

ACAS RESPONSE TO WOMEN AND EQUALITIES SELECT COMMITTEE INQUIRY INTO SEXUAL HARASSMENT IN THE WORKPLACE

Introduction

Acas is pleased to respond to the Select Committee's inquiry into sexual harassment in the workplace.

It is becoming increasingly apparent that sexual harassment has long been a feature of the workplace in this country. The recent publicity on the subject and the allegations made have begun to shine a light on some of the practices that have until now been largely hidden. The Committee's inquiry is therefore both welcome and timely. As this issue has risen up the public agenda, Acas has already noticed an increase of around 20% in requests for our advice and training on not only sexual harassment but also, equality and diversity and workplace bullying in general over recent months.

The Government is responsible for setting the legal framework for countering sexual harassment in the workplace and there are already a number of provisions currently in effect. It is Acas' role, as an impartial, independent non-governmental organization charged with the statutory duty to improve employment relations, to help employers and employees understand that legal framework and how it applies to them. Acas also has a role in relation to outlining and promoting best practice and of course, resolving disputes that might occur on the issue.

Acas Guidance

Acas has long provided guidance on sex discrimination and the related issue of sexual harassment and bullying at work. Following the high profile sexual harassment cases reported in the media, Acas recently updated its specific [guidance on sexual harassment](#). The guidance provides a detailed explanation of what sexual harassment is and outlines the various forms it can take in the workplace ranging from written or verbal comments of a sexual nature to sexual assault. In this latter case the guidance makes clear that this would be regarded as a criminal matter. Acas guidance also provides advice on handling historical allegations; emphasises the need to handle complaints in line with existing policies, procedures and the Acas Discipline and Grievance Code of Practice, including the need for investigations and importantly sets out what individuals can do if they feel they have been sexually harassed.

Since it went live on the Acas' website in the middle of November 2017, the guidance has been viewed some 23,300 times. The Committee may be interested to note that nearly 62% of the visits are from women (cf 56% for our web pages in general). We have also looked at the age distribution of visitors to the guidance on sexual harassment, where feasible, and found that just over half of visits are from people in the 35 – 54 age bracket (cf 45% for visits to our other guidance). These figures, although interesting, should not be read of course as a proxy for data on who experiences sexual harassment in the workplace.

Although the guidance has been live a relatively short time we are conscious that the demand for constructive solutions on the issue of sexual harassment is growing

and are therefore actively looking at how the guidance can be updated and strengthened. To this end we will also be holding a stakeholder event to consider our guidance and how it can be improved. The event will be held on 25 April in London and members of the committee are welcome to attend.

From the information we have been able to obtain so far we will be looking to extend our guidance to focus more on creating a positive culture around gendered behaviours and further clarify the role and responsibilities of management and employers in dealing with sexual harassment in the workplace. We will also be looking to provide more guidance on dealing with historical cases which our advisors have found is an issue of particular concern to HR professionals.

The question of creating a workplace culture around positive behaviours is particularly salient when it comes to sexual harassment. Policies and procedures have an important role to play in the workplace and we see them as a key area for Acas to support employers on. But they are only part of the solution. Our experience indicates that creating the right workplace culture which encourages positive behaviours, and allows for open dialogue is crucial. Acas' advisory and training services described next are part of the support we offer employers and employees in this respect.

Acas advisory work and training

Although Acas is best known for its dispute resolution work it also has an important advisory role, helping individuals and organisations understand their rights and responsibilities under the law and promoting good working practices and relationships. This help takes a number of forms including a national telephone helpline, advisory visits to organisations, tailored training and facilitated workshops with groups of employees that aim to get an understanding of the types of sexual harassment staff might be facing, and developing policies and practices to address this proactively.

In recent months our advisors have been dealing with enquiries about sexual harassment from a range of organisations across a number of sectors seeking in depth support in addressing problems associated with tackling sexual harassment. Acas also currently runs a series of half day course around the country offering training in dealing with unacceptable behaviours at work and we are in the process of updating this course to include a section on sexual harassment.

In addition to training Acas advisors have also spoken at a number of conferences and seminars on sexual harassment recently drawing attention to our guidance on the subject and highlighting the importance of creating a workplace culture based on positive behaviours as a key to tackling workplace sexual harassment.

Non-disclosure agreements

We note that one of the issues the Committee will be looking at is the use of non-disclosure agreements or confidentiality clauses in sexual harassment cases. Acas offers guidance on the use of such clauses specifically in settlement agreements.
Link

It is common for settlement agreements that are reached to resolve a workplace dispute to contain a confidentiality clause. In principle, this is a legitimate business practice that can help prevent the release of sensitive company or commercial information, or keep details of the agreement itself, such as the amount of financial compensation, confidential.

However, such clauses should not and indeed cannot lawfully be used to prevent a worker raising legitimate whistleblowing concerns with either their employer or a regulatory body (Section 43j(1) ERA). Acas emphasises this point in its guidance on settlement agreements, stating that:

Settlement agreements often contain clauses relating to confidentiality whereby the parties agree to keep the agreement itself confidential and not disclose its details to third parties... Such confidentiality clauses are voluntary and are a matter for the parties to agree during the course of the settlement discussions.

It is important to note that any part of the agreement which is aimed at keeping the agreement confidential will not prevent the individual from making a protected disclosure under whistleblowing legislation, as any provision which attempts to prevent protected disclosures is unenforceable.

Confidentiality, or non-disclosure, clauses are also often agreed by parties in Acas conciliated settlements (known as COT3 settlements) and agreed during early conciliation and conciliation in employment tribunal cases. Again, in principle such clauses are an acceptable way for an employer to protect legitimate business interests, as well as to keep the terms of the settlement itself confidential.

Where a confidentiality clause is proposed in conciliation discussions, Acas' policy is for our conciliators to make the parties aware of the limitations, including that any such clause would not prevent a worker from making a "protected disclosure" (ERA 96 s43J(1)). If an employer were to insist on including a confidentiality clause that did purport to prevent a protected disclosure, then under Acas' policy, the conciliator must withdraw from conciliation.

Acas has developed the following sample wording which can be used in COT3s to make the point that protected disclosures are excluded from the scope of any confidentiality clause:

"For the avoidance of doubt, this confidentiality clause does not affect or otherwise prevent the claimant from making a public interest disclosure under the Public Interest Disclosure Act 1998(PIDA)."

We hope this submission is helpful to the Committee. If you would like any further information about Acas' work in this areas please do not hesitate to let us know.

Acas

March 2018