs.uk/Meetings/BoardsMeetings/Documents/March%202020/6b%20Healing%20Process%20and%20appendices.pdf>.

4.3.2 Investigations

Even when distinct sexual harassment policy exists, the way in which sexual and sexist harassment complaints are handled can rest on their initial categorisation by an employer. This has implications for victim-survivors who may not recognise or describe their experiences as sexist or sexual harassment, and for employers who may not have the knowledge or gender competency to distinguish between different behaviours and forms of harassment. In order to sidestep this and - in an ideal world - to ensure that intersecting forms of harassment, such as racial harassment, are considered cumulatively, some experts have advocated for a blanket approach to handling complaints under the Equality Act.¹⁶⁰ However, the EHRC recommends a distinct approach should be taken for sexual harassment complaints due to the sensitivity and complexity of such cases,¹⁶¹ and noting that staff involved should receive specialist training. On balance, we agree that a distinct approach is needed to maximise understanding and application of a gendered approach. However, sexual harassment policy should also be integrated with other bullying and harassment frameworks so that intersecting forms of harm can be adequately understood. Specialist training must include a robust gender competence element to ensure that appropriate procedures are followed and that victim-survivors are adequately supported from the outset of reporting a case of sexual or sexist harassment.



And the most important thing for me is like, this accountability shouldn't be performed by the employer. It should be performed by trade unions. Because it's like asking the fox to take care of the hens. It's like, it makes no sense. Of course they're going to hide it.

FOCUS GROUP WITH WOMEN IN LOW PAID AND/ OR PRECARIOUS WORK

According to Acas guidance regarding discipline and grievances, a trained person uninvolved in the case should carry out the investigation, noting however that in

¹⁶⁰ For example, by Laura Dunlop QC in her review of the Scottish Government's procedure for handling harassment complaints. See: Dunlop QC L (2021) Review of the Scottish Government procedure for handling harassment complaints involving current or former Ministers. Scottish Government. Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/corporate-report/2021/03/review-of-the-scottish-government-procedure-for-handling-harassment-complaints-involving-current-or-former-ministers/documents/review-of-the-scottish-government-procedure-for-handling-harassment-complaints-involving-current-or-former-ministers/review-of-the-scottish-government-procedure-for-handling-harassment-complaints-involving-current-or-former-ministers/govscot%3Adocument/ReportLauraDunlopQC.pdf>.

¹⁶¹ EHRC (2017) Sexual harassment and the law: Guidance for employers. Equality and Human Rights Commission. Available at: <https://www.equalityhumanrights.com/sites/default/files/sexual-harassment-and-the-law-guidance-for-employers.pdf>.

smaller organisations this may not always be possible.¹⁶² The EHRC states that in cases of harassment, including sexual and sexist harassment, employers should consider appointing an external investigator where necessary to ensure objectivity and take account of the sensitivities of the case. For example, a victim-survivor may prefer to speak to a female investigator.¹⁶³ The House of Commons Women and Equalities Committee inquiry into the use of non-disclosure agreements in discrimination cases highlighted the imbalance of power between the employer and employee at most stages of a discrimination complaint, with employers setting and overseeing policy and processes and therefore having control over the investigation and handling of the complaint.¹⁶⁴ To partially address this imbalance and to better respond to the sensitivity of disclosures and the preferences of many victim-survivors for more confidential or anonymous approaches, there are clear merits to independent, external investigatory processes.¹⁶⁵

External investigation could potentially be delivered by individuals operating within a good practice framework or set of regulations, or by an external investigating body that is specifically equipped to investigate sexual harassment. Either of these models would improve objectivity, and consistency of knowledge and approach, given that there is currently no obligation for an employer to appoint an investigator or decision-maker with sexual harassment expertise. Independent investigation would also increase feelings of security and wellbeing for victim-survivors. Participants in our focus groups and survey raised various issues with internal investigatory processes, including access for perpetrators to influence the outcome, and their disclosures not having been kept confidential. Several women said that the only way they would have considered making a sexual harassment complaint was if external investigation had been possible.

Public funding for independent investigation would improve access and mitigate against smaller organisations avoiding formal proceedings because of costs. Nonetheless, there is very little well-gendered evidence in this area of practice, there are large gaps about what approaches work best for victim-survivors, and significant questions remain regarding the practical application of external investigation and its interaction with disciplinary decisions. We recommend that development work

¹⁶² Acas (2022) Step 2: Preparing for an investigation. Available at:

<https://www.acas.org.uk/investigations-for-discipline-and-grievance-step-by-step/step-2-preparing-for-an-investigation>.

¹⁶³ EHRC (2020) Sexual harassment and harassment at work: Technical guidance. Equality and Human Rights Commission. Available at:

https://www.equalityhumanrights.com/sites/default/files/sexual_harassment_and_harassment_at_work.pdf.

¹⁶⁴ Women and Equalities Committee (2019) The use of non-disclosure agreements in discrimination cases. House of Commons. Available at:

<https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1720/1720.pdf>.

¹⁶⁵ See: Committee on the Scottish Government Handling of Harassment Complaints (2021) Report of the Committee on the Scottish Government Handling of Harassment Complaints. Scottish Parliament. Available at: https://sp-bpr-en-prod-cdnep.azureedge.net/published/SGHHC/2021/3/23/3dc69e08-899e-4d55-aa77-83f08cc4a815/_SGHHC2021R1.pdf.

on the external investigation of sexual harassment complaints is undertaken within broader work on best practice.

Our research and engagement points to the following elements as potential features in best-practice standards of investigation into a sexual harassment claim:

- Independent investigation by a practitioner who has appropriate expertise in VAW and relevant structural inequalities (e.g. racism, ableism, homophobia) and is able to obtain information sensitively and without compounding trauma.
- Compliance with and supported by written policies on sexual harassment, sexist harassment and other forms of discrimination, with a view to capturing intersectionality.
- A predictable and transparent timeframe, with regular updates on progress provided to the complainant.
- A confidential and accessible process, with complainants informed about who has access to their information and why.
- The right to be accompanied by a companion to all investigation meetings, including by persons other than colleagues or trade union representatives.¹⁶⁶
- Specific actions to prevent victimisation or further harassment during an investigation, for example redeployment of the alleged harasser or arranging working from home.
- Support for the victim-survivor during and post-investigation, including specialist support and/or counselling where appropriate.

Scottish Government should:

- Undertake research to build the evidence base on best practice around employer responses to sexist and sexual harassment complaints, including informal responses, investigations, preventing victimisation and decision-making.

¹⁶⁶ At present the legal right to be accompanied is only in place for all meetings during a grievance procedure and meetings where warnings or disciplinary actions are handed down during disciplinary procedures. There is no legal right to be accompanied to a disciplinary investigation meeting, though Acas advises that it is good practice to allow it. At present, 'companions' who are colleagues or trade union reps must be allowed but partners, friends, or reps from a professional support body or legal rep advocacy can accompany workers at the employer's discretion. See: Acas (2022) Step 3: Carrying out an investigation. Available at: <https://www.acas.org.uk/investigations-for-discipline-and-grievance-step-by-step/step-3-carrying-out-an-investigation>; and EHRC (2020) Sexual harassment and harassment at work: Technical guidance. Equality and Human Rights Commission. Available at: https://www.equalityhumanrights.com/sites/default/files/sexual_harassment_and_harassment_at_work.pdf.

- Encourage employers to extend the right to be accompanied to disciplinary investigation meetings regarding sexual and sexist harassment and to expand the definition of ‘companion’ in these circumstances.

4.3.3 Decision-making: remedies and sanctions

There is a notable lack of clarity around the shape of justice and accountability regarding sexual and sexist harassment. Perpetrators should be held accountable and may be dismissed without notice if found guilty of gross misconduct. However, this does nothing to repair the severe professional and personal setbacks suffered by victim-survivors, many of whom are forced out of their careers and continue to suffer trauma.¹⁶⁷ Nor does this prevent perpetrators from reoffending. If research tells us anything, it is that harassment is a widespread institutional problem that cannot be solved by firing or punishing harassers one by one. A focus on structural remedy is sorely needed, but again we lack good practice on what this looks like.

There is very little evidence about what should happen after sexual harassment has been investigated, and therefore little good practice to draw upon around decision-making, disciplinary hearings, remedies and sanctions. This lack of clarity feeds into concerns for employers around unfair dismissal claims, which can result in a stagnating lack of action regarding sexual harassment complaints. If an unfair dismissal claim is successful at employment tribunal this is likely to be more expensive for employers than failure to meet their harassment obligations. This is partly because perpetrators are usually more senior employees and compensation would be correspondingly higher. This is the sort of power imbalance that must be addressed in the development of good practice, as well as in other areas of the system.



Management talk a good game but difficult to be taken seriously if not going along with their male pack behaviour. So makes it difficult to raise complaint without being seen as being a prude or not one of the guys.

ENGENDER SURVEY RESPONSE

¹⁶⁷ Schultz V (2018) Reconceptualizing Sexual Harassment. Again. The Yale Law Journal Forum 128:22–66.

Non-disciplinary remedies

According to the EHRC, if a harassment complaint is not upheld, or is upheld but results in action short of dismissal, the employer should carefully consider the “continuing relationship between those affected”, making an offer of temporary redeployment or amending management arrangements if necessary, and arrange for appropriate support and counselling.¹⁶⁸ Flexible options for ongoing mental health support, over which women have autonomy, are essential. This must be structured to ensure time off work as needed with no ramifications for current employment or future opportunities. Participants at our focus group with disabled women felt that it would be significantly preferable for organisations to resource women to access their mental health support of choice, as opposed to being assigned predesignated options. Disabled women need to be confident in the practitioner’s knowledge of their clinical specialisms and capacity for trauma-informed counselling. This was also raised in our focus group with women of colour where racism-informed mental health services were seen as vital. Where survivors are already accessing support, it may also be preferable to continue with this rather than restarting the process with an employer-chosen support service.



It would be far better for organisations to give women money to choose their own mental health support, rather than being given one of the organisations choosing - don't know if the counsellor will be trauma informed, what their clinical specialisms are, and if the survivor already has their own therapist they may wish to continue this rather than start again.

FOCUS GROUP WITH DISABLED WOMEN

Disciplinary action

If the complaint is upheld, disciplinary action should be taken immediately. This must be in line with the Acas Code of Practice on disciplinary and grievance procedures,¹⁶⁹ and the employer’s own policies. The range of sanctions available to tribunal include formal apology, disciplinary warnings (verbal, written or final), training requirements, suspension, demotion or other role changes, and compulsory transfer, and will be set out in an employer’s disciplinary procedure. In cases of gross misconduct and

¹⁶⁸ Ibid.

¹⁶⁹ Acas (2015) *Grievance: Keys to handling grievances in the workplace*. Available at: <https://www.acas.org.uk/acas-code-of-practice-for-disciplinary-and-grievance-procedures/html#grievance:-keys-to-handling-grievances-in-the-workplace>.

repeated behaviour where final warnings have previously been issued, misconduct may result in dismissal or dismissal without notice. Some of these disciplinary penalties can only be applied if allowed for in the employment contract or with the agreement of the perpetrator.¹⁷⁰

Unfortunately, data that would allow analysis of whether and how sanctions applied in cases of sexual harassment routinely differ from those applied for other types of workplace misconduct do not exist. However, there is clearly a lack of severity customarily attached to sexual harassment, due to systemic lack of understanding of sexual harassment as violence against women and a breach of human rights, and its normalisation in workplaces.

Many cases of sexual harassment should be categorised as gross misconduct, including behaviours that constitute sexual assault. However, the definition of harassment means that the severity of behaviour is contingent on how it is experienced by the recipient and cannot therefore be rigidly categorised. Employers' disciplinary and grievance policy/ies should be clear that sexist and sexual harassment may constitute gross misconduct and indicate that all relevant circumstances including the misuse of power will be taken into account in determining whether this is the case. This should also be covered in management training and set out in detail in Acas guidance.

Scottish Government should:

- Undertake research to build the evidence base on best practice around employer responses to sexist and sexual harassment complaints, including informal responses, investigations, preventing victimisation and decision-making.

Acas should:

- Offer guidance on how to determine whether behaviour constitutes gross misconduct in sexual and sexist harassment cases, taking account of all relevant circumstances including the misuse of power.

¹⁷⁰ Ibid.



I work for like a company who like supplies workers like for like events so like across like all different sectors so like I don't know like if like you see people who are in the same position with me like I've never got a clue like who I would approach because it's not as if there's an HR because I'm not actually employed by like the place I'm working at.

FOCUS GROUP WITH YOUNG WOMEN

Structural remedies

Whilst an individual can make a discrimination claim under the Equality Act, there is little existing practice or thinking around structural remedies to sexual harassment. There is a real need to reframe sexual harassment investigations away from a grievance between two people towards a systemic understanding that is rooted in women's inequality with men and other forms of discrimination.¹⁷¹ The structural nature of sexual harassment and sexist behaviours, and the role of workplace cultures and practices in enabling or preventing them, should be emphasised throughout the process. Employers and government have a role to play in shifting the issue of sexual harassment away from the individual and into broader conversations about fair work and good workplaces.

Structural remedies to sexual and sexist harassment would focus on primary prevention of sexism and intersecting forms of discrimination. For instance, employers could undertake organisational sexual harassment reviews, akin to equal pay reviews, focussed on what changes are needed and integrating a prevention perspective into employers' responses to SSH. Whilst accreditation programmes can yield limited results, the Equally Safe at Work accreditation has had some success in progressing mutual understanding around sexual and sexist harassment in the workplace.¹⁷² As a form of tertiary prevention, employers should also be instructed or encouraged to collect data on how disclosures and complaints were handled, including retrospective communication with victim-survivors as to whether their complaint has been satisfactorily resolved.

A systemic approach to 'passing the harasser' is also needed, whereby men accused of sexual harassment are allowed to 'move on' quietly from their positions - either within the organisation or to a new employer - only for repeat allegations to

¹⁷¹ E.g. racism, homophobia, transphobia, ableism, ageism, faith-based discrimination, and discrimination against those with insecure migration status.

¹⁷² Expert working group discussion on investigation and decision-making.

emerge.¹⁷³ This raises issues with what can or should be disclosed to a perpetrator's potential new employer. The EHRC advises that, when contacted for references, employers should assess whether reasons for dismissal can be lawfully disclosed under Article 6 of the GDPR, given the risk that harassment may be repeated in a different setting.¹⁷⁴ At present there is a lack of incentive for employers to share when an individual has been subject to complaint, investigation, or disciplinary action. Rather, alleged perpetrators will often change employment before an investigation has been concluded, and employers may choose to facilitate this. This is a legally complex issue that should be given further thought within evidence gathering and the development of best practice around employers' responses to sexist and sexual harassment in the workplace.

There are also questions about how best to constructively address sexist and predatory attitudes and behaviours, and to manage perpetrators in the workplace whilst ensuring that other employees feel safe. Zero Tolerance advises employers to ask for advice from, or refer the employee to, a reputable organisation that works with perpetrators to change their behaviour.¹⁷⁵ Likewise, section 19 of the International Labour Organisation's Recommendation No. 206 on Violence and Harassment states that perpetrators of harassment in the workplace 'should be held accountable and provided with counselling or other measures, where appropriate, with a view to preventing the reoccurrence of violence and harassment, and facilitating their reintegration into work, where appropriate.'¹⁷⁶ However, there are concerns that this behavioural change approach is at odds with how most other workplace grievances are handled by an employer, that there are few such perpetrator programmes in Scotland and that the evidence base around their effectiveness is weak.

Scottish Government should:

- Undertake research to build the evidence base on best practice around employer responses to sexist and sexual harassment complaints, including informal responses, investigations, preventing victimisation and decision-making.

¹⁷³ Kidder W C, Cantalupo N C (2018) A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty. *Utah Law Review* 2018:3 671–786.

¹⁷⁴ EHRC (2020) Sexual harassment and harassment at work: Technical guidance. Equality and Human Rights Commission. Available at: https://www.equalityhumanrights.com/sites/default/files/sexual_harassment_and_harassment_at_work.pdf.

¹⁷⁵ Zero Tolerance (n.d.) Zero Tolerance at Work 2: Checklist for Employers. Available at: <https://www.zerotolerance.org.uk/resources/Zero-Tolerance-at-Work-pt-2.pdf>.

¹⁷⁶ ILO (2019) Violence and Harassment Recommendation, 2019 (No. 206). International Labour Organization. Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R206.

4.4 EMPLOYMENT TRIBUNALS

Victim-survivors of sexual or sexist harassment may choose to raise a claim against an employer at the employment tribunal. Critical issues and barriers involved in doing so include financial cost, time constraints imposed under the Equality Act, emotional toll, the inaccessibility of the system and the lack of gender competence across its processes. There is also an entrenched understanding of employment disputes as individualised issues between private parties, of little public significance, which risks disregarding the structural and systemic nature of sexual and sexist harassment.¹⁷⁷ In recent years the ‘me too’ movement has done much to provide an amenable context for reframing this.

Against this backdrop, very few victim-survivors of sexual harassment in the workplace pursue or win a claim at an employment tribunal. The Equality and Human Rights Commission (EHRC) estimated that in 2017, only eight sexual harassment claims were successful at hearing in Great Britain, with a further six being unsuccessful and four withdrawn or settled.¹⁷⁸ This is from a total of almost 110,000 applications made to the employment tribunal from April 2017 – March 2018. Clearly there is need to increase recourse to justice and accountability for victim-survivors of workplace sexual harassment, including for women who experience intersectional sexual harassment. We therefore recommend that, once powers are devolved, Scottish Government replaces the employment tribunal with an employment and equality court.¹⁷⁹ Background on proposals for such a court is set out in the discussion paper ‘Making employment tribunals work for all’ by the Law Society of England and Wales.¹⁸⁰

4.4.1 Issues with the employment tribunal

Since April 2014, a system of ‘early conciliation’ has been in place, whereby claimants must notify Acas before lodging an employment tribunal claim. This notification must be submitted within three months of the date that the sexual harassment last occurred.¹⁸¹ Acas then offers conciliation and mediation to attempt to resolve ‘your

¹⁷⁷ Blackham A (2017) Employment Discrimination Law in the United Kingdom: Achieving Substantive Equality at Work? *Australian Journal of Labour Law* 30:257–274.

¹⁷⁸ EHRC (2018) Additional written submission from the Equality and Rights Commission (SHW0091). Equality and Human Rights Commission. Available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/sexual-harassment-in-the-workplace/written/86429.html> cited in Women and Equalities Committee (2018) Sexual harassment in the workplace. House of Commons. Available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72502.htm>.

¹⁷⁹ The devolution of the employment tribunal to Scotland has been anticipated for a number of years and is currently expected in 2024.

¹⁸⁰ The Law Society (2015) Making employment tribunals work for all Is it time for a single employment jurisdiction? Available at: https://consult.justice.gov.uk/digital-communications/review-of-fees-in-employment-tribunals/supporting_documents/lawsocietydiscusisondocument.pdf.

¹⁸¹ Acas (2021) How early conciliation works. Available at: <https://www.acas.org.uk/early-conciliation/how-early-conciliation-works>.

dispute', without the need to attend the tribunal, although participation is not mandatory. Agreements made at this stage can include financial settlement.

The conciliation stage may be beneficial for some victim-survivors by providing a mechanism for resolution that alleviates the stress of waiting for and then participating in the tribunal process. However, as set out in Chapter 4.3.1, this approach is inappropriate for many victim-survivors of sexual harassment, and Acas does not have the necessary expertise to adequately handle sexual harassment cases. Meanwhile claimants are likely to receive lower financial compensation at conciliation proceedings than at a tribunal hearing, and whilst agreements made are legally-binding, agreed outcomes are extremely unlikely to involve structural remedies, such as changes to workplace policies and/or practices.¹⁸²



Going to a tribunal can be at the expense of your mental health. You have to consider if the outcome outweighs the impact on your mental health, it can also be quite public and you are vulnerable. I would say go to a tribunal if it's happened to multiple women and you have strength in numbers. There needs to be easier ways for women to have justice.

FOCUS GROUP WITH WOMEN OF COLOUR

Time limits

The time limit for raising a claim at the employment tribunal is a clear barrier to justice. It is commonly accepted that traumatic events may take time to process¹⁸³ and that victim-survivors may not recognise what has happened as sexual harassment in the immediate term. Retrospective conversations with colleagues and friends, sometimes long after the fact, often help to bring women's experiences into focus. Time constraints place pressure on victim-survivors to assess multiple and complex complaints processes within a very short timeframe, while also trying to process traumatic or stressful experiences.¹⁸⁴ Women who remain employed in the institution where harassment occurred are often reluctant to seek remedy from an employment tribunal, due to realistic concerns about victimisation, stress and other

¹⁸² Blackham A (2017) Employment Discrimination Law in the United Kingdom: Achieving Substantive Equality at Work? *Australian Journal of Labour Law* 30:257–274.

¹⁸³ Mind (2020) Trauma. Available at: <https://www.mind.org.uk/information-support/types-of-mental-health-problems/trauma/about-trauma/>

¹⁸⁴ Women and Equalities Committee (2018) Sexual harassment in the workplace. House of Commons. Available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72502.htm>.

impacts. The UK Government has pledged to ‘look closely’ at extending the time limit for bringing cases based on the Equality Act to the employment tribunal from three months to six months. Clearly this would be an improvement on the current system. However, the same issues would apply within a six-month timeframe for many women. Extending the limit to one year would provide more security for victim-survivors and provide a more realistic period in which to begin coming to terms with events.

Finances and stress

Significant financial barriers also prevent women from taking a claim to a tribunal. Legal aid funding is extremely limited for employment disputes and access is subject to stringent means testing. Legal costs associated with a well-run discrimination or harassment claim through tribunal is likely to be in excess of £10,000.¹⁸⁵ The formal procedures of the tribunal may also discourage participation, particularly for those who are unable to afford legal representation, do not have access to trade union representation, and who may not feel confident in their use of formal English.¹⁸⁶ Women have less access to resources than men, with stark inequalities for women of colour, disabled women, trans women, migrant women and refugees, amongst others within this. Women are also less likely to belong to a trade union. Meanwhile, being cross-examined by a lawyer on an employer’s behalf is likely to be a stressful and gendered experience,¹⁸⁷ whilst employers will tend to be more familiar with the tribunal system, have more resources at their disposal to employ experienced lawyers, and drive negotiations by stipulating the terms and timings of settlement offers.¹⁸⁸ Claimants who do not have legal representation may be particularly vulnerable to financial, emotional and psychological pressure, as well as intimidating tactics used by some employers, such as threats that a claimant will have to pay the employer’s costs or may face legal action themselves if the case is unsuccessful.¹⁸⁹

In 2018, the House of Commons Women and Equalities Committee recommended that employers should be required to pay employees’ legal costs if the former loses a harassment case at tribunal.¹⁹⁰ This one-way cost shifting for employment claims would constitute a small step to redressing the imbalance of power and resources

¹⁸⁵ Women and Equalities Committee (2019) The use of non-disclosure agreements in discrimination cases. House of Commons. Available at:

<https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1720/1720.pdf>.

¹⁸⁶ Busby N, McDermont M (2012) Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings. *Industrial Law Journal* 41:2 166–183.

¹⁸⁷ Busby N (2016) The costs of justice: barriers and challenges to accessing the employment tribunal system. In: Kirwan S (2016) *Advising in Austerity: Reflections on Challenging Times for Advice Agencies*, pp 77–89. Bristol: Policy Press.

¹⁸⁸ Women and Equalities Committee (2019) The use of non-disclosure agreements in discrimination cases. House of Commons. Available at:

<https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1720/1720.pdf>.

¹⁸⁹ Ibid.

¹⁹⁰ Women and Equalities Committee (2018) Sexual harassment in the workplace. House of Commons. Available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72502.htm>.

between employers and employees at tribunal. However, to date this has been rejected by the UK Government, and has not been explored at the Scottish level.



I think everybody's mentioned it, there are unintended consequences to making a complaint.

FOCUS GROUP WITH WOMEN IN LOW PAID AND/ OR PRECARIOUS WORK

Lack of relevant expertise across the system

Historically, claims of sexual harassment have been defeated on the basis that either conduct was welcome, or that it did not seriously affect the claimant, particularly if it was not reported in the first instance.¹⁹¹ A lack of sexual harassment expertise and/or gender competence amongst tribunal chairs and panel members is likely to perpetuate such myths and feed into ongoing low rates of successful claims and compensation. Many employment judges are very experienced in dealing with sexual harassment cases. However, to our knowledge there is no systematic mandatory training on handling cases sensitively and in a way that avoids compounding trauma. We recommend that the Employment Tribunal Scotland (ETS) develops presidential guidance on dealing with sexual harassment cases to ensure good practice. Such guidance could mandate training for judges and make training available to representatives, as well as setting out steps to minimise the risk of harm to individuals throughout the tribunal process.

Victim-survivors are also unable to readily access trauma-informed protections, such as anonymity, and other adjustments that would make the process more accessible. The UK Government have maintained that special measures similar to those used in criminal courts, such as the use of screens, remote attendance and the option to give evidence in private,¹⁹² are available within the tribunal.

However, such support is not consistently available across tribunals in Scotland and should be made the default approach for sexual harassment cases. This is particularly urgent given that, since February 2017, employment tribunal decisions have been published online, and that these include the names of claimants and details of their claims.¹⁹³

¹⁹¹ Lockwood G (2008) A legal analysis of sexual harassment employment tribunal cases 1995-2005. *International Journal of Law and Management* 50:6 316–322.

¹⁹² CPS (2021) Special Measures. Crown Prosecution Service Available at: <https://www.cps.gov.uk/legal-guidance/special-measures>.

¹⁹³ House of Commons Women and Equalities Committee (2019) The use of non-disclosure agreements in discrimination cases.

Guidance from the ETC could also encourage the use of judicial mediation, which has been found to be a very effective means of dealing with sensitive issues. This approach, which is distinct from workplace mediation (see Chapter 4.3.1), avoids the airing of evidence in open tribunal and can be significantly less stressful for victim-survivors. It involves mediation with the employer and not with the individual perpetrator.

4.4.2 Remedies at tribunal

The main remedies available to the employment tribunal are to make a declaration that the employer has discriminated, to award compensation for financial loss suffered and damages for ‘injury to feelings’, and to require the employer to take a prescribed action to address the impact that the claim has shown to have had on the individual.¹⁹⁴ Structural remedies have been increasingly difficult to obtain since the Deregulation Act 2015 revoked the power of employment tribunals to make wider recommendations that do not affect the claimant but benefit the wider workforce.

Tribunals are not able to award punitive damages, which contributes to the comparatively low awards available to claimants, although this has also been recommended by the House of Commons Women and Equalities Committee.¹⁹⁵ Instead, compensation is largely determined by tangible loss or prospective loss of earnings, and relatively low levels of compensation for hurt or distress suffered. Such damages for ‘injury to feelings’ are calculated using Vento guidelines, ranging between £900-£49,300 across three bands depending on the seriousness of the case.¹⁹⁶ In 2019/20, the median award at tribunal for sex discrimination was £14,073 in total,¹⁹⁷ a sum which – despite having doubled from £6,498 the previous year¹⁹⁸ – is perhaps unlikely to encourage victim-survivors to endure the risks, costs and stresses of the tribunal or to incentivise employers to prevent harassment. Even if claimants are successful, awards for ‘less serious’ (£900 - £9,900) and ‘serious’ cases

¹⁹⁴ EHRC (2020) Key points about discrimination cases in a work situation. Equality and Human Rights Commission Available at: <https://www.equalityhumanrights.com/en/multipage-guide/key-points-about-discrimination-cases-work-situation>.

¹⁹⁵ Women and Equalities Committee (2018) Sexual harassment in the workplace. House of Commons. Available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72502.htm>.

¹⁹⁶ Clarke B, Simon S (2022) Presidential Guidance Employment Tribunal awards for injury to feelings and psychiatric injury following *De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879 Fifth Addendum to Presidential Guidance Originally Issued on 5 September 2017. Tribunals Judiciary and Employment Tribunals (Scotland). Available at: <https://www.judiciary.uk/wp-content/uploads/2013/08/Vento-bands-presidential-guidance-April-2022-addendum.pdf>.

¹⁹⁷ Ministry of Justice (2020) Employment Tribunal and Employment Tribunal Tables 2019 to 2020. Available at: [Employment_and_EAT_2019-20.ods](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/531113/Employment_and_EAT_2019-20.ods) (live.com)

¹⁹⁸ There is speculation that this trend may have been influenced by the #MeToo movement and shifting social attitudes. However, with the impact of Covid from 2020 onwards, it is not yet possible to draw any conclusions around this. See: Clark I (2020) Employment tribunal award statistics published - 2019/2020. Morton Fraser Lawyers Available at: <https://www.morton-fraser.com/insights/employment-tribunal-award-statistics>.

(£9,900 to £29,600) may not even cover legal costs, with fees for a well-run harassment claim estimated at over £10,000.¹⁹⁹ This could be taken up through presidential guidance regarding sexual harassment cases from the ETS, which could recommend that awards for harassment cases tend towards the middle or upper bands, in recognition of the long-term impacts of sexual harassment and sex discrimination on women's wellbeing, careers and incomes. Such guidance could also mandate training on SSH for employment tribunal judges.

Scottish Government should:

- Replace the employment tribunal with an employment and equality court once relevant powers are devolved to the Scottish Parliament.
- Push UK Government to:
 - Extend the time limits for making a discrimination claim at tribunal to one year
 - Explore the introduction of punitive damages for employers at the employment tribunal
 - Require employers to pay employees' legal costs if the former loses a harassment discrimination case at tribunal.

The Employment Tribunal Scotland should:

- Issue presidential guidance on dealing with sexual harassment cases, including use of Vento guidelines, mandatory training for judges, judicial mediation and minimising harms for women accessing the employment tribunal.
- Adopt special measures, such as those in place for vulnerable witnesses in criminal courts in the UK, as the default approach in sexual harassment cases.

¹⁹⁹ Women and Equalities Committee (2019) The use of non-disclosure agreements in discrimination cases. House of Commons. Available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1720/1720.pdf>.

4.5 REGULATING SEXUAL HARASSMENT

The regulatory regime is the final cog in the system regarding workplace sexual and sexist harassment. Oversight and enforcement are essential elements of an effective process in which women feel able and confident to report SSH, in which perpetrators and employers know what to expect and are held accountable, and in which victim-survivors have recourse to justice. At present, however, this regulatory function is weak. In 2018, the House of Commons Women and Equalities Committee found “the passivity and indifference of regulators in the face of widespread workplace sexual harassment to be not only surprising, but gravely irresponsible.”²⁰⁰

A more radical approach to the regulatory environment regarding sexual and sexist harassment in Scotland is sorely needed, though levers to achieve this are limited. For effective enforcement to take place, all relevant regulators should be resourced and encouraged to undertake proactive oversight of employers’ work to prevent sexual harassment, in addition to the narrow and responsive approach that is currently possible. Regulators must also have the gender expertise required to undertake their work. This section summarises the regulatory landscape with regards to workplace sexual and sexist harassment.

4.5.1 Equality and Human Rights Commission

Sexual harassment and sex discrimination are unlawful under the Equality Act 2010. As such the EHRC, which operates across Great Britain, is the lead regulator in Scotland regarding sexual and sexist harassment. The EHRC is empowered to enforce anti-discrimination legislation, and to pursue strategic anti-discrimination and human rights litigation. Due to budget limitations, the Commission is more likely to intervene or assist in a case than to bring a case of its own accord.²⁰¹ Its enforcement action can require employers to implement preventative measures, such as training programmes or the implementation of anti-harassment strategies. However, since its creation in 2007, the EHRC’s budget has been cut from £70m to under £20m per annum,²⁰² and its original mandate has been curtailed by the UK Government.²⁰³ In recent years, the UK Government has also appointed commissioners who are ambivalent or hostile to understandings of structural discrimination and other aspects of gender equality. There are consequently significant concerns about the ability of the EHRC to fulfil its mandate regarding sexual and sexist harassment, with

²⁰⁰ Women and Equalities Committee (2018) Sexual harassment in the workplace. House of Commons. Available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72502.htm>.

²⁰¹ Blackham A (2017) Employment Discrimination Law in the United Kingdom: Achieving Substantive Equality at Work? *Australian Journal of Labour Law* 30:257–274.

²⁰² EHRC (2022) Business plan 2021 to 2022. Equality and Human Rights Commission Available at: <https://www.equalityhumanrights.com/en/what-we-do/business-plan-2021-2022#budget>.

²⁰³ Government Equalities Office (2012) Building a fairer Britain: Reform of the Equality and Human Rights Commission Response to the Consultation. HM Government. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/85308/EHRC-consultation-response.pdf.

much of the burden of accountability for sexual harassment still relying on individual complainants to take their cases to the employment tribunal.²⁰⁴

4.5.2 Health and safety

The Health and Safety Executive (HSE) is responsible for the regulation and enforcement of workplace health, safety and welfare in the UK. It is also empowered with an inspectorate that has enforcement and investigatory functions. However, it has hitherto declined to tackle or investigate sexual harassment, despite the manifest harm it causes to women's health, safety and wellbeing at work (see Chapter 2.3). A health and safety approach to sexual harassment is currently taken in other jurisdictions. WorkSafe, New Zealand's primary workplace health and safety regulator, has a strategic focus on preventing harm and considers sexual harassment to fall under its remit. As such, it provides advice and guidance for employers on prevention and response, including an example policy, as well as support for workers.²⁰⁵ Both the European Agency for Safety and Health at Work and the Occupational Safety and Health Administration (OSHA) of the US Department of Labour, have a stronger focus on sexual harassment than health and safety bodies in the UK.²⁰⁶



I am continually disappointed by the way that an organisation as big as [X] deals with those complaints, and the colleagues and unfortunately also fellow reps who maybe don't always treat it with the importance or the relevance you know. Some of the language I come across quite regularly is "oh this is quite low level stuff" when actually it's not.

FOCUS GROUP WITH WOMEN IN LOW PAID AND/ OR PRECARIOUS WORK

There is a real opportunity for sexual and sexist harassment to be reframed and understood as a health and safety issue in the UK. Co-regulation by the Health and Safety Executive (HSE) could boost the political weight afforded to the prevention and remedy of SSH and increase traction with employers. The HSE does claim to address "the issue of work-related violence," defining this as "any incident in which a person is abused, threatened or assaulted in circumstances relating to their work,"

²⁰⁴ Blackham A (2017) Employment Discrimination Law in the United Kingdom: Achieving Substantive Equality at Work? Australian Journal of Labour Law 30:257–274.

²⁰⁵ Worksafe (2022) Sexual harassment. New Zealand Government Available at: <https://www.worksafe.govt.nz/topic-and-industry/sexual-harassment>.

²⁰⁶ EU OSHA (2021) Sexual Harassment at Work. European Agency for Safety and Health at Work Available at: https://osha.europa.eu/sites/default/files/EU-OSHA_SexualHarassment_update19.pdf.

and signposts to materials on preventing workplace harassment and violence. In this context, its current failure to engage with sexual harassment has been described as a blindspot and, together with the comparative lack of power and resources of the EHRC, as creating a 'regulatory vacuum'.²⁰⁷

The Women and Equalities Committee inquiry into workplace sexual harassment recommended that the UK Government require the HSE, along with all other regulators,²⁰⁸ to set out plans to ensure that employers are protecting workers from sexual harassment.²⁰⁹ The UK Government rejected this recommendation, but stated that HSE will improve its advice and signposting regarding sexual harassment, and strengthen liaison with the EHRC with a view to promoting best practice.²¹⁰ At present the work of the HSE is not well gendered and intersectional gender mainstreaming should be integrated throughout its operations.

Although health and safety law is largely reserved,²¹¹ there is some Scotland-specific activity through the HSE's partnership working. HSE is a member of PHASS, a voluntary partnership with Scottish Government, NHS Health Scotland, health and safety professionals, trade unions, business, the voluntary sector and local authorities.²¹² Public Health Scotland also delivers the workplace guidance and accreditation programme Healthy Working Lives. At present, this none of this work references sexual harassment or is well gendered.

Scottish Government should:

- Assess what it can do to ensure sexual harassment is treated as a health and safety concern in Scotland.

The Health and Safety Executive should:

- Include the prevention and regulation of sexual harassment as a strategic priority and integrate gender mainstreaming throughout its operations.

²⁰⁷ Hazards (2019) Hands off: Time to take sexual harassment at work seriously and change the law. Hazards Magazine 146 Available at: <https://www.hazards.org/violence/handsoff.htm>.

²⁰⁸ This includes all sectoral inspectorates and professional bodies.

²⁰⁹ Women and Equalities Committee (2018) Sexual harassment in the workplace. House of Commons. Available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72502.htm>.

²¹⁰ UK Government (2018) Sexual harassment in the workplace: Government Response to the Committee's Fifth Report of Session 2017–19. House of Commons. Available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1801/180102.htm>.

²¹¹ Criminal law is devolved to the Scottish Parliament.

²¹² HSE (2022) About HSE in Scotland. Health and Safety Executive Available at: <https://www.hse.gov.uk/scotland/aboutscotland.htm>.

4.5.3 Acas

The Advisory, Conciliation and Arbitration Service (Acas) is a non-departmental public body of the UK Government, responsible for employment relations. It runs dispute resolution services and is empowered to hand down decisions within its mandate, and it must be notified in the first instance regarding claims at the employment tribunal. It is not a regulator, but as an independent body with a critical role in the course of a sexual or sexist harassment case, it holds considerable power over women's lives. It is, however, overstretched and underfunded,²¹³ and this has a clear impact on the service it provides. A recent Employment Lawyers Association survey found that the vast majority of lawyers see the early conciliation process as 'hit or miss', due in large part to staff inconsistencies.²¹⁴ This is the baseline against which an almost complete lack of gender competence undermines Acas's ability to provide the gender-sensitive, intersectional and trauma-informed advice and conciliation service that victim-survivors of sexual harassment need.

Acas should review all relevant policies, codes of practice and training programmes through a gendered lens, to embed the gendered nature of sexual harassment throughout its work, ensure they are equipped to support victim-survivors, and pivot its decision-making towards primary prevention. However, leverage in Scotland is limited, with Acas accountable to the UK Parliament and without an operationally distinct arm in Scotland.

Acas should:

- Refresh all relevant policies, codes of practice and training programmes through a gender lens and with a view to primary prevention of sexual harassment

4.5.4 Scottish Human Rights Commission

There may also be a role for the Scottish Human Rights Commission to play in developing protection and oversight for violence against women as a human rights violation, including in the workplace. Whilst the division of competence regarding human rights and equality issues is technical and strictly agreed between the SHRC and the Equality and Human Rights Commission, the forthcoming incorporation of

²¹³ Jimmy Nicholls (2017) UK employers at risk after tribunal fees quashed. ICSA Available at: UK employers at risk after tribunal fees quashed.

²¹⁴ Sole J, Glynn QC C (2021) Employment Tribunals - At Breaking Point? New Law Journal 7952. Available at: <https://www.newlawjournal.co.uk/content/employment-tribunals-at-breaking-point->

CEDAW²¹⁵ into Scots law and potential new legislation around misogynistic harassment²¹⁶ underscore the relevance of sexual harassment to the SHRC's work. The SHRC also has stronger gender competence than other regulators operating in Scotland.

In 2020, the First Minister's National Advisory Council on Women and Girls recommended that the SHRC appoint a Commissioner for Women's Rights, within the offices of whom a focus on sexual harassment could potentially sit. In March 2022, however, the SHRC published a paper outlining that this recommendation would not be compatible with its remit as a National Human Rights Institution accredited with 'A status'.²¹⁷ We therefore recommend that the SHRC develops a strand of work on preventing violence against women, including sexist and sexual harassment, as a core human rights issue in Scotland. Additional funding should be made available by Scottish Government as appropriate.

Scottish Human Right Commission should:

- Develop internal expertise and public advocacy specific to women's human rights, including the prevention of violence against women as a human rights issue, and on sexual harassment in the workplace within this.

²¹⁵ UN General Assembly (1979) Convention on the Elimination of All Forms of Discrimination against Women Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979. United Nations. Available at: <https://www.ohchr.org/sites/default/files/cedaw.pdf>.

²¹⁶ Kennedy QC H (2022) Misogyny - A Human Rights Issue. Scottish Government. Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/independentreport/2022/03/misogyny-human-rights-issue/documents/misogyny-human-rights-issue/misogyny-human-rights-issue/govscot%3Adocument/misogyny-human-rights-issue.pdf>.

²¹⁷ Scottish Human Rights Commission (2022) Position Paper: Women's Commissioner Recommendation. Available at: <https://www.scottishhumanrights.com/media/2300/nacwg-position-paper-17032022.pdf>

5. CONCLUSION AND RECOMMENDATIONS

The view of experts²¹⁸ in Scotland is clear: policymakers and employers must do all that they can to tackle endemic sexual and sexist harassment in our workplaces. Women who have experienced sexual harassment²¹⁹ have told us the impact of this on their working and personal lives, and suggested solutions to address the scale, nature and unacceptable normalisation of sexual and sexist harassment. These stories and reflections are supported by a growing body of evidence, and proliferation of voices and analysis in the UK calling for action to be taken. Over half of women have experienced sexual harassment in the workplace,²²⁰ with disabled women, women of colour, Muslim women, young women, LGBT women, and women in precarious employment or on low incomes experiencing greater rates and/or harassment that is shaped by further discrimination.

Sexual harassment is a form of violence against women and a violation of women's human rights. It is a clear and significant risk to women's health, safety and wellbeing in the workplace. It is not, however, generally understood as such by employers or the public. Scottish Government and other public bodies must work to reframe sexual harassment as an issue of women's equality that is rooted in sexism and sits within the spectrum of violence against women and girls. This will enable effective solutions to be developed. We recommend a suite of actions that are targeted across the areas of prevention, reporting mechanisms, investigation and decision-making, the employment tribunal and the regulatory landscape.

²¹⁸ Experts by experience via Engender's survey, focus group and literature review, and experts in respective professional fields including employment and discrimination law, human resources, violence against women organisations and the third sector.

²¹⁹ At our focus groups with disabled women, women of colour, Muslim women, LBT women, young women and women on low incomes or in precarious work.

²²⁰ TUC (2016) Still Just a Bit of Banter? Sexual Harassment in the workplace in 2016. Available at: <https://www.tuc.org.uk/sites/default/files/SexualHarassmentreport2016.pdf>.

SUMMARY OF RECOMMENDATIONS

PREVENTION

Scottish Government should:

1. Develop a gendered strategy on working with public bodies and other employers to prevent workplace sexual and sexist harassment, in co-production with women's organisations.
2. Undertake a review of national policy frameworks to consider how they can be refreshed to prevent sexual harassment and sexist behaviours.
3. Introduce a duty on preventing sexual harassment under the Scotland-specific regulations of the public sector equality duty, including the requirement to develop a standalone policy on sexual harassment.
4. Explore providing legal protection for volunteers from workplace sexual harassment through devolved powers relating to justice and violence against women.
5. Endorse and implement our model sexual harassment policy and encourage take up by employers by all possible means, including through procurement policy.
6. Undertake rigorous evaluation of the gaps between policy and practice regarding current workplace sexual and sexist harassment policy, including a focus on gaps in coverage for minoritised women.
7. Fund development and delivery of training for employers on sexism and sexual harassment by a specialist body or bodies.
8. Produce a public awareness campaign addressing different forms of sexual harassment, including workplace harassment.
9. Develop best-practice guidance on anti-sexist practices and primary prevention of sexual and sexist harassment in the workplace, and integrate this into its work on the labour market, including the Fair Work Framework and Fair Work First.

REPORTING SYSTEMS

Scottish Government should:

10. Create and fund an independent specialist body to receive sexual harassment complaints, including anonymous complaints, offer advice, investigate patterns of concern and make structural recommendations for specific employers.

11. Resource the Scottish Women's Rights Centre to develop and deliver FollowIt App as a tool for women to record experiences of sexual harassment.
12. Explore sustainable funding for and with violence against women organisations to provide specialist advocacy support for women that experience sexual harassment in the workplace.

INVESTIGATING AND RESPONDING TO HARASSMENT

Scottish Government should:

13. Undertake research to build the evidence base on best practice around employer responses to sexist and sexual harassment complaints, including informal responses, investigations, preventing victimisation and decision-making.
14. Encourage employers to extend the right to be accompanied to disciplinary investigation meetings regarding sexual and sexist harassment and to expand the definition of 'companion' in these circumstances.
15. Push for the UK Government to legislate to ensure non-disclosure agreements do not restrict people's access to advice or support.

Acas should:

16. Offer guidance on how to determine whether behaviour constitutes gross misconduct in sexual and sexist harassment cases, taking account of all relevant circumstances including the misuse of power.

EMPLOYMENT TRIBUNAL

Scottish Government should:

17. Replace the employment tribunal with an employment and equality court once relevant powers are devolved to the Scottish Parliament.
18. Push UK Government to:
 - Extend the time limits for making a discrimination claim at tribunal to one year
 - Explore the introduction of punitive damages for employers at the employment tribunal
 - Require employers to pay employees' legal costs if the former loses a harassment discrimination case at tribunal.

The Employment Tribunal Scotland should:

- 19.** Issue presidential guidance on dealing with sexual harassment cases, including use of Vento guidelines, mandatory training for judges, judicial mediation and minimising harms for women accessing the employment tribunal.
- 20.** Adopt special measures, such as those in place for vulnerable witnesses in criminal courts in the UK, as the default approach in sexual harassment cases.

REGULATING EMPLOYERS

Scottish Government should:

- 21.** Assess what it can do to ensure sexual harassment is treated as a health and safety concern in Scotland.

Scottish and UK Governments should:

- 22.** Ensure that regulatory bodies are adequately resourced and have the gender expertise required to undertake their work.

The Health and Safety Executive should:

- 23.** Include the prevention and regulation of sexual harassment as a strategic priority and integrate gender mainstreaming throughout its operations.

Acas should:

- 24.** Refresh all relevant policies, guidance, codes of practice and training programmes through a gender lens and with a view to primary prevention of sexual harassment.

Scottish Human Rights Commission should:

- 25.** Develop internal expertise and public advocacy specific to women's human rights, including the prevention of violence against women.



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