

The Worker Protection (Amendment of the Equality Act 2010): The public sector equality duty, changing expectations and the impact on Regulators

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Setting the scene

Changing landscape

- Cultural changes
 - Increased status of women in society
 - Changes in police practices
 - Reduced stigma for survivors
- High profile campaigns and supportive media commentary
 - #MeToo
 - #TimesUp
 - #ReclaimTheseStreets
 - #ThisIsNotWorking

What is 'sexual safety'?

- The **CQC** definition
- “being and feeling **psychologically and physically safe**, including being free of, and feeling safe from, behaviour of a sexual nature that is unwanted, or makes another person feel uncomfortable, afraid or unsafe.”
- Health and Social Care Act 2008 (Regulated Activities) relating to person-centred care ([Regulation 9](#)), safe care and treatment ([Regulation 12](#)), and good governance ([Regulation 17](#))

Equality Act 2010: overview

- Prohibits discrimination and harassment because of a protected characteristic
- Also prohibits victimisation on grounds of having brought a claim or complaint of discrimination or harassment on grounds of a protected characteristic
- Protected characteristics: race, sex, age, disability, sexual orientation, religion or belief, gender reassignment, marriage and civil partnership, pregnancy and maternity
- Imposes equality duty on public sector employers

Harassment

- Person A harasses Person B if they engage in unwanted conduct related to a relevant protected characteristic which has the purpose or effect of either:
 - Violating Person B's dignity, or
 - Creating an intimidating, hostile, degrading, humiliating or offensive environment for Person B.
- Person B's perception and whether it is reasonable for the conduct to have the effect it did on Person B will be considered – but is not a decisive factor (*Ali v Heathrow (EAT) (2022)*)
- Employer liable unless can show that they have taken all reasonable steps to prevent the harassment – training alone may not be enough - *Allay (UK) Ltd v Gehlen (EAT)(2021)*

Unwanted conduct

- A single incident can amount to sexual harassment - *Reed v Stedman [EAT, 1999]*
- Express objection not required - *Insitu Cleaning Co v Heads [1995]*
- Sexual conduct that has been welcomed in the past can become unwanted - *A v Chief Constable of West Midlands Police [2014]*
- Banter? *Smith v Renrod Ltd [2015]* and *Munchkins Restaurant Ltd and another v Karmazyn and others [2009]*
- It does not have to be directed at the claimant - *Moonsar v Fiveways Express Transport Ltd [2004]*
- Seniority of harasser can be a relevant factor - *Majid v AA Solicitors Ltd (t/a AA Solicitors) and another [2013]*

Sexual harassment

■ Sexual harassment occurs when:

- A engages in **unwanted conduct of a sexual nature**, AND,
- The conduct has the **purpose or effect** of either violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

■ Less favourable treatment for rejecting or submitting to harassment occurs when:

- **A or another person** engages in either **unwanted conduct of a sexual nature** or **unwanted conduct that is related to gender reassignment or sex**.
- The conduct has the **purpose or effect** of either violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- Because of B's rejection of or submission to the conduct, **A treats B less favourably** than A would treat B if B had not rejected or submitted to the conduct

Sexual nature

- Conduct 'of a sexual nature' includes a wide range of behaviour, such as:
 - sexual comments or jokes
 - displaying sexually graphic pictures, posters or photographs
 - suggestive looks, staring or leering
 - propositions and sexual advances
 - making promises in return for sexual favours
 - sexual gestures
 - intrusive questions about a person's private or sex life or a person discussing their own sex life
 - sexual posts or contact on social media
 - spreading sexual rumours about a person
 - sending sexually explicit emails or text messages
 - unwelcome touching, hugging, massaging or kissing
- Sexual interaction that is invited, mutual or consensual is not sexual harassment because it is not unwanted.

Sexual harassment – preventative duty

- 26 October 2024 - new positive duty on **employers** to take 'reasonable steps' to prevent sexual harassment
- Should an employer fail to comply with this duty, they may be the subject of:
 - enforcement action by the EHRC (which does not depend on an incident of sexual harassment having taken place); and/or,
 - an order by an employment tribunal to uplift the compensation awarded against them in a successful sexual harassment claim under the *Equality Act 2010* by up to 25%
- Actions recommended to employers in the EHRC's guidance (and the [accompanying eight-step guide](#))

Sexual harassment – preventative duty

- Applies to all employers – no minimum number of employees required
- Applies across sectors – they can learn from each other – NHS and particularly ambulance employers are leading work in this area
- Private and public sector employers are grappling with this issue – public have the additional PSED to consider

NHS Sexual Safety Charter

■ NHS Sexual safety in healthcare – organisational charter

- 4 September 2023

- [NHS England » Sexual safety in healthcare – organisational charter](#)

■ NHS Confederation’s Health and Care Women Leaders Network’s letter to Chairs and CEOs of Integrated Care Boards and provider trusts

- Encouraged to sign-up and adopt pledges

- 13 October 2023

- [51470_hcwlIn-sexual-safety-charter-letter-final.pdf \(emlfiles4.com\)](#)

■ NHS Staff Survey - New question added in 2023:

“In the last 12 months, how many times have you been the target of unwanted behaviour of a sexual nature in the workplace? This may include offensive or inappropriate sexualised conversation (including jokes) touching or assault.”

Impact on employers

■ Preparatory work

- Policies – expand harassment or a specific sexual safety policy
- Campaigns
- Reporting channels
- Risk assessments
- Training for employees
 - Acceptable behaviour
 - Bystander intervention

■ Tricky areas

- What do we mean by zero tolerance
- How transparent can the process be
- Support for survivors and alleged perpetrators
- Information about sanctions
- Transfer of data regarding perpetrator

Impact on employers

- Increase in sexual safety complaints
 - Historical complaints are now being raised
- Focus on harassment generally
 - Can they apply the tools here to other forms of harassment?
- Likely to be an increase in claims

Impact on regulators

Public sector equality duty

- Applies to qualifications bodies and regulators
- Duty is a legal obligation
- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Equality Act
- Advance equality of opportunity between people who share a protected characteristic and those who do not
- Foster good relations between people who share a protected characteristic and those who do not
- Requires public bodies to be open about
 - information on which decisions are based
 - what you are seeking to achieve
 - results

Public sector equality duty

- Requirement to report on equality issues
 - publish equality objectives at least every four years (all organisations)
 - publish information annually to demonstrate compliance with the general equality duty (all organisations)
 - publish information relating to their employees and others affected by their policies (such as service users) (where 150 or more staff)
 - publish gender pay gap data every year (where 250 or more staff)
- All information must be published in a way that is accessible to the public
- Aim is a “light touch” approach
- Key resources
 - [PSED: government guidance](#)
 - [PSED: EHRC statutory code of practice](#)
 - [PSED: EHRC technical guidance](#)

Public sector equality duty

- Compliance enforce by the EHRC
- The EHRC can:
 - assess your organisation's compliance with the duty
 - require your organisation to remedy the failure to comply within 28 days
 - apply for a court order if you still fail to comply
- The general duty can also be enforced by judicial review
- Could this be where regulators will see the PSED bite, i.e. challenges to an actual or perceived failure to uphold standards?

Impact on regulators

- Regulators as employers
- Changing societal approach to sexual harassment, the NHS sexual safety charter and employer's proactive duty to prevent sexual harassment =
 - Increase in referrals to regulators and qualifications bodies
 - Increase in references to historical allegations – how and when to deal with those
 - Important to manage expectations
 - Changes in approach to initial assessments / triage
 - Changes to how seriousness determined

Expectations on regulators?

- Setting the standard for all with their approach to their own employees?
- Setting the standard, culture and tone for the industry they oversee?
- Duty of care towards practitioners referred to them before the matter is proved
- Increased number of referrals – how will this impact on timescales for processes/hearings?
- Ensuring panels' understand what sexual misconduct is and how this impacts fitness to practise

Good medical practice

- [Good medical practice - professional standards – GMC](#) - which came into effect on 30 January 2024
- Sets out the standards of patient care and professional behaviour expected of all doctors in the UK, across all specialities, career stages and sectors
- Contributing to a positive working and training environment
 - Paragraph 57
 - “You must not act in a sexual way towards colleagues with the effect or purpose of causing offence, embarrassment, humiliation or distress. What we mean by acting “in a sexual way” can include – but isn’t limited to – verbal or written comments, displaying or sharing images, as well as unwelcome physical contact. You must follow our more detailed guidance on [Maintaining personal and professional boundaries](#).”

Good medical practice 2

■ Contributing to a positive working and training environment

■ Paragraph 58

■ “If you witness any of the behaviours described in paragraph 56 and 57 you should act, taking account of the specific circumstances. For example, you could:

- Check in and offer support to anyone targeted or affected by the behaviour, and/or let them know that you feel that the behaviour you witnessed is unacceptable;
- Challenge the behaviour by speaking to the person responsible – either at the time, if safe to do so, or at an appropriate time and place
- Speak to a colleague and/or consider reporting the behaviour in line with your workplace policy and our more detailed guidance on Raising and acting on concerns about patient safety. Before you report the behaviour you witnessed, try and make sure that the person who was targeted is aware of, and supports, your intention to report it. We recognise some people may find it harder than others to speak up but everyone has a responsibility – to themselves and their colleagues – to do something to prevent these behaviours continuing and contributing to a negative and unsafe environment.”

Good medical practice 3

- Maintaining personal and professional boundaries
 - Professional and respectful working relationships between colleagues are central to positive working cultures. It is essential that individuals feel safe and respected in their workplaces, that they feel able to speak up when they experience or witness negative behaviours, and that they are supported to do so.
- Personal relationships with colleagues
- Inappropriate sexual behaviours towards patients and colleagues
- Sexual behaviours towards colleagues

Good medical practice 4

- Identifying and tackling sexual misconduct
- [Identifying and tackling sexual misconduct - ethical topic - GMC \(gmc-uk.org\)](#)
 - Sexual misconduct in healthcare
 - Is always unacceptable and can be a criminal offence.
 - Can have a devastating impact on individuals, teams a patient safety
- Advice on:
 - How to identify behaviours, cultures and norms which may lead to sexual misconduct
 - How to make sure appropriate boundaries between doctors, patients, colleagues and students are maintained
 - Signposts to help and support for anyone affected by sexual misconduct in the workplace, including how to speak up and raise concerns
- Sexual boundaries between colleagues
- Speaking up, supporting others and doctors duty to notify
- How professional standard relate to the fitness to practise process

Seriousness

- Concept of seriousness is used in two main ways in FtP processes across health regulators; to help define misconduct itself and to place a particular misconduct on a spectrum of seriousness to determine an appropriate sanction
 - extent or risk of harm
 - registrant engagement level
 - registrant's attitudinal issues
 - environmental factors
 - whether the misconduct took place at work or social setting.
- Consistency amongst regulators – how is this achieved?

Seriousness

- Seriousness regarding sexual misconduct often features more extensive consideration of harm than other forms of misconduct, and victim impact statements were often included within the case determinations

- Harms explored
 - physical harm,
 - emotional and psychiatric harm to the victims
 - damage to interpersonal relationships including with colleagues,
 - to trust, including the public's trust in professions and organisations

- Mitigating factors

How do regulators determine seriousness?

■ HCPC

[Fitness to Practise concerns relating to sexual misconduct 2023-24 | The HCPC](#)

■ NMC

[Making decisions on sexual misconduct - The Nursing and Midwifery Council](#)

[How we determine seriousness - The Nursing and Midwifery Council](#)

- “Sexual misconduct can have a profound and long-lasting impact, on people, including causing physical, emotional and psychological harm. Acts of sexual misconduct directly conflict with the standards and values set out in the Code.
- Sexual misconduct is likely to be serious enough to impair fitness to practise whether the conduct takes place in professional practice or outside professional practice. Sexual misconduct poses risks both to people receiving care and colleagues and can seriously undermine public trust and confidence in our professions.”
- When a concern is raised with us, and there's evidence that a professional on the register has engaged in harassing, discriminatory or victimising behaviours, we'll always thoroughly investigate, taking into account our professional standards and the aims of the public sector equality duty.

How do regulators determine seriousness?

■ GMC

[How we make decisions - information for doctors under investigation - GMC](#)

- Page 5 of Good Medical Practice – heading “How the professional standards relate to our fitness to practise process”
- The “five year rule” - [Guidance for decision makers on the five-year rule \(external\)](#)
- *“19. In some cases, the allegations about a doctor are so serious that, if proven, they are likely to result in us taking action on the doctor’s registration. These types of case tend to fall within seven main headings:*
 - *a. sexual assault or indecency*
 - *b. sexual or improper emotional relationships with a patient or someone close to them*
 - *c. violence*
 - *d. dishonesty*
 - *e. unlawfully discriminating in relation to characteristics protected by law*
 - *f. knowingly practising without a licence*
 - *g. gross negligence or recklessness about a risk of serious harm to patients.”*

Risks

- A regulator's approach to sexual misconduct allegations could result in claims / challenges
 - Increase in judicial reviews?

- Common themes / allegations that we routinely see in claims and threatened action against regulators include:
 - Unconscious and conscious bias
 - Delay
 - Lack of transparency
 - Lack of communication
 - Failing to deal with complaints
 - Lack of empathy
 - Failing to acknowledge any wrong doing

What can we do to address these risks?

- Provide clarity on the process from the outset:
 - Why are you/are you not investigating the concern
 - What information is this based on?
 - What is the process being followed?
 - What is expected of the individual and what should they expect from you?
 - What are the usual timeframes?
- Provide updates:
 - If the process is taking longer than expected, tell them and explain why
 - Manage expectations
 - Inform them of the progress you have made

Historic allegations

- Should regulators apply a limitation period for referrals? i.e. GMC's five year rule
- With the focus on zero tolerance, more people are coming forward about historical sexual misconduct
- Difficulties in collecting historic evidence
 - Relevant witnesses (perpetrator, complainant, colleagues) may have left
 - Quality of any evidence deteriorates over time
- Do the regulators have a stance on how to address this issue?

Note for readers: April 2026

- Capsticks note that there will be a requirement on employers to take 'all reasonable steps' to prevent sexual harassment and further protections in respect of third party harassment later this year. The law, particularly as to what amounts to 'all reasonable steps' will likely be clarified over the coming months. Please check the latest position.

Panel discussion

Questions and Close