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SEX DISCRIMINATION LAW REVIEW

January 2018

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We would like to thank all those who submitted evidence to the Review. The diverse range of individuals and organisations who have contributed have greatly enriched the panel's discussions and the findings of this final report.

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About the panel and this report

We are grateful to the Panel for their invaluable contribution to this Report. Without their expertise and insights the Review would not have been possible. Inevitably, not all panelists agree with or endorse each and every one of the final recommendations of the report and so this report should not be read as a representation of the views of any one member of the Panel or their organisations.

The Equality Act 2010 applies in England, Wales and Scotland. The devolved administrations also have some specific equality provisions. The Report has focused on the Equality Act although some specific mention of the situation in the areas of the devolved administrations is also discussed. The situation in Northern Ireland is dealt with separately in Chapter 7.

Panel Members



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Chair of the Sex Discrimination Law Review

Dame Laura Cox DBE served as a High Court Judge from 2002 to 2016. Previously, she was the Head of Chambers at Cloisters where she specialised, wrote and lectured in equality and employment law. She was appointed as Queen's Counsel in 1994 and appeared in many leading sex discrimination cases in both domestic and European courts. She also chaired the Bar Council Sex Discrimination Committee and, subsequently, the Equality Policy Committee overseeing the implementation of the Equality Code for the Bar. For 15 years Laura also served as the British member of the Committee of Independent Experts at the International Labour Organisation, monitoring ILO Member States' compliance with international labour and equality standards, with particular emphasis on the 1951 Equal Remuneration Convention. She was elected as the Vice President of the United Kingdom Association of Women Judges from 2013-2016 and is currently Honorary President of the Association of Women Barristers



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EXECUTIVE SUMMARY

Background and Context

In 2018, the centenary year of the first women's suffrage legislation, much progress has been made towards gender equality but much remains to be done. The gender pay gap remains stubborn, violence against women and girls is endemic, and access to justice is limited.

It is more than seven years since the landmark Equality Act 2010. Supported by the generosity of many private donations from members, supporters and organisations the Fawcett Society brought together a panel of legal and policy experts, following the Brexit referendum decision, to ask: is sex discrimination law in the UK fit for purpose?

Brexit

UK women have benefitted significantly from our membership of the European Union (EU), yet women are sorely underrepresented in the Brexit negotiating process. Given this under-representation, it is perhaps not a surprise that women have been missing from the Government's agenda on Brexit.

The EU has acted as a protective "backstop" on equality and human rights law in the UK, including a freestanding right to non-discrimination through Article 21 of the EU's Charter of Fundamental Rights. **We recommend that a new constitutional right to equality should be introduced to provide a similar level of protection.** Such a right would operate similarly to the rights protected by the Human Rights Act, providing a standard against which laws and state actions could be tested.

The European Union (Withdrawal) Bill has been introduced to Parliament with the stated aim of incorporating EU law into UK law so that our statute book continues to function. But **the current wording of the Bill leaves equality law, including the Equality Acts 2010 and 2006, open to significant changes** without substantial parliamentary scrutiny. This must be amended, with the acts excluded, as the Human Rights Act 1998 is currently.

Similarly, the Bill does not reflect the Prime Minister's commitment to "ensure that workers' rights are fully protected and maintained". Without the backstop of the EU, powers given by the Bill could curtail rights protected in the Working Time Directive, the Parental Leave Directive, and part-time and agency workers' rights. **We should limit the use of Ministerial powers conferred by the European Union (Withdrawal) Bill so that the powers cannot be used to substantively amend employment law in the UK.**

Brexit also provides **an opportunity to go beyond what is permitted by EU law** in order to further gender equality, including by permitting further positive action, and reforming procurement rules to enable more specialist women's services such as refuges to secure public contracts to deliver services.

Leaving the EU will impact legislation and policy on domestic abuse and violence against women and girls (VAWG). The Lisbon Treaty has harmonised police co-operation on issues like trafficking and EU membership has strengthened victims' rights. EU funding supports VAWG services and research in the UK. These must be safeguarded, through **unilaterally recognising European Protection Orders and prioritising cross-border VAWG protection, co-operation and funding** throughout negotiations.

Women in the Workplace

Pay

Women remain consistently disadvantaged in the workplace. The gender pay gap varies significantly across women's working lives and for women with different characteristics. Its causes are complex and varied, but the gap is stubbornly slow in closing.

By April 2018 all organisations employing over 250 people will have to report data on their gender pay gap for the first time. The new requirements are an important step forward, but proper enforcement is essential if the regulations are to have impact. **Civil penalties for non-compliance with gender pay gap reporting should be introduced** which could be issued without the need for extensive enforcement work in advance. The Equality and Human Rights Commission should be given the powers and resources to carry out enforcement activity which would have a more immediate impact on those who do not comply. Gender pay gap reporting law should be amended so that data is broken down by age, disability, ethnicity, LGBT and part-time status, with due consideration paid to privacy. **The threshold for reporting should also be progressively lowered** to workplaces with over 50 employees.

Alongside the gender pay gap, Equal Pay – the right to equal pay for equal work and work of equal value – is yet to be achieved across the board. The Panel identified three key challenges to the efficacy of the legal right to equal pay. First, securing women's access to pay information so that they are able to challenge unequal pay effectively is vital. **Equal Pay Questionnaires should be reintroduced with the Employment Tribunal entitled to draw adverse conclusions from refusals to answer them.** We heard that Tribunals rarely use their powers to order a full equal pay audit – they should be ordered as standard, conducted with transparency, and the law should be changed so that the Employment Tribunal has the power to order them at any stage, not just when they identify discrimination. More must also be done to enable real pay transparency. To that end we recommend **amending the Freedom of Information Act to include pay in the private sector** so that accurate information (anonymised if necessary) can enable claims to be brought.

Second, the responsibility of employers to regulate pay structures so as to reduce and avoid inequalities is key. To address this, we recommend **mandatory equal pay audits every three years, for employers of 250 people or more.**

Third, we need effective procedures for the resolution of claims once they are made. **The indicative timetable for equal value claims should be enforced by Employment Tribunals.** Consideration should be given to introducing a similar indicative timetable for equal pay claims. **Class actions should be developed for equal pay claims**, although women should not lose their right to pursue individual claims. And when women win equal pay claims, the law should be changed to **automatically include pension contributions in equal pay awards.** To recognise how the emotional impact of pay discrimination can be humiliating, awards should also recognise injury to feelings.

Maternity, paternity and family friendly rights

Strong maternity, paternity, parental leave and flexible working rights are essential to enabling women with children to participate in the workforce, and to support fathers to care. An estimated 54,000 pregnant women and working mothers are made redundant or are pressured to leave their jobs each year, yet protection from dismissal due to pregnancy and maternity discrimination ends on the last day of maternity leave. **This protection must be extended to cover the 6 months after a mother returns to work.** To prevent new mothers being made redundant we recommend that employers could be required to consult with ACAS, with expanded resourcing and expertise, before making protected women redundant.

The current requirement for a discrimination claim related to pregnancy or maternity to be made within three months of an act of discrimination taking place is far too restrictive, especially when the implications of discriminatory decisions are often only felt many months down the line. **This limit should be extended to six months for all cases linked to pregnancy and maternity.** Given its extensive benefits to mother and baby, we should **introduce a right to reasonable time off and facilities for breastfeeding.** The law must be updated to recognise that there is a requirement for employers to carry out an **individual risk assessment for pregnant women, women who have given birth in the last six months or are breastfeeding.** 4% of pregnant women leave their jobs because of health and safety risks that have not been tackled. The Government should enact specifically that women are protected at work from discrimination on the grounds of breastfeeding in accordance with European caselaw.

Restrictions on entitlement to Statutory Maternity Pay (SMP) limit productivity and cause hardship. **SMP, Paternity Pay, and Shared Parental Pay should be day one rights.** Similarly, in an increasingly casual jobs market the requirement to have worked 26 weeks in the last 66 is not appropriate for women on Maternity Allowance (MA), and should be removed. The rates of all of these statutory payments are too low, at £140.98 for most of their duration. **The flat rate period for each should be raised to the equivalent of the Real Living Wage for 36 hours per week.**

The introduction of Shared Parental Leave has been an important step forward, but take-up appears to be low. A number of incentives and defaults preserve the status quo where women undertake the majority of unpaid care. **We recommend a comprehensive review of parental leave policy** to ensure that it is structured to presume equal responsibility for the care of children. As a first step, **paternity leave should be extended to six weeks, paid at 90% of earnings,** to be taken at any time in the first year after the birth.

Workplace harassment

Sexual harassment in the workplace creates misery for many women, leading to humiliation and intimidation. Recent coverage of the issue has raised awareness, but evidence of its prevalence is not new. TUC and Everyday Sexism Project research finds that 52% of women have experienced it in some form, and that 80% did not report it to their employer.

Perpetrators of sexual harassment in the workplace can be third parties, such as clients or customers. Section 40 of the Equality Act 2010 provided protection to employees in these cases, but it was repealed in 2013 – **we recommend that section 40 is reintroduced,** with an amendment so that it requires only a single prior incident of harassment. Pregnancy and maternity, as well as marriage and civil partnership status, should also be included as protected characteristics when it comes to prohibiting harassment.

Dress codes

Under the provisions of the Equality Act 2010, employers are permitted to impose a dress code on their employees, but will be acting in an unlawfully discriminatory way if they impose requirements which amount to less favourable treatment for women or for men. The law does not need to be changed but a Code of Practice is needed which is clear about the types of requirement placed on women which are unlikely to have an equivalent for men.

Violence against women and girls

Violence against women and girls (VAWG) is intimately linked with women's inequality, and its scale is endemic. Much can be done to prevent VAWG, with mandatory, age-appropriate relationships and sex

education (RSE) a key component. When this is introduced it **must cover gendered violence, address consent from an early age, and limit opt-outs**. Programmes which work with perpetrators should also be expanded with additional funding.

Services for Women and Girls

Funding from local authorities for refuges fell by 23% from 2010/11 to 2016/17. Amid this pressure on local funding, **an Independent Violence against Women and Girls Commissioner should be established** with resources and expertise to intervene in litigation and scrutinise local implementation of the Home Office's National Statement of Expectations.

Independent Domestic Violence Advisors (IDVAs) and Independent Sexual Violence Advisers (ISVAs) enable women to access public services, and justice under the law. Both services are under-resourced, and the **Government should provide secure, long-term funding** so that women who report domestic or sexual violence can be supported for as long as they need it.

Domestic violence and the law

In 2016, there were over one million female victims of domestic violence in England and Wales, and two women a week were killed by a partner, ex-partner or close relative. We have seen some positive progress, with more crimes reported, more convictions, and a reduction in unsuccessful prosecutions between 2008/07 and 2016/17. But the criminal justice system and the law must change to tackle the full scale of the problem.

The police are more likely to close domestic abuse cases due to evidential difficulties compared with other violent offences. There is a need to **move away from solely relying on victim testimony** and take into account evidence from third parties, evidence collected at the scene and body-worn cameras. The Panel received evidence that a worrying number of domestic violence incidents are resolved using "street level" restorative justice, which can often be little more than an apology. Guidance must be strengthened to make clear that **"street level" restorative justice should not be used in cases of domestic abuse or sexual violence**, and data should be collected to ensure that forces are held accountable.

The UK currently has extraterritorial jurisdiction, meaning UK laws can be applied to offences that took place outside the UK, for certain child sex offences, forced marriage and female genital mutilation offences. **Extraterritorial jurisdiction should be expanded to cover all sexual offences and incidents of domestic violence**. Transnational abandonment, where foreign national wives are abused and then deliberately abandoned by their British national husbands, **should be recognised in definitions of domestic violence, and changes to the immigration system and justice system are needed** to ensure it is treated appropriately.

Not all of the civil law remedies available to women who have suffered domestic violence result in a criminal offence if they are breached. This means that some, such as Domestic Violence Prevention Orders, are often viewed as meaningless by perpetrators. **Breaching any domestic abuse civil order should be made a criminal offence**. Another gap in the legislation was identified in relation to coercive control, which was introduced as an offence in 2015 but only where the victim continues to live with the perpetrator. **Coercive control should continue to be an offence where the parties have separated**, and there should be a comprehensive review of the ways in which perpetrators use the family justice system and child contact to continue their abuse.

The Panel received evidence that suggests that some Family Court Judges are not taking domestic violence seriously enough when making child contact arrangements, which can be hugely detrimental

to both mother and child. The new Practice Direction 12J begins to address this issue, but **it must be accompanied by compulsory and ongoing training for the judiciary, and its impact must be reviewed**. A ban on perpetrators of domestic violence cross-examining victims in the Family Court, which was proposed in the Prisons and Courts Bill 2016/17 before it was dropped, is long overdue and must be reintroduced in the new Domestic Violence and Abuse Bill. Local authorities play an important role in tackling VAWG, but the Panel heard concerning examples of councils using “written agreements”, which place the onus on abused women to prevent future domestic violence or face fast-track care proceedings. **Written agreements should not be used unless the victim has access to advocacy support**, and their use should be reviewed.

Sexual violence and the law

Almost a fifth of women aged 16 or over have experienced sexual assault, and 3.2% in the last year. These crimes are part of an environment of misogynistic abuse and harassment.

We welcome the creation of new offences to cover what is commonly known as “revenge porn”. This term is inadequate to describe the harm caused by this crime. Submissions to the Review argued it should be called “image-based sexual abuse”. The law should be changed to encompass a wider range of offences than is currently included, such as the *creation* as well as distribution of private, sexual images through “**upskirting**”, which is illegal in Scotland but not England and Wales, and **pornographic photoshopping**. The law also requires prosecutors to prove “an intention to cause distress”, which should be amended to encompass a wider range of reasons for abuse including financial gain or amusement. **Victims of the current and any additional criminal offences should have the right to anonymity held by victims of other sexual offences.**

The law currently restricts the use of the complainant’s sexual history as defence evidence in sexual offence cases, through a procedure outlined in section 41 of the Youth Justice and Criminal Evidence Act 1999. However, evidence from a survey of ISVAs finds that this procedure is often ignored, resulting in victims having their sexual history used in court without prior notice. To combat this, **victims should have a right to legal representation whenever an application to use section 41 is made; and the Government must review the law** – in particular, whether the use of sexual history evidence should be used at all for the purposes of establishing consent.

The prostitution trade and the trafficking of women into it, is driven by demand from a minority of men and the £130m annual worth of the trafficking trade to abusers in England and Wales. In line with the End Demand campaign, we support the introduction of the Nordic model, which criminalises the purchase of sex and decriminalises its sale.

Hate Crime and Misogyny

The law currently treats hate crimes relating to different protected characteristics differently. Crimes motivated by misogyny are not currently statutorily regarded as hate crimes.

Hate crime against women and girls is a cause and consequence of gender inequality and should be treated as unlawful. It is important that the hate crime in question is misogyny hate crime, not gender hate crime, recognising the direction of the power imbalance within society. This would be consistent with the one-directional nature of transgender or disability hate crime.

Some police forces, including Nottinghamshire and North Yorkshire, have already begun recording misogyny hate crime and hate incidents. **All police forces should be required to recognise misogyny as a hate crime for recording purposes** – and police computer systems should be developed to ensure

that they are able to record intersectional experiences of hate crime, which they are currently unable to do. But this alone is not sufficient. Enhanced sentencing for offences motivated by hostility towards people based on other protected characteristics recognises that those offences are especially harmful to individuals and society. **This is certainly the case for misogyny, and so it should be introduced as a hate crime for enhanced sentencing purposes**, and included in decisions about the wider hate crime framework.

Intimidating behaviour outside abortion clinics represents an organised campaign of harassment targeted at a vulnerable group of women, falling outside the traditional limits of a protest. There is a limit to what police can do in these cases, and recent use by councils of Public Spaces Protection Orders may be open to legal challenge. Government failure to take action may constitute a breach of women's Article 8 rights under the Human Rights Act 1998 – **we recommend that Government legislate for the adoption of buffer zones**, as used around vivisection clinics and in a number of other countries.

Online abuse of women and girls is widespread, and has a very real censoring impact. Social media platforms must take action. The Panel also heard from a number of submissions that social media users are often unaware that their location is being tracked by apps as a result of them having geo-location "on" by default. This can leave women and girls vulnerable to abusive men. **Default-"on" geolocation is an unnecessary risk to women's safety, and should be changed by platforms or legislated for if necessary.**

Promoting Equality

The public sector equality duty (PSED) has the potential to be a very effective way of ensuring fairness and equality. However, currently those with protected characteristics often lose out as a result of policy choices or spending decisions. Women's Budget Group and Runnymede Trust's recent analysis of the impact of welfare reform and spending cuts illustrates this very clearly, showing that BAME (Black and Minority Ethnic) women have been disproportionately adversely affected.

The duty comprises a general duty which applies across Britain, and specific duties which vary in England, where they are more limited, Scotland, and Wales. The more extensive duties in Scotland and Wales include duties to develop and report on plans to meet equality objectives, to carry out impact assessments and consult with affected groups when making policy, and to ensure training and resources for those carrying out equality work. These are valued, and **we recommend that England adopt the same specific duties as Wales.**

The duty has had a positive impact on equality practice within public authorities, but its aim of bringing about a transformative approach to structural inequality has yet to be achieved. Bringing us closer to that aim will require much work including positive and visible leadership from elected leaders and managers; development of capacity in organisations; active engagement with service users and civil society; and greater openness and transparency.

Enforcement of the PSED is conducted by the EHRC, which has seen budget and remit cuts since 2010; and through Judicial Review (JR) actions brought after decisions are made. The latter have been effective, but new procedural rules including changes to costs rules, and changes to legal aid, have had a chilling effect on the availability of JR. **To enforce the PSED effectively these rules must be repealed, and the EHRC must be properly resourced.**

The Equality Act 2010 includes provisions in Section 1 for the duty to cover "socio-economic status" as well as other protected characteristics, but this was not implemented by the Coalition Government – **Section 1 should be commenced to ensure that the intersectional impact of economic**

inequality can be understood. Equal political representation at local and national level is also key to achieving equality more widely, and the first step is understanding the makeup of our candidates and representatives – so **Section 106 of the Equality Act which requires parties to report on monitoring data should also be commenced.**

The public sector procures around £242bn worth of goods and services a year, and more must be done to harness this power to promote equality. **Employers with equal pay judgements against them in the last two years should be ineligible for public sector contracts** unless they have a high-quality action plan in place to address equal pay, and procurement processes should give weight to equality.

Promoting equality cannot solely be the responsibility of the public sector. Sexual harassment and sex discrimination are bad for business, and it is clear that their incidence is worryingly high. **Now is the time to introduce a new requirement on employers to take steps to prevent discrimination and harassment in their workplaces.** They should be required to set out what steps they are taking to address the risk of discrimination. Employment Tribunals should also regain the power to make wider recommendations to improve workplace practices in relation to discrimination claims.

Access to Justice

The pursuit of equality is significantly undermined by the lack of access to justice; legal rights that cannot be exercised become devalued, ignored and seen as merely theoretical. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) removed many areas of civil law from the scope of legal aid – they were meant to save £450 million per year but have saved almost twice that. This has led to those who cannot afford representation representing themselves. **Legal aid should be restored to cover family law, asylum support, clinical negligence, compensation from the Criminal Injuries Compensation Authority, debt, education, employment, housing, immigration and welfare benefits.**

LASPO excessively restricted access to legal aid for domestic abuse victims and survivors, although rules were widened in February 2017. However, major barriers persist, including the gap between those deemed financially ineligible for legal aid and those who can actually afford to pay, and the existence of “advice deserts”.

The Panel welcomes the Supreme Court judgement, in the case brought by the trade union UNISON, which ruled that the introduction of Employment Tribunal Fees in 2013 was inconsistent with the right of access to justice. Those fees had resulted in an 80% drop in sex discrimination claims. **No attempt must be made to reintroduce fees.**

There has been a drastic reduction in the number of sources of legal help available – the number of not-for-profit legal advice centres halved between 2005 and 2015. **New provision needs to be made urgently,** with the Civil Legal Assistance Offices set up by the Scottish Legal Aid Board providing a possible model.

Multiple Discrimination

We increasingly expect our multiple identities to be recognised in policy and practice, however the provisions of the Equality Act (2010) that have been brought into force only recognise discrimination on the basis of one characteristic at a time, not a combination.

Section 14 of that Act provides for protection from *dual* discrimination in some cases, on the basis of any two protected characteristics in combination, but this has not been implemented.

Other countries such as Canada, Germany, Austria and Poland have, to varying degrees, recognised multiple discrimination in their laws. **The law should be amended to include a multiple discrimination provision**, perhaps initially with a limit of three combined grounds, and with clarity that any justification must apply to each of the grounds engaged. Award amounts in relation to injury to feelings should be increased to reflect the number of grounds, if appropriate.

More research must be done across the public sector so that analysis of data takes account of multiple characteristics.

Sex Equality in Northern Ireland

Sex equality law which is a devolved matter, is significantly behind the rest of the UK – the Northern Ireland Assembly has not introduced parallel provisions to the Equality Act 2010. There is no reason in principle why women in Northern Ireland should enjoy different protection from discrimination depending on which part of the UK they find themselves in. Reflecting the submission from the Women's Policy Group in Northern Ireland, **we recommend the introduction of a Single Equality Act to bring Northern Ireland in line with the rest of the UK.** Northern Ireland also urgently needs a new Gender Equality Strategy given theirs expired in 2016.

Because Northern Ireland's equality law lags behind the Equality Act 2010, it is more reliant on EU equality law than the rest of the UK, and therefore potentially at even greater risk due to Brexit. Yet women's rights in Northern Ireland are often marginalised because of the legacy of the sectarian divide – it is vital that they are made a political priority.

In Great Britain, the law is clear that pregnancy discrimination does not require reference to a male comparator – but this is not the case in Northern Ireland. The law should be clarified in this area.

Due to extreme restrictions in place, women in Northern Ireland are forced to travel to England or Wales for abortions, and women seeking an illegal abortion face a maximum punishment of life imprisonment. **The law must be changed, as a matter of urgency, to ensure that women across the UK have access to abortion on the same terms.**

SUMMARY OF RECOMMENDATIONS

Brexit

- ▶ Limit the use of Ministerial powers conferred by the European Union (Withdrawal) Bill so that the powers cannot be used to substantively amend employment law in the UK, which would disproportionately impact on women workers. This could be achieved through narrowing the scope of the powers to exclude substantive changes to employment law from the powers to amend legislation without substantial parliamentary scrutiny.
- ▶ Ensure Brexit does not result in the dilution of existing equality and human rights law in the UK, including via the introduction of new opt-outs for small businesses.
- ▶ After leaving the EU review sections 158 and 159 of the Equality Act (2010) to identify whether more can be done to encourage use of the existing provisions or whether it is necessary to extend the provisions to enable employers to tackle inequality more effectively.
- ▶ Reform procurement law to ensure it can be used to promote equality and positive action, and to simplify the process for quality small local providers.
- ▶ Continue to recognise all current and future European Protection Orders issued so that women fleeing violence from the EU to the UK continue to be protected.
- ▶ Prioritise the replication of cross-border VAWG protection, law and order activity and funding throughout the Brexit process.

Women in the workplace

Pay and Pensions

- ▶ Civil penalties for non-compliance with gender pay gap reporting should be introduced which could be issued without the need for extensive enforcement work in advance. The Equality and Human Rights Commission should be given the powers and resources to carry out enforcement activity which would have a more immediate impact on those who do not comply.
- ▶ Gender Pay Gap Reporting Regulations should be amended so that the gender pay gap is also broken down by age, disability, ethnicity, sexuality and part-time status. This must be done with due consideration to privacy where low representation of groups with particular characteristics could lead to their data being identified.
- ▶ Gender Pay Gap Reporting Regulations should be progressively amended, so that by 2020 the threshold is lowered to workplaces with over 50 employees.
- ▶ Employers should recognise and bargain with trade unions in the workplace and on equal pay.
- ▶ Employment Tribunals must enforce the timetable for equal value claims. Consideration should be given to introducing a similar indicative time limit for all equal pay claims.
- ▶ The procedures for obtaining equal pay should be reviewed and simplified and consideration given to the development of class actions to address unequal pay. Women who participate in class actions should not lose their right to pursue individual claims if they decide the class action does not best represent their interests.

- ▶ Equal Pay Questionnaires should be reintroduced. The Employment Tribunal should be entitled to draw adverse conclusions from an employer's failure to answer relevant questions.
- ▶ Amend the Freedom of Information Act to include pay in the private sector so that the accurate information needed to bring equal pay claims is more freely available.
- ▶ Where Employment Tribunals find cases of unequal pay or discrimination they should require a full equal pay audit as standard. These should be conducted with transparency and the data made publicly available.
- ▶ Employment Tribunals should have the power to order equal pay audits at any stage in a case where this will be in the interest of employees or the wider workforce.
- ▶ Mandatory equal pay audits should be required every three years. This should initially apply to employers of over 250 people. These must be conducted transparently and the data made publicly available.
- ▶ Awards following successful equal pay claims should include pensions contributions and reflect injury to feelings.

Maternity, paternity and family friendly rights

- ▶ The protection offered by Section 18 of the Equality Act should be extended to a period of six months after maternity or parental leave.
- ▶ Employers could be required to consult with ACAS prior to making protected women redundant. This would require an expansion of resourcing and expertise in this area.
- ▶ The time limit for all discrimination and harassment claims linked to pregnancy and maternity should be increased to six months.
- ▶ Introduce a statutory right to reasonable time off and facilities for breastfeeding.
- ▶ Recognise that there is a requirement for employers to carry out an individual risk assessment for pregnant women, women who have given birth in the last six months or are breastfeeding.
- ▶ Enact specifically that women are protected at work from discrimination on the grounds of breastfeeding in accordance with European caselaw.
- ▶ Introduce a statutory, paid period of carers' leave to enable carers, who are disproportionately women, to stay in touch with the labour market.
- ▶ The qualifying period for Statutory Maternity Pay should be removed. Statutory Maternity Pay, Shared Parental Pay and Paternity Pay should be a right for all employees from their first day of employment.
- ▶ The requirement to have worked 26 weeks in the 66 weeks before the baby is due to be eligible for Maternity Allowance should be removed. No parent should have to face raising a new baby without a decent source of income.
- ▶ The flat rate of Statutory Maternity Pay, Statutory Paternity Pay, Statutory Shared Parental Pay and Maternity Allowance should be paid at the equivalent of the Real Living Wage, as set by the Living Wage Foundation, for the equivalent of at least 36 hours a week.
- ▶ Extend paternity leave to 6 weeks, paid at 90% of earnings, to be taken any time in the year after the baby is born.
- ▶ The maternity, paternity and parental leave policy should be comprehensively reviewed to ensure that it is structured to presume equal responsibility for the care of children and ensures that both parents have leave entitlements in their own right. One parent's entitlement should not be dependent upon the other.
- ▶ Section 18 of the Equality Act should be amended to include those on Shared Parental Leave.

Workplace harassment and dress codes

- ▶ Reintroduce section 40 of the Equality Act to guarantee legal protection against harassment from third parties.
- ▶ Section 40 should be revised, requiring only one previous incident of third party harassment.
- ▶ Protection from harassment under section 26(5) should be extended to pregnancy and maternity as well as marriage and civil partnership status.
- ▶ The Government should bring forward guidance on dress codes at work which makes clear when a dress code is imposing a requirement on women where there is unlikely to be an equivalent requirement placed on men and women. It must also make clear that both policy and practice by employers in terms of dress codes must be non-discriminatory. This guidance must be well publicised and kept under review.

Violence Against Women and Girls

Preventing VAWG, and Services for Women and Girls

- ▶ The forthcoming guidelines for relationships and sex education (RSE) must cover gendered violence, address consent from an early age and limit opt-outs.
- ▶ Domestic violence perpetrator programmes should be expanded with additional, not reallocated, funding.
- ▶ We recommend the establishment of an Independent Violence against Women and Girls Commissioner to review existing law and practice. They must have the status and resources to drive forward change.
- ▶ The Government should provide secure, long-term funding so that women who report domestic or sexual violence can be supported by domestic violence advocates or an Independent Sexual Violence Advisor for as long as they need one.

Domestic Violence and the Law

- ▶ Police forces should move away from evidence based solely on victim testimony in domestic violence cases and maximise the evidence they collect at the scene of the crime.
- ▶ “Street level” restorative approaches should not be used in cases of domestic abuse or sexual violence; the College of Policing and National Police Chief Guidance needs to be strengthened with regard to this issue.
- ▶ There must be greater transparency about the use of restorative approaches in domestic abuse cases to enable police forces to develop best practice and share experiences – positive and negative. Data should be routinely collected and held centrally and forces should answer for any use of resolutions that are contra-indicated by College of Policing guidance.
- ▶ Restorative justice measures above street level should not be used in cases of domestic abuse until women’s organisations are confident that they are being delivered in a way which will not harm victims or survivors. Women’s organisations should be consulted in their future development.
- ▶ Training is needed for all parties within the family justice system to ensure transnational marriage abandonment is treated appropriately.
- ▶ Transnational marriage abandonment must be recognised in cross-governmental and immigration policy definitions of domestic violence and women who are abandoned in another country should be able to access the domestic violence route to indefinite leave to remain.

- ▶ The Government should extend its extraterritorial jurisdiction to include all sexual offences and incidents of domestic violence and abuse that take place abroad.
- ▶ A breach of any domestic abuse order, including a DVPO, should be made a criminal offence.
- ▶ The criminal offence of coercive control should apply in circumstances where the parties have separated and no longer live together.
- ▶ There should be a comprehensive review of the ways in which abusers use the family justice system and child contact arrangements to continue to abuse survivors and what can be done to address these issues.
- ▶ Judges should have compulsory and ongoing training on domestic violence and abuse in all its forms and on the new Practice Direction 12J. The impact of the new Practice Direction should be regularly reviewed.
- ▶ Government must legislate to ban cross-examination of a victim or alleged victim by the perpetrator in the Family Court.
- ▶ The use of written agreements by local authorities in child safeguarding cases where there is domestic violence should be reviewed. In the meantime, they should not be used unless the victim involved has access to advocacy support from a lawyer or qualified IDVA. They should never be used to make the victim responsible for a violent partner's abuse.

Sexual Violence and the Law

- ▶ The law should be changed to provide for anonymity for all victims in cases of image-based sexual abuse. Without anonymity few will want to report cases to the Police.
- ▶ The current law on disclosing private sexual photographs or films should be amended to remove the requirement of an intention to cause distress or extended to cover reckless intention to cause distress.
- ▶ The law should be extended to cover threats to distribute private sexual images without consent.
- ▶ The creation and distribution of up skirt images and sexualised photoshopping, should be criminalised.
- ▶ In any case where a section 41 application to use sexual history evidence is made, the victim should have a right to legal representation.
- ▶ The Government must review the law on the use of sexual history evidence.
- ▶ The Government should introduce the Nordic Model and end demand for the sex trade.

Hate Crime and Misogyny

- ▶ Police forces should be required to recognise misogyny as a hate crime for recording purposes alongside the existing five grounds.
- ▶ Hate crime recording systems should be reviewed to ensure they can capture intersectional experiences of hate crime.
- ▶ Misogyny should be legally introduced as a hate crime; initially for enhanced sentencing purposes and potentially as an aggravated crime subject to decisions about the wider hate crime framework.
- ▶ Government should legislate for the adoption of buffer zones around the peripheries of abortion clinics.
- ▶ Social media platforms and apps should remove the automatic “on” setting for geo-location.

Promoting Equality

- ▶ England should adopt the same specific duties as Wales so that public bodies can understand what is needed to comply properly with the equality duty.

In order to make the Public Sector Equality Duty work:

- ▶ There must be positive and visible leadership from both elected leaders and those in management positions that focuses on goals that will advance equality of outcomes.
- ▶ Decision making must take robust but proportionate account of the likely impact of a decision on the three goals of the equality duty.
- ▶ Ensure organisations have the capacity to implement the equality duty effectively. This normally includes increasing staff understanding and awareness, the proliferation of up to date information to aid consideration of equality issues and policy and decision-making processes that enable equality implications to be considered before decisions are made.
- ▶ An organisation must commit itself to achieving clear equality outcomes and objectives that inform its business planning. These should reflect priorities that are based on evidence and community engagement.
- ▶ There must be active engagement with service users, residents and employees, particularly those from protected groups. This is likely to lead to better quality and more appropriate decision-making.
- ▶ Organisations must make active use of qualitative and quantitative evidence to inform understanding of the likely impact of policy, service and employment decisions. Collecting information is not an end in itself but must inform action. Although there are challenges involved in collecting evidence on certain issues (such as on the cumulative impact of a series of fiscal and spending decisions) much of the information that public bodies need should be routinely available to public bodies that understand and are in touch with their communities.
- ▶ Organisations must be open and transparent, including by making clear information about progress a public body is making towards the equality duty's three goals publicly available.
- ▶ Regulatory regimes that have equality and diversity embedded in their assessment criteria and should be assessed rigorously.
- ▶ The understanding and capacity of public bodies must be improved to meet the requirements of the equality duty.
- ▶ Civil society, including women's organisations, must be meaningfully engaged with during policy development.

Enforcement

- ▶ The new procedural rules in the Criminal Justice and Courts Act 2015 sections 84-89 must be repealed together with the Civil Legal Aid (Remuneration) (Amendment) Regulations 2015.
- ▶ The EHRC must be properly resourced enabling it to meaningfully promote and enforce the public sector equality duty.

Socio-economic duty

- ▶ Commence section 1 of the Equality Act.

Political representation

- ▶ Commence section 106 of the Equality Act and amend it to include candidates who stand in devolved and local government elections.

Public procurement

- ▶ Harness the power of public procurement. Employers with equal pay judgements against them in the last two years should be ineligible for public sector contracts unless they have a high quality action plan in place to address equal pay.
- ▶ All public authorities should include relevant equality conditions in their procurement processes.

Preventing discrimination and harassment in the workplace

- ▶ The time is right to introduce a new requirement on large employers to take steps to prevent discrimination and harassment in their workplaces.
- ▶ The new duty should require organisations with 250 or more staff to publish a diversity and inclusion review of their workplace every three years. Organisations should also be required to report on their action plan to prevent discrimination and harassment and promote equality.
- ▶ Section 124 of the Equality Act should be reinstated in order to permit Employment Tribunals to make wider recommendations to employers to improve their work place practices.

Access to Justice

- ▶ Provision for legal advice must be made as a matter of urgency. The Civil Legal Assistance Offices set up by the Scottish Legal Aid Board could provide a model for the provision of legal advice and assistance.
- ▶ Legal aid should be restored to cover asylum support, clinical negligence, compensation from the Criminal Injuries Compensation Authority, debt, education, employment, family law, housing, immigration and welfare benefits.
- ▶ Fees for employment tribunals must not be reintroduced.

Multiple Discrimination

- ▶ The Equality Act should be amended to include a multiple discrimination provision in respect of direct and indirect discrimination, harassment and victimisation for all of the protected characteristics. It should be clear that any justification applying to one ground must apply to each of the grounds engaged and that in awarding damages for cases of multiple discrimination, the amount awarded in relation to injury to feelings may be increased to reflect the number of grounds in question if that is appropriate in the light of the facts.
- ▶ More research must be undertaken so that analysis of monitoring data, reporting and recording mechanisms and staff training consider the impact of having multiple protected characteristics.

Sex Equality in Northern Ireland

- ▶ The Northern Ireland Executive should ensure that women in Northern Ireland have the same rights as those in the rest of the UK and in line with wider recommendations in this report.
- ▶ Give women in Northern Ireland access to abortion services on the same terms as women in the rest of the UK.
- ▶ Introduce a Single Equality Act to bring Northern Ireland in line with the rest of the UK.

- ▶ Clarify the definition of direct sex discrimination to include discrimination on grounds of pregnancy.
- ▶ Prohibit discrimination and harassment by public bodies on grounds of sex when carrying out their public functions.
- ▶ Change the laws relating to private clubs and associations, to include discrimination on grounds of pregnancy, maternity and gender reassignment.
- ▶ Extend the scope of voluntary positive action that employers, service providers and public bodies can take in order to promote sex equality so that the sex equality legislation includes an exception that permits associations (including private clubs) to restrict their membership in certain circumstances to people of a certain gender (or gender identity).
- ▶ Provide greater protection for employees against harassment on grounds of sex by a third party such as a customer or client, when the employer ought to have been reasonably aware of the risk of harassment, current provisions are insufficient because it requires two or more occasions when the harassment has taken place.
- ▶ Prohibit “pay secrecy clauses”.
- ▶ Introduce measures to require large private and voluntary sector employers to publish gender pay information.
- ▶ Require tribunals to order a respondent found in breach of an equal pay provision to carry out an equal pay audit.
- ▶ Give powers to tribunals to make wide recommendations that benefit the whole workforce.
- ▶ Prohibit multiple or intersectional discrimination.
- ▶ Improve the remedies available under the current legislation.
- ▶ Introduce a new Gender Equality Strategy which should include targeted measures, action plans, a budget that is adequate to ensure effectiveness and a framework to assess the success of the strategy.
- ▶ Introduce coercive control legislation in line with the rest of the UK.
- ▶ Amend Section 75 of the Northern Ireland Act 1998 to improve data collection to address structural inequalities.

FOREWORD



Foreword from Dame Laura Cox DBE

My train journey into London takes me past the old Bryant & May match factory. Some may be surprised to learn that it was still in operation when I first began my professional life as a barrister, finally closing only in 1979. Like other such monuments to our industrial past, the factory has since been turned into a gated community (now known as Bow Quarter), but for me the building serves as a regular reminder that equality for women in this country has only come relatively recently in our long history. In 1888 women working in the factory famously went on strike over their low wages, as well as their working conditions, but it was nearly 90 years before sex discrimination and equal pay legislation finally arrived in this country in 1975, driven principally by our membership of the then “European Economic Community” but also, partly, by our obligations as members of the UN International Labour Organisation. In this special centenary year it is a sobering thought that it was only as recently as 1918 that women were first allowed even to vote, thanks to the efforts of Millicent Fawcett and others, and even then they had to be over 30 years old and meet a property qualification. And in 1975, women working at the Foreign Office were still forced to resign when they got married.

So what of the years since 1975? I would argue that when it comes to sex discrimination law, the UK’s national story has undoubtedly been one of considerable progress, but it is also true that in some areas that progress has been too slow or has stalled altogether. Our laws have been instrumental in changing attitudes and in improving life for many women, at work and in society generally. Yet, in some areas those laws have been shown to be inadequate, or to be beset by undue complexity and unacceptable delays for those women who have sought to use those laws in our courts and tribunals. As both a QC and later on as a judge, I was only too well aware of the difficulties in applying the laws in too many cases. And in 2018 the gender pay gap remains stubbornly in place, despite more than 40 years of equal pay legislation and litigation. It is also worth remembering that it was only 25 years ago, in 1992, that our highest court finally decided that rape within marriage was a crime.

So we should recognise the good progress made, but also recognise the law’s limitations. We have clearly led the way at some points, with the landmark Equality Act of 2010 going above and beyond the protection provided for women in a number of other nations. But we must constantly be vigilant and must beware of complacency. Important rights for women that we have hitherto regarded as firmly embedded and long established could so easily be diminished, or even lost. Some of our laws have been shown over time to need changing and improving. And, as the various forms of sex discrimination in our society continue to evolve or to change, the law also needs to adapt and improve to reflect those changes. It is now more than seven years since the Equality Act was passed. We are living in interesting times. With the political and social landscape now at such a pivotal moment, this is an ideal time to take stock of our current sex discrimination laws: to analyse what works well for women; to identify what needs to change; and to draw together diverse ideas to improve both the legislation and our system of justice, for those women who consider that they have been the victims of unlawful sex discrimination and who rightly want to complain about it.

For all these reasons I was delighted to support the Fawcett Society’s Sex Discrimination Law Review and to accept their invitation to chair the advisory panel. Inevitably, the Review has involved a great deal of hard work and commitment, but the discussions have been wide-ranging, stimulating and hugely rewarding. Over the course of the past year I have been privileged to work with the team of formidable legal experts on the panel,

with the lawyers and the team at the Fawcett Society, and, in particular, with the equality lawyer Gay Moon, who has co-ordinated the Review so ably and effectively.

The Review has taken a necessarily broad view of the various forms of sex discrimination in society. As readers would expect, the problems of sex discrimination at work and in wider life that the Equality Act is designed to prevent are obviously within its scope. But violence against women and girls is a fundamental driver and consequence of sex inequality, and so this Review also explores some of the gaps in the legislation and the improvements we regard as necessary in that area too. It also considers, with an eye to international practice, the extent to which there should be a greater onus on organisations to take steps to tackle sex discrimination themselves.

Continuation of the good progress made so far, on many fronts, is not inexorable. European Union law has provided both a backstop and a stimulus to developments in sex discrimination law in the UK; and the Brexit process could render our laws vulnerable to change without adequate scrutiny, to the disadvantage of everyone. But this Review was planned well before the referendum of 2016. There is, in any event, a need for a continuing focus on improving and updating the laws available in this country to protect women and prevent sex discrimination, and to ensure that those laws work properly and effectively as we approach the third decade of the twenty first century.

That is why I believe that the work of this Review has been so timely and important – and why I hope that everyone takes heed of our recommendations.

INTRODUCTION



Introduction from Sam Smethers, CEO of the Fawcett Society

When I joined the Fawcett Society as Chief Executive in 2015 I decided that I wanted us to carry out a review of our sex equality laws and protections. Despite the fact that there have been many advances and that we are often regarded as having some of the best legislation in the world, there are also a number of gaps in the law (many more as it turns out than I had realised when we started this review). But my bigger concern is that fundamentally, the law isn't working and change isn't happening fast enough. The discrimination, harassment, misogyny and violence that women experience on a daily basis shows no sign of abating. If anything, it feels like it's getting worse while at the same time, women's access to justice and redress has diminished.

The outcome of the referendum on the European Union has given this work an additional significance and timeliness. The risk that Brexit presents to women's rights is real and Fawcett has been actively working with over 20 women's and equalities organisations to highlight that through the passage of the EU Withdrawal Bill. At the same time, there is a renewed outrage at the discrimination that women experience, a recognition that we are all held back if we hold women back and a determination right across the political spectrum, in government and amongst employers to drive forward a progressive agenda for change.

The Fawcett Society could not have completed such an ambitious project without the generous contributions of our funders and supporters, our panel members who have given their time so generously, the hard work and professionalism of our staff team and the wisdom, expertise and patience of our Chair, Laura Cox and our expert adviser, Gay Moon. I want to extend my heartfelt thanks to them all.

Finally, I dedicate this report to every woman who has ever stood up against discrimination, harassment or violence and I appeal to those reading it, those who have the power to change things for the better to resolve to do so.

CHAPTER 1

BREXIT

UK women have benefitted significantly from the UK's membership of the European Union.

Women's voices and interests must be represented during the Brexit negotiation process.

There must be no rolling back of women's rights following the UK's exit from the European Union.

Background and Context

UK women have benefitted significantly from the UK's membership of the European Union (EU) due to the EU's agenda on equality and human rights, employment rights and measures aimed at tackling violence against women and girls (VAWG). When the UK exits the EU, these laws, rights and cooperative mechanisms are at risk of being rolled back or eliminated altogether and there is a risk that we may fall behind the EU and the international community. It is vital that these protections are preserved and progress continues. However, Brexit also offers opportunities to go beyond current equalities law, which are considered here.

Given the wide-ranging implications of Brexit for women's rights and gender equality in the UK, it is essential that women are represented at every level in the Brexit negotiation process. However, at the time of writing, across the three Government departments tasked with negotiating the terms of the UK's exit from the EU,¹ only one of the 14 Ministerial roles has been held by a woman at any one time.² This means that only 7% of the responsible Ministers are women, a severe underrepresentation when compared with the general population and far lower than the 33% women around the cabinet table.

In June 2017, the Department for Exiting the European Union (DExEU) released the list of individuals making up the UK negotiating team. Of the nine senior officials listed, only one is a woman (Catherine Webb, Director of Market Access and Budget at DExEU).³ Therefore, only 11% of the senior civil service negotiating team are women.

Given this underrepresentation, it is unsurprising that women have been missing from the Government's Brexit announcements, with no mention of women's rights or gender in the main Brexit white paper⁴ and scant discussion of relevant issues in the panoply of position papers published. This chapter explores some of the primary ways in which leaving the EU could impact women's rights and makes recommendations to safeguard them.

1 These are the Department for Exiting the EU (DExEU), the Department for International Trade (DIT) and the Foreign and Commonwealth Office (FCO).

2 Initially Baroness Anelay at DExEU, who then resigned at the same time as Baroness Rona Fairhead was appointed at DIT.

3 Department for Exiting the European Union. (2017). *UK Negotiating Team Biographies*. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/620076/Biographies_of_the_Civil_Service_representatives_for_the_negotiations_with_the_EU_.pdf

4 Department for Exiting the European Union. (2017). *Legislating for the United Kingdom's withdrawal from the European Union*. <https://www.gov.uk/government/publications/the-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union>

Equality Law and Brexit

The EU has undoubtedly acted as a protective “backstop” on equality and human rights law in the UK, in part due to the inclusion of a freestanding right to non-discrimination in the Charter of Fundamental Rights (article 21). After leaving the EU, the UK will be able to change many of its equality laws that offer vital protection against discrimination; the UK will no longer have a guarantee that these rights will be preserved due to its membership of the EU. Additionally, while it is true that some provisions, such as the Equality Act 2010, go beyond the requirements of EU directives and are viewed as a best practice model internationally,⁵ there are a number of areas where the EU has driven the agenda and enhanced the protection afforded to women.

As this backstop will cease to exist after exit day, it is imperative that equality and human rights legislation is safeguarded once the UK leaves the EU and that the significant protections it provides are not rolled back.

In this context, it is important to recognise that over time the UK has ratified a number of international equality conventions which will be unaffected by Brexit and will therefore continue to apply. For example, in 1986 the UK ratified the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the international human rights treaty which commits the UK to taking steps to end discrimination against women in all its forms. In addition, through its membership of the UN International Labour Organisation (ILO), the UK has ratified a number of labour law conventions addressing the elimination of discrimination against women at work, including requiring equal remuneration for work of equal value. Additionally, UK membership of the Council of Europe is not dependent on its membership of the EU. As such, the UK will remain committed to upholding the provisions of the European Convention on Human Rights, even after it leaves the EU. Consequently, post-Brexit, the UK will continue to be subject to a range of international agreements to which it is bound, irrespective of its membership of the EU. These agreements and conventions are likely to become increasingly significant without the backstop of the EU.

Against this backdrop and to ensure that there can be no attempt to roll back long established equality and human rights protections post-Brexit, we recommend that a new constitutional right to equality should be introduced to provide a similar level of protection. Such a right would operate similarly to the rights protected by the Human Rights Act. While that Act brings a European treaty into force in UK legislation – the European Convention on Human Rights – a free-standing right to equality would remain alterable by Parliament. It would however, provide a standard against which laws and state actions could be tested.⁶

The EU Withdrawal Bill

The European Union (Withdrawal) Bill (“the Bill”) has been introduced to Parliament with the stated aim of incorporating EU-derived law into UK legislation to ensure continuity of the law and the functioning of our statute book on and after exit day. The Government’s position is that that delegated powers contained in the Bill are only intended to be used to remedy technical deficiencies in EU-derived law, which, if left, would mean it would fail to operate properly once the UK leaves the EU. The Government claims that the powers are not intended to be used to make substantive changes to the law. However, the current wording of the Bill would create wide-ranging and extensive powers which open the door to Ministers to make significant changes to the law with very little parliamentary scrutiny. This includes the ability to amend primary legislation.

5 Women and Equalities Committee (2016), “Oral Evidence: Impact of Brexit on the Equality Agenda, HC657”, House of Commons

6 Equality and Human Rights Commission. (2017). *European Union (Withdrawal) Bill: Second reading, House of Commons*. <https://www.equalityhumanrights.com/sites/default/files/briefing-eu-withdrawal-bill-second-reading.pdf>

Secondary legislation, most of which requires very limited scrutiny by the House of Commons and cannot be amended, could be made in circumstances where a Minister considers there is a “deficiency”. The definition of a deficiency is very widely drawn. While an amendment tabled by Dominic Grieve was passed against the will of the Government requiring the final terms of withdrawal to be voted on in Parliament before the agreement is implemented,⁷ provisions to enable the implementation of the withdrawal agreement are still very broad and require little parliamentary scrutiny.⁸ The Government has accepted amendments tabled by Charles Walker MP⁹ requiring the creation of a sifting committee to identify which pieces of secondary legislation must be subject to the slightly more demanding affirmative procedure. This is a significant improvement on the Bill’s original proposed process. However, it still leaves a great deal of room for changes to be made without the scrutiny involved in the full Bill process.

The use of these powers could include making alterations to the Equality Acts 2010 and 2006. We are concerned that these powers may be used, by accident or design, to undermine equality and human rights law and women’s rights and gender equality more generally. While the Human Rights Act has been explicitly excluded from alteration using delegated powers under the Bill, other equality and human rights law have not. It is urgent that this is rectified.

Significantly, a concession was secured by Maria Miller MP with the Minister agreeing that a statement of compatibility with the Equalities Act must be made regarding Brexit legislation. This then leaves government open to legal challenge in the event of that not being the case. However, we would prefer to see protections written into the face of the bill, preventing ministerial powers from being used to amend equality legislation.

Recommendations

- ▶ Limit the use of Ministerial powers conferred by the European Union (Withdrawal) Bill 2017 so that the powers cannot be used to amend, repeal, revoke or modify the effect of the Equality Acts 2006 and 2010, the Human Rights Act 1998 and any other equality or human rights legislation.
- ▶ Introduce a constitutional right to equality in UK legislation.
- ▶ Retain the protections of the EU Charter on Fundamental Rights.
- ▶ Ensure the Courts consider whether it is appropriate to take account of EU law when construing or applying law relating to equality and human rights.

Women in the Workplace and Brexit

Employment rights in the UK have undoubtedly been improved and extended as a result of the UK’s membership of the EU, particularly for women workers.¹⁰ The Government has previously committed to maintaining employment rights, with the Prime Minister stating in her Lancaster House speech that she will “ensure that workers’ rights are fully protected and maintained.”¹¹ However, as with equality law, this commitment has not been included on the face of the European Union (Withdrawal) Bill.

There are several areas of EU-derived protection which would disproportionately harm women were they to be removed:

7 European Union (Withdrawal) Bill 2017-19, as amended in Committee, clause 9

8 European Union (Withdrawal) Bill 2017-19, as introduced

9 European Union (Withdrawal) Bill 2017-19, as amended in Committee, schedule 7(3, 7, 8)

10 TUC. (2016). *UK employment rights and the EU: Assessment of the impact of membership of the European Union on employment rights in the UK*. <https://www.tuc.org.uk/sites/default/files/UK%20employment%20rights%20and%20the%20EU.pdf>

11 Speech by Rt. Hon. Theresa May MP. (17 January 2017). *The Government’s negotiating objectives for exiting the EU: PM Speech*.

- The Working Time Directive (WTD) and associated UK regulations, which established the right to paid annual leave for all UK workers. This gave rights to two million workers who previously had no entitlements to any paid leave, many of whom were part-time women workers. When asked about this in Parliament on 18th December 2017 the Prime Minister repeatedly failed to guarantee that the WTD would be maintained after Brexit.¹²
- The EU Pregnant Workers Directive 1992, which provided for the right to paid time off for ante-natal appointments and outlined the enhanced health and safety procedures employers must follow with regards to new and expectant mothers.
- Court of Justice of the European Union (CJEU) case law, which has made clear that dismissal because of being pregnant or on maternity leave is direct sex discrimination whether the worker is engaged under an indefinite or fixed term contract. It has also ensured that women on additional maternity leave enjoy the same contractual rights as women on ordinary maternity leave.
- The Parental Leave Directive, which gave all working parents the right to 18 weeks' unpaid parental leave to care for their child in addition to statutory maternity and paternity leave. This can be used, for example, to care for an ill child.
- The right to equal pay for equal work and of equal value, not just equal pay for those in identical job roles was implemented through the Equal Pay Act 1970. Its inclusion in the Treaty of Rome 1957 was a key driver for its place in UK law.
- Other rights for part-time workers, who now have the same entitlements as those who work full-time. For example, part-time workers have access to equal pension entitlements as a result of CJEU rulings. 73% of part-time employees are women and just under 42% of working women work part-time.¹³ It is therefore of utmost importance for the protection of women at work that the rights of part-time workers are protected.

Without the backstop of the EU, powers given to Ministers under the current draft of the Bill enable regulations to be brought forward within the 2 year “sunset” period following Brexit which could curtail these rights. There are good reasons to believe that this presents a real risk to equality legislation. For example, the 2011 Beecroft report, commissioned as part of the “Red Tape Challenge”, included proposals to cap discrimination damages awards. This was prevented by the Court of Justice of the European Union, which had ruled in 1993 that damages for sex discrimination could not be limited.¹⁴ That report also proposed a number of other retrograde steps, including opt-outs of equalities requirements for small businesses.

There must be a broad commitment from the Government to set a positive post-Brexit agenda for the promotion of women and girls' rights and gender equality. The Government should also commit to keeping pace with the EU and the rest of the international community with regards to equality and human rights law, employment rights and measures aimed at furthering gender equality. For example, in 2017 the European Commission introduced proposals for a Directive on work-life balance for parents and carers,¹⁵ which would provide for four months paid non-transferrable leave for fathers.¹⁶ This goes beyond current UK statutory provision. Failing to keep pace with these improvements would leave UK families without rights and entitlements enjoyed by their European neighbours.

12 Hansard 18th December 2017. Column 768. <https://hansard.parliament.uk/commons/2017-12-18/debates/5DBF331C-8129-4485-9B84-468B2D480FAB/EuropeanCouncil>

13 ONS. (2017). *UK labour market: November 2017*.

14 *Marshall v Southampton and South West Hampshire Area Health Authority (No 2)*: ECJ Case C-271/91, [1994] ICR 242.

15 European Commission. (2017). *Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU: explanatory memorandum*. <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1494929657775&uri=CELEX:52017PC0253>

16 *Ibid.*

An opportunity to go further

In addition to ensuring that the rights women currently enjoy are not weakened, rolled back, or lost altogether, Brexit also presents an opportunity for the UK to take action beyond what is required or permitted by EU law, in order to further gender equality.

For example, under the s158 and s159 Equality Act (2010) employers are permitted to use positive action in limited circumstances during recruitment and promotion to create a more diverse workforce. When considering candidates who are as qualified for a role as each other, employers are able to choose a candidate with a particular protected characteristic if they have good reason to believe that persons who share that characteristic suffer a disadvantage connected to it, or the participation of that group of people in the particular work activity is low.¹⁷ However, as Muriel Robison writing for the Equality and Human Rights Commission observes:

*...in order to ensure compliance with European law that there should be no absolute or unconditional priority, the employer must not have a policy of automatically treating persons in the protected group more favourably in connection with recruitment or promotion, that is that each case must be considered on its merits.*¹⁸

Use of the existing positive action provisions has been limited. Post Brexit it will be possible to pass new legislation permitting positive action which goes further, allowing employers to prioritise improving representation of particular groups. We recommend that Government reviews the legislation on positive action to identify whether more can be done to encourage use of the existing provisions and whether it is necessary to extend the provisions to enable employers to tackle inequality more effectively.

The Panel heard evidence that there is also potential to reform procurement rules once the UK leaves the European Union in order to enable more small organisations to deliver services of this kind.

Women's Aid observe:

It is important to note that EU procurement laws only apply to tenders and contracts above a certain amount – currently 750,000 EURO – and are not required for services identified to be of social benefit. A number of Member States have decided not to commission or procure domestic abuse services under EU rules.

... Complex commissioning and procurement practices can often be impenetrable for smaller organisations, who do not have the capacity to compete against large, commercial providers, and who struggle to meet the monitoring requirements for contracts.

*These barriers are particularly concerning within the domestic abuse sector in the UK, where the specialist support victims need is typically provided through independent or charitable organisations.*¹⁹

NCVO observes that the EU has introduced reforms to simplify procurement and commissioning for small and medium-sized organisations. However, the complexity of EU legislation has meant that many Commissioners often fail to make the most of these provisions²⁰ For example, Women's Aid has seen

17 Robison, M (2016) *Positive action – your opportunity to advance equality*, Equality and Human Rights Commission <https://www.equalityhumanrights.com/en/legal-work-scotland/legal-work-scotland/scottish-legal-articles/positive-action-%E2%80%93-your-opportunity>

18 *ibid*

19 Women's Aid, Evidence submitted to the Review, 2017

20 NCVO(2016) *The EU referendum a discussion paper for charities*

examples of Commissioners who have been unaware that they do not need to establish a procurement process when commissioning a domestic violence service of a value under €750,000.

Leaving the EU is an opportunity for the UK Government to reform procurement to simplify the processes, end the practice of commissioning for specialist domestic abuse services where it is not required, and secure a new approach that is based on quality and expertise, rather than cost.

Recommendations

- ▶ Limit the use of Ministerial powers conferred by the European Union (Withdrawal) Bill so that the powers cannot be used to substantively amend employment law in the UK, which would disproportionately impact on women workers. This could be achieved through narrowing the scope of the powers to exclude substantive changes to employment law from the powers to amend legislation without substantial parliamentary scrutiny.
- ▶ Ensure Brexit does not result in the dilution of existing equality and human rights law in the UK, including via the introduction of new opt-outs for small businesses.
- ▶ After leaving the EU review sections 158 and 159 of the Equality Act (2010) to identify whether more can be done to encourage use of the existing provisions or whether it is necessary to extend the provisions to enable employers to tackle inequality more effectively.
- ▶ Reform procurement law to ensure it can be used to promote equality and positive action (see Chapter 4), and to simplify the process for quality small local providers.

Violence against women and girls, criminal law and Brexit

Co-operation between EU member states has meant that victims of crime have enjoyed enhanced rights and protections. The decision to leave the EU will impact two major areas of criminal justice legislation which help tackle domestic abuse and violence against women and girls (VAWG) more broadly.

Firstly, the EU Lisbon Treaty harmonised police co-operation and criminal law. Such co-operation means that crimes across borders, many of which have a gendered dimension, such as human trafficking, can be dealt with effectively. Withdrawal from this may weaken the effectiveness of police co-operation and data sharing in tackling crime.

Secondly, the EU has significantly strengthened the legal rights to provide support and for victims of domestic abuse. Key measures that require safeguarding are the rights and standards included within the EU Victims' Directive (2012/29/EU) and the European Protection Order Directive (2011/99/EU). These ensure that women who have suffered domestic violence are protected from the perpetrators if they travel or move anywhere in the EU. When Britain leaves the EU these arrangements will lapse and women will lose their protection unless alternative arrangements are made. We are concerned that this issue has not been included in the Government's negotiation proposals so far. Safeguarding these established rights is a priority for victims of domestic abuse following Brexit and the Government must ensure these rights are protected as the UK's future relationship with the EU is negotiated.

The Victims' Directive establishes clear rights for victims and obligations on Member States – including specific measures for victims of violence. It includes new and strengthened measures for:

- Victim support, including referrals to victim support organisations.
- Specialist support services such as minimum provision of shelters and targeted and integrated support for victims with specific needs – including victims of domestic violence.
- Individual assessments for victims to identify vulnerability and special protection measures required by women and children.
- Protection of victims, including avoiding contact with the accused (e.g. all new court buildings must have separate waiting areas).²¹

Much of the Directive is implemented in the UK through the Code of Practice for Victims of Crime.²² This Code was introduced under domestic legislation, but its content is informed by both the Victims Directive and directives around child sexual exploitation and human trafficking.

European Protection Orders (EPOs) grant victims of crime equivalent protection across the EU, by enabling a person who is protected against a perpetrator in one member state to retain that protection when they travel or move within the EU. This means that a woman who has legal protection against an abusive partner or family member in one EU country, for example through a restraining order or a non-molestation order in the UK, is able to apply for an EPO which replicates those protections, which is then recognized by courts across the EU.²³ The orders are new in their implementation, with four such orders having been either recognised or issued by UK courts to date.²⁴ Their use needs to be expanded and the protection they provide needs to be sustained after exit day.

The UK Government can unilaterally decide to continue to recognise European Protection Orders (EPOs) and maintain the protection afforded to women coming to the UK from EU member states. In terms of replicating the provisions available to UK-based women moving to other EU nations after exit day, we urge the Government to give this issue sufficient priority in exit negotiations to ensure that equivalent protection is guaranteed post-Brexit.

In addition to the legal implications, the UK's departure from of the European Union has ramifications for co-operation on a range of issues including female genital mutilation (FGM), child sexual exploitation and data-sharing on VAWG perpetrators. It will also have an impact on funding for VAWG services and related research. For example, the European Commission's €3 million Rights, Equality and Citizenship grant programme aims to advance non-discrimination and tackle VAWG. The Equality and Diversity Forum has found that since 2014, out of the 140 projects funded by the programme, 42 had a UK lead or partner.²⁵ Government must replace this funding which UK organisations will no longer be eligible for after exit day.

Recommendations:

- ▶ Continue to recognise all current and future European Protection Orders issued so that women fleeing violence from the EU to the UK continue to be protected.
- ▶ Prioritise the replication of cross-border VAWG protection, law and order activity and funding throughout the Brexit process.

21 Women's Aid. (2016). *The Impact of Leaving the European Union*. P.6.

22 Ministry of Justice. (2015). *Code of Practice for Victims of Crime*.

23 Official Journal of the European Union. (2011). *Directive 2011/99/EU of the European Parliament and of the Council of the 13 December 2011 on the European protection order*.

24 Charalambous, B. (2017). *European Protection Orders: Written question – 107624*. <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-10-12/107624>

25 Equality and Diversity Forum analysis of "Rights, Equality and Citizenship programme 2014-2020" shared with the review but yet to be published. http://ec.europa.eu/justice/grants1/programmes-2014-2020/rec/index_en.htm

CHAPTER 2

WOMEN IN THE WORKPLACE

Women remain consistently disadvantaged in the workplace.

Progress on the gender pay gap has stalled; significant changes are needed to close it.

The Employment Tribunal process in equal pay cases is complex, cumbersome and lengthy. It limits women's ability to pursue claims in respect of their equal pay rights at work and needs to be reformed.

Protection from third party harassment should be reintroduced to ensure women are better protected from harassment in the workplace.

Pay and Pensions

Background and Context

In the UK, the median gender pay gap for all those in work stands at 18.4%²⁶. Women are far more likely than men to work part-time (73% of part-time employees are women)²⁷ but part-time work is paid on average 35% less than full-time work.²⁸

The pay gap varies significantly across women's working lives and for women with different characteristics. For instance, it is 7.5% for women in their twenties but increases to 26.6% for women in their fifties.²⁹ By the time they reach retirement, the gap is 40%³⁰.

The Government does not require the Office for National Statistics to publish gender pay gap data for other characteristics such as ethnicity, disability or sexuality. Better data is urgently required to ensure policy genuinely reflects the diversity of women's experience and the nuanced causes of the pay gap for different women. However, research consistently shows that whilst the picture is complex, women with multiple protected characteristics tend to experience even greater pay gaps. Fawcett Society research has found significant gaps between women of colour and their white counterparts. For instance, Pakistani and Bangladeshi women earn on average 26.2% less than White British men.³¹ The Equality and Human Rights Commission (EHRC) has found that many of those with disabilities receive lower pay, for instance women with a physical, activity-limiting disability earn on average 6.1% less than non-disabled women.³² More data and evidence is needed on the gaps for Lesbian, Bisexual and Transgender women.

It is clear that motherhood is an important driver of the pay gap for many women. The Institute for Fiscal Studies has found that the gender pay gap widens over twelve years after a child is born to 33%, due to

26 Office for National Statistics. (2017). *Annual Survey of Hours and Earnings 2017 Provisional Results*.

27 Office for National Statistics. (2017). *UK Labour Market, November 2017*.

28 Office for National Statistics. (2017). *Annual Survey of Hours and Earnings 2017 Provisional Results*.

29 Office for National Statistics. (2017). *Annual Survey of Hours and Earnings 2017 Provisional Results*. Table 6.6a.

30 Burkevica, I. et. al. (2015). Gender gap in pensions in the EU: Research note to the Latvian Presidency, European Institute for Gender Equality

31 Li, Y. and Breach, A. (2017). *Gender Pay Gap by Ethnicity in Britain- Briefing*. (London: The Fawcett Society).

32 Equality and Human Rights Commission. (2017). *Disability: what does the pay gap look like?* www.equalityhumanrights.com/en/pay-gaps/disability-what-does-pay-gap-look. Accessed 8th November 2017.

lost wage progression for women.³³ Women continue to undertake the majority of caring responsibilities, consequently they are more likely to work part-time or in jobs below their skill level that offer them the flexibility they need. Our labour market remains highly segregated along gender lines and men continue to hold the majority of the most senior and highly paid jobs.³⁴

The House of Commons Women and Equalities Select Committee (WESC) has observed:

*The causes of the gender pay gap are complex and varied. Direct discrimination plays a part in women's lower wages, particularly for older women who entered the labour market on less equal terms to men and who may face dual discrimination on the grounds of age and gender. However, structural factors are the key cause of the gender pay gap. These include occupational segregation; the part-time pay penalty; women's disproportionate responsibility for unpaid caring; and women's concentration in low-paid, highly feminised sectors.*³⁵

The Gender Pay Gap

Women make up the majority of the low paid; they are 61% of those earning below the real living wage as set by the Living Wage Foundation.³⁶ We agree with Virgin Money's submission that minimum pay protection is a vital step for lower paid women:

*Women comprise the majority of people who are low paid and the average gender pay gap of women in Financial Services is the highest of all other sectors. It is important now and for the future that current protections remain – especially as pension entitlement is dependent on life-time earnings.*³⁷

The Women and Equalities Select Committee examined the gender pay gap in 2016, with a particular focus on women over 40 years old. They observe that:

*...the Government does not have a coherent strategy to address the issues underlying this gap and ensure younger women do not encounter the same difficulties as they age.*³⁸

By April 2018 all organisations employing over 250 people in England, Wales and Scotland will have to report data on their gender pay gap.³⁹ In Scotland certain public bodies employing over 20 people already have to publish gender pay gap information.⁴⁰ The new requirements are an important step forward, improving the information available to employees and the wider public. Publication offers the opportunity for employers to build their understanding of the pay gap in their organisations and for increased public pressure on organisations to take action to address it. Similar requirements are yet to be implemented in Northern Ireland.

33 Costa Dias, M, Elming, W. and Joyce, R. (2016). *The Gender Wage Gap: IFS Briefing Note BN186*. <https://www.ifs.org.uk/uploads/publications/bns/bn186.pdf>. Accessed 6th December 2017.

34 The Fawcett Society. (2017). *Gender Pay Gap and Causes Briefing Equal Pay Day – 10th November 2017*. <https://www.fawcettsociety.org.uk/equal-pay-day-2017-briefing>. Accessed 6th December 2017

35 Women and Equalities Select Committee. (2016). *Gender pay gap inquiry: Conclusion and Recommendations*. <http://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/inquiries/parliament-2015/gender-pay-gap-15-16/>. Accessed 6th December 2017.

36 Office for National Statistics. (2016). User requested data: Annual Survey of Hours and Earnings (ASHE) – Number and percentage of employee jobs with hourly pay below the living wage, by parliamentary constituency and local authority, UK, April 2015 and 2016. <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/>

37 Virgin Money. Evidence submitted to the Review. (2017).

38 Women and Equalities Select Committee. (2016). *Gender Pay Gap: Second Report of Session 2015–16*. <https://publications.parliament.uk/pa/cm201516/cmselect/cmwoREQ/584/584.pdf>. P.5. Accessed 6th December 2017.

39 The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2917 No. 172

40 Equality and Human Rights commission. (2016). *Technical Guidance on the Public Sector Equality Duty: Scotland*. <https://www.equalityhumanrights.com/en/publication-download/technical-guidance-public-sector-equality-duty-scotland>

However, the Panel was concerned that the regulations did not include any specific civil or criminal penalties for non-compliance. In their evidence Menzies Law commented:

...without the risk of penalties being applied in the short term, some private sector organisations are struggling to convince their boards of the need to submit the data, particularly where the organisations are UK subsidiaries.⁴¹

The Equality and Human Rights Commission has very recently launched a consultation on its plans for enforcement of the regulations.⁴² Using its existing enforcement powers under the Equality Act, this will include seeking summary convictions with an unlimited fine, but this will only be an option where an employer has been investigated, issued with an unlawful act notice and has still failed to comply. We therefore recommend that civil penalties for non-compliance should be introduced which could be issued without the need for such extensive enforcement work in advance. The Equality and Human Rights Commission should be given the powers and resources to carry out enforcement activity which would have a more immediate impact on those who do not comply.

Employers are required to publish:

- Mean and median gender pay gaps
- Mean and median gender bonus gaps
- The proportion of women and men in each salary quartile
- The proportion of women and men who receive a bonus.

These headline figures will not give employers sufficient information to identify the causes of the gender pay gap within their organisation. Nor will they be detailed enough to identify causes of unequal pay, or enable women to identify a comparator⁴³ or make equal pay claims. There is no requirement to publish salary ranges for the salary quartiles, so employees will not even be able to tell which quartile they are in. The Panel is also concerned that looking at the gender pay gap in isolation is too blunt a measure and will not reflect the challenges faced by women with multiple protected characteristics.

We recommend that Gender Pay Gap reporting Regulations should be amended so that the gender pay gap is also broken down by age, disability, ethnicity, LGBT and part-time status. This must be done with due consideration to privacy and the rights of individuals to withhold personal data from their employer.

The Panel is also concerned that the current threshold of 250 employees excludes too many women – 99% of businesses fall below the threshold.⁴⁴ Reporting regulations in France apply to organisations with over 50 employees and in Sweden to those with over 25 employees.⁴⁵

We recommend that the regulations should be amended by 2020 to progressively lower the threshold to workplaces with over 50 employees.

41 Menzies Law. Evidence submitted to the Review. (2017).

42 Equality and Human Rights Commission (2017) Closing the gap: Enforcing the gender pay gap regulations <https://www.equalityhumanrights.com/sites/default/files/gender-pay-gap-enforcing-the-regulations.pdf>

43 A comparator is someone of the opposite sex doing work of equal value with more favourable terms in his or her contract.

44 Rhodes, C. (2016). *House of Commons Library: Briefing Paper Number 06152 Business Statistics*.

45 DLA Piper. (2017). *Gender Pay Reporting: An International Survey*. https://www.dlapiper.com/~/_media/Files/Insights/Events/2017/01/Annual%20Employment%20CLE%20Briefing_Gender%20pay%20survey.pdf. Accessed 9th November 2017.

The data required for pay gap reporting is relatively high-level. It is important to note that pay gap reporting on its own will not enable employers or their female employees to identify the causes of their pay gap.

The gender pay gap is lowest in countries with a higher proportion of collective bargaining coverage, and both are linked with greater overall income equality.⁴⁶ Trade unions thus have an important role to play in tackling the gender pay gap. International examples suggest a way forward, such as Norway, where a gradual narrowing of their pay gap since 2008 is partly as a result of increases in pay for women in female dominated sectors that were secured through collective bargaining agreements. In addition to collective bargaining, unions in the UK have, in recent years, supported women in a number of equal value cases, including the current Asda claim and claims against a number of local councils.⁴⁷ Women who are trade union members also benefit from significant support when taking discrimination cases to the Employment Tribunal.

It is clear that alongside structural and social causes of the pay gap, unequal pay remains an important issue.⁴⁸ Action continues to be necessary to make equal pay a reality; this issue is considered in the next section of this report.

Recommendations

- ▶ Civil penalties for non-compliance with gender pay gap reporting should be introduced which could be issued without the need for extensive enforcement work in advance. The Equality and Human Rights Commission should be given the powers and resources to carry out enforcement activity which would have a more immediate impact on those who do not comply.
- ▶ Gender Pay Gap Reporting Regulations should be amended so that the gender pay gap is also broken down by age, disability, ethnicity, LGBT and part-time status. This must be done with due consideration to privacy where low representation of groups with particular characteristics could lead to their data being identified.
- ▶ Gender Pay Gap Reporting Regulations should be progressively amended, so that by 2020 the threshold is lowered to workplaces with over 50 employees.
- ▶ Employers should recognise and bargain with trade unions in the workplace and on equal pay.

Protection for equal pay

The right to equal pay for equal work was set out in the Equal Pay Act 1970. This was amended after a number of legal cases were brought, clarifying that equal work included work of equal value.⁴⁹ Further legal challenges confirmed that this is the case even if no job evaluation study had been done and so could include cases wherever women are systematically underpaid or have less favourable terms.⁵⁰ Today the main provisions are set out in the Equality Act 2010.

46 Pillinger, J., (2014) *Bargaining for Equality: How collective bargaining contributes to eliminating pay discrimination between women and men performing the same job or job of equal value*, Confederation Syndicat Europeaan Trade Union

47 e.g. UNISON, (2013), 'UNISON wins historic equal pay case worth millions of pounds for members', accessed at <https://www.unison.org.uk/news/article/2013/06/wins-historic-equal-pay-case-worth-millions-of-pounds-for-members/>

48 The pay gap is the difference between average hourly pay for women and men. It is different to equal pay which refers to the right of all individual employees to equal pay for work of equal value. There are a number of ongoing equal pay claims, suggesting the persistence of illegal unequal pay. For example, there is a claim against Asda regarding the pay of shop workers versus those in distribution centres <https://www.leighday.co.uk/News/News-2017/August-2017/Another-victory-for-workers-in-their-fight-for-equ>.

49 *Commission v UK* (1982) ICR 578

50 *Enderby* (1994) ICR 112, *Danfoss* (1992) ICR 74

The Panel identified three key challenges to the efficacy of the right to equal pay:

- A lack of transparency and the need to secure women's access to pay information so that they are able to challenge unequal pay effectively.
- The responsibility of employers to regulate pay structures so as to reduce and avoid inequalities.
- Effective procedures for the resolution of claims once they are made.

Protection for equal pay – Access to information

As long ago as 1989, in Case 109/88 *Danfoss*⁵¹ the Court of Justice highlighted the absolute necessity for transparent pay systems. Yet, a lack of transparency has been a continuing barrier to securing equal pay. Information about the degree of inequality is critical to motivate women to take action to secure their rights and to enable them to identify an appropriate comparator. A comparator is a person of the opposite sex working for the same organisation who is doing work of equal or lower value, but with more favourable terms in his or her contract. Finding a comparator enables a woman to make an equal pay claim. Consequently, the Panel considers the provisions of the Equality Act 2010, which make it unlawful to prevent an employee disclosing details of their pay,⁵² to be extremely important. However, no evidence was received on the efficacy of this provision and we call for further research to explore how much impact the provision has had and whether it can be improved.

Recent public policy has hindered women's ability to access information needed to make an equal pay claim. Employees were once able to send an equal pay questionnaire⁵³ to their employer asking for details of other employees' pay rates and reasons for any differential payments. This system was abolished in April 2014⁵⁴ and no alternative has been introduced.

It is clear that Questionnaires were highly valuable in enabling potential claimants to find out if they had a viable case or not. As Sheila Wild and Sue Hastings said in their evidence to the Review

...the questionnaire is the most efficient tool for gathering the sort of statistical and detailed grading information that is needed, on the one hand to enable a prospective claimant to decide whether or not to proceed with a claim, and on the other, to enable the Employment Tribunal to clarify the issues and decide on the most cost-effective way of progressing the claim through the Tribunal process. Careful consideration needs to be given to which is preferable, the relative informality of the statutory questions procedure, or the more cumbersome and administratively expensive alternatives of formal disclosure, or written requests for information made formally through and by the Employment Tribunal.⁵⁵

We recommend that the Equal Pay Questionnaire is reintroduced. Additionally, the Employment Tribunal should be entitled to draw adverse conclusions from an employer's failure to answer relevant questions.

51 Case 109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* ECLI:EU:C:1989:383, 1989 ECR 03199

52 Equality Act 2010, s.77.

53 Equality Act 2010, s.138.

54 Equality Act 2010, s.138 was repealed by Enterprise and Regulatory Reform Act 2013 s.66.

55 Equality Act 2010: consultation on the repeal of the procedure for obtaining information in a claim for equality of terms (formerly known as an equal pay claim), a response, Sheila Wild and Sue Hastings, 2012. Evidence submitted to the Review 2017

Additional measures could further improve the transparency of pay data. We recommend that the Freedom of Information Act 2000 is amended to include pay in the private sector so that the accurate information needed to bring equal pay claims is more freely available. The pay data from the private sector could be anonymised to protect individual privacy until a tribunal orders a disclosure.

Where Employment Tribunals find cases of unequal pay or discrimination they can order a full equal pay audit.⁵⁶ However, these are not being ordered. In fact, one panel member with extensive experience of pursuing equal pay claims told the Review that she was unaware of a single case where a full equal pay audit has been ordered following such a finding. Full audits should be ordered as standard. However, they must be conducted with transparency. The data must be made publicly available in order to generate broader change.

Furthermore, Employment Tribunals should have the power to order equal pay audits at any stage in a case where this will be in the interest of employees or the wider workforce.

Protection for equal pay – Responsibility of employers to regulate pay structures

Employers have a responsibility to ensure their pay structures are compatible with equal pay requirements. However, we received evidence that whilst there is much good practice, many employers continue to ignore their obligations in this area.

Menzies Law, a firm of solicitors that acts mainly for employers and assists them to undertake gender pay audits, told the Review:

...there is a real reluctance to acknowledge any credible equal pay risk. In particular, directors and senior managers believe that paying the same wage for the same role is sufficient. Job evaluation and serious engagement with the comparison of different types of role as being of potentially equal value is very patchy.⁵⁷

The firm stated that for employers they have worked with, the principle statistical drivers for the pay gap appear to be:

- A lack of clear strategies and policies regarding pay decisions
- The predominance of men in higher paid managerial grades
- The predominance of males in technical/professional roles, particularly at higher levels
- Length of service increments favouring male employees.

Though the sample of firms that Menzies Law has worked with is relatively small it is likely to be indicative of wider trends. Pay discrimination can often be unintentional, emerging as an unconscious result of pay systems.

To address this we recommend the introduction of mandatory equal pay audits. These would provide a system by which employers regularly review their structures and systems to ensure that they have no unintended unequal pay. These must be conducted transparently and the data made publicly available.

⁵⁶ An equal pay audit is a more thorough and rigorous analysis of pay within an organisation than required by pay gap reporting. The Equality and Human Rights Commission provides details of what an equal pay audit is and how to conduct one. Equality and Human Rights Commission. *What is an equal pay audit?* <https://www.equalityhumanrights.com/en/multipage-guide/equal-pay-audit-larger-organisations#h2>

⁵⁷ Menzies Solicitors. Evidence submitted to the Review. (2017).

We recommend these are conducted every three years. Initially the requirement should apply to employers of over 250 people.

Protection for Equal Pay – Effective resolution of claims once they are made

The Panel identified a number of ways in which the current system for resolving cases of unequal pay must be improved.

The procedures for applying to the Employment Tribunal for an equal pay ruling are complex and drawn out. They should be reviewed and simplified to ensure that women are able to enforce their workplace rights.

Equal Pay cases can notoriously last many years. For example, the case against Reading Council includes Equal Pay Claims dating back to 2003. Parts of the case are still ongoing.⁵⁸ Women have died waiting for justice.

There is an indicative timetable for equal value claims of the time to hearing (25 weeks where there is no independent expert and 37 weeks where there is). This is not being enforced. It should be properly enforced.⁵⁹ Consideration should be given to introducing a similar indicative time limit for all equal pay claims.

We recommend that it should be possible to pursue class actions but that women who participate in them should not lose their right to pursue individual claims if they decide the class action does not best represent their interests.

Alternatively, a voluntary procedure that would require and facilitate early examination, and perhaps arbitration, of a potential claim, before legal action is initiated, would be an improvement. This could sensibly utilise an ACAS-like organisation but the procedure should operate transparently to ensure that women do not settle for less than they may be entitled to and to prevent future unlawful practice. Women must retain the right to make a claim through an Employment Tribunal.

Failure to pay women and men equally clearly impacts on women's incomes but has knock on effects for employer pensions contributions. At the moment, when an equal pay claim is successful the employer is required to pay the difference in pay for up to six years prior to the commencement of the case. However, no automatic pension rights follow an equal pay claim. Furthermore, if an equal pay case settles the law does not automatically trigger an obligation on the pension provider to increase the level of the pension.

Equal pay cases are currently treated as a purely contractual matter. In other discrimination cases, injury to feelings is recognised in awards. We see no reason why pay discrimination is any less impactful on individuals, with the potential to leave those who have been underpaid feeling humiliated and undervalued.

We recommend that awards following successful equal pay claims should include pensions contributions. Awards in equal pay case should also recognise injury to feelings as with other discrimination cases.

58 Hyde, N.J. (2016). *Reading Borough Council urged to pay staff "the money they are due"*. <http://www.getreading.co.uk/news/reading-berkshire-news/reading-borough-council-urged-pay-12037136>. Accessed 12th December 2017.

59 See the annexe to schedule 3 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, SI 2013 No. 1237

Recommendations

- ▶ Employment Tribunals must enforce the timetable for equal value claims. Consideration should be given to introducing a similar indicative time limit for all equal pay claims.
- ▶ The procedures for obtaining equal pay should be reviewed and simplified and consideration given to the development of class actions to address unequal pay. Women who participate in class actions should not lose their right to pursue individual claims if they decide the class action does not best represent their interests.
- ▶ Equal Pay Questionnaires should be reintroduced. The Employment Tribunal should be entitled to draw adverse conclusions from an employer's failure to answer relevant questions.
- ▶ Amend the Freedom of Information Act to include pay in the private sector so that the accurate information needed to bring equal pay claims is more freely available.
- ▶ Where Employment Tribunals find cases of unequal pay or discrimination they should require a full equal pay audit as standard. These should be conducted with transparency and the data made publicly available.
- ▶ Employment Tribunals should have the power to order equal pay audits at any stage in a case where this will be in the interest of employees or the wider workforce.
- ▶ Mandatory equal pay audits should be required every three years. This should initially apply to employers of over 250 people. These must be conducted transparently and the data made publicly available.
- ▶ Awards following successful equal pay claims should include pensions contributions and reflect injury to feelings.

Maternity, Paternity and family friendly rights

Background and context

Women continue to undertake the majority of unpaid work in the home, in particular childcare and activities associated with looking after children.⁶⁰

Strong maternity, parental leave and flexible working rights are essential to enabling women with children to participate in the workforce and to support the socially and economically essential task of raising children.

The first maternity leave provisions were introduced in 1975.⁶¹ For the first time, women were protected from losing their job as a result of pregnancy, entitled to maternity leave with reinstatement rights and maternity pay. The last 40 years have seen progressive improvements but there remains much to do. Research by the Equality and Human Rights Commission found that an estimated 54,000 working mothers are made redundant or are pressured to leave their jobs each year.⁶² The Introduction of Shared

60 For example, see ONS. (2016). *Changes in the value and division of unpaid care work in the UK: 2000 to 2015, 10th November 2016*. <https://www.ons.gov.uk/economy/nationalaccounts/satelliteaccounts/articles/changesinthevalueanddivisionofunpaidcareworkintheuk/2000to2015#main-points>. Accessed 6th December 2017. See also Olchawski, J. (2016). *Parents, Work and Care: Striking the Balance*. <https://www.fawcettsociety.org.uk/parents-work-and-care-striking-the-balance>. (London: The Fawcett Society). Accessed 6th December 2017.

61 Employment Protection Act 1975.

62 Equality and Human Rights Commission. (2016). *Pregnancy and Maternity-Related Discrimination and Disadvantage: Summary of Key Findings*. <https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/pregnancy-and-maternity-discrimination-research-findings>. Accessed 6th December 2017.

Parental Leave has been an important step in supporting parents who wish to share care more equally. Yet, the Government's own estimates before the policy was introduced indicated that take up would be low at around 4-8%.⁶³

Girlguiding UK's annual Girl's Attitudes Survey showed that although many girls would prefer to share parenting responsibilities they recognise that their aspirations are unlikely to be fulfilled:

*Girls expect to enjoy equal parenting responsibilities with their partners, but they worry that gender stereotypes and financial constraints reinforce inequality. In 2013, 93% of girls aged 11 to 21 thought that in relationships between a mother and father, both parents should be able to share time off after a baby is born. However, 41% recognised that people may look down on 'stay-at-home dads' and that ideas of gendered roles can be restrictive to both men and women's opportunities.*⁶⁴

The Panel accepts that there is a clear relationship between people undertaking caring responsibilities and lower levels of pay. When examining the gender pay gap, the WESC said that:

*as long as women continue to take the majority of responsibility for childcare and other forms of unpaid caring, pay differentials will persist. Women pay a high price for time taken out of work, and this disadvantage persists well beyond the years they spend caring. If men and women shared care equally this would not be the case. Investing in policies that support men to share childcare, and allow women to continue working, will reap financial benefits as well as reducing the gender pay gap.*⁶⁵

Pregnancy and Maternity Discrimination

In 2016 the Equality and Human Rights Commission (EHRC) in partnership with the Department for Business, Innovation and Skills (BIS)⁶⁶ published a report on the prevalence and nature of pregnancy discrimination and disadvantage in the workplace.⁶⁷ They concluded that most employers reported that it was in their interests to support pregnant women and those on maternity leave and they agreed that statutory rights relating to pregnancy and maternity are reasonable and easy to implement. However, the research found that 77% of mothers said that they had a negative or possibly discriminatory experience during pregnancy, maternity leave and/or on return from maternity leave. 11% of mothers reported that they were either dismissed, made compulsorily redundant when others in their workplace were not, or treated so poorly they felt they had to leave their job.⁶⁸

The research found that harassment and negative comments related to pregnancy or flexible working from employers and colleagues were common. One in ten mothers said their employer discouraged them from attending antenatal appointments. Whilst three quarters of those who had submitted a flexible working request had had it approved, half of that group said that they felt it had resulted in negative consequences.

63 HM Government. (2012). *Consultation on Modern Workplaces*.

64 Girlguiding UK. Evidence submitted to the Review. (2017).

65 Women and Equalities Select Committee. (2016). *Gender Pay Gap Inquiry Report*.

66 This department is now the Department for Business, Energy, Innovation and Skills.

67 Equality and Human Rights Commission. (2016). *Pregnancy and Maternity-Related Discrimination and Disadvantage: Summary of Key Findings*. <https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/pregnancy-and-maternity-discrimination-research-findings>. Accessed 6th December 2017.

68 *Ibid.*

Working Mums told the Panel that this report echoed their experience. They give a number of specific examples of problems that have been raised with them:

I've worked with the same company for three years now on a zero hours contract, but despite my contract I have worked 16.5 hours EVERY week, sometimes above that, but it's always at least 16.5. I have been rota-ed in for these shifts... I am now looking to return to work and I have been informed there are no hours for me to return to.

I started my maternity leave in the Spring and in July/August I saw an advert for a job that was nearly my job description, managing my team within the small company, but under a slightly different job title. I called my company and spoke to a director to be told that it wasn't my job, but they can't expect customers to wait a year to have their issues solved. (So it's my job and it wasn't a temporary job). Due to the fact it's a small company I know that there isn't enough work for two people to manage my team. I have recently been in to see my manager and he told me that if I was to return to work it would have to be full-time and that there are no part-time jobs within the company. This was before I even asked about part-time jobs.

I'm currently on maternity leave for the second time. When I returned to work after my first child, flexible working was agreed and my role changed from five days to three. I've now been told that my role will be made redundant, along with a part-time colleague to make way for a new full-time position. This is exactly the same job that the two of us have been doing. It's just been given a different title and requires a full-timer.

The protection from dismissal for pregnancy and maternity in the Equality Act section 18 only applies during the protected period of pregnancy and ends on the last day of maternity leave. Women who are treated less favourably after they return from maternity leave cannot rely on section 18 for protection. It may be argued that they can instead rely on section 13 which protects individuals against direct discrimination because of a protected characteristic. They will have to show they have been treated less favourably because of sex. However, this makes claims harder to establish.

In many cases it is on return to work that women experience discrimination as a result of having taken maternity leave. We recommend the extension of the protection offered by Section 18 to a period of six months after a mother returns to work.

The WESC reported on Pregnancy and Maternity Discrimination in 2016. They concluded that:

additional protection from redundancy for new and expectant mothers is required. The Government should implement a system similar to that used in Germany under which such women can be made redundant only in specified circumstances. This protection should apply throughout pregnancy and maternity leave and for six months afterwards.⁶⁹

There was discussion amongst panellists as to whether this approach would be beneficial. Some panellists felt that discrimination against pregnant women is so prevalent that it requires far reaching measures to create cultural change. Others were concerned that this change would create unfairness between colleagues where one person may be objectively evaluated as higher performing but lose their job as another candidate is pregnant or on maternity leave. There was also concern that this might disincentivise employers from recruiting women of childbearing age.

69 Women and Equalities Committee. (2017). *Pregnancy and Maternity Discrimination: First Report of Session 2016–17*. <https://publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/90/90.pdf>. Accessed 6th December 2017.

The Panel agreed though that change is required. We propose a greater role for mediation where pregnant women or those on maternity leave are at risk of redundancy. Employers could be required to consult with ACAS prior to making protected women redundant. This could create an opportunity for employers to be reminded of their responsibilities and to ensure transparency and compliance around the proper process. However, this would require significant investment in resources and expertise to ensure ACAS is able to properly deliver this function in a way that reflects the complexities of the law and represents the interests of pregnant women.

Claimants must bring a claim to an Employment Tribunal within three months of an act of discrimination. We are concerned that this is too restrictive for those who are about to or who have very recently given birth. In their evidence to the panel, Working Families explained:

At its simplest, the length of pregnancy and maternity leave means that the implications of discriminatory decisions – for example forcing a pregnant worker on to sick leave, which can consequently reduce the amount of maternity pay she is eligible for – often only become clear to the affected employee some months down the line.... It is not enough to say that time limits can be increased at the discretion of the Tribunal, and it is not fair to put the onus on a new or expectant mother to make the case for this to happen.⁷⁰

It is clear that there are particular circumstances which make it additionally challenging for new or expectant mothers to make a claim. Therefore, we call for the extension of the time limit to six months for all claims linked to pregnancy and maternity.

Many women wish to continue to breastfeed their baby after they return to work. Given the extensive benefits of breastfeeding to both mother and baby,⁷¹ this is a choice that should be facilitated and enabled by employers. Yet, there is currently no legal requirement for employers to allow mothers breaks for breastfeeding.⁷² This can leave women facing a choice between getting back to work and continuing to feed their child in the way they prefer. The lack of breastfeeding rights is a barrier to women returning to work and to more equal sharing of childcare. At present section 13 (6&7) of the Equality Act 2010 specifically provides that a woman cannot pursue a claim for direct sex discrimination if she suffers a detriment because she has breastfed at work. However, the judgment of Court of Justice in *Elda Otero Ramos v Servicio Galego de Saúde*⁷³ suggests that this provision is contrary to EU law and these exclusions will have to be disapplied. We recommend that the law is immediately changed to align with that judgment and that these wider rights be widely publicized and put into operation.

The Panel was also concerned that following the Red Tape Challenge it is no longer recommended that employers conduct an individual health and safety risk assessment for each pregnant employee. Employers are only required to carry out a workplace risk assessment and to take account of risks to new and expectant mothers and mothers who are breastfeeding. This means that they do not have to have a one-to-one conversation with the woman in question. As a result, employers can fail to identify what specific action needs to be taken reflecting the circumstance of each employee. Calls to the Maternity Action advice line show some of the problems that arise when risks are not adequately assessed with the woman's individual role and circumstances in mind.

70 Working Families. Evidence submitted to the Review. (2017).

71 NHS Choices Online. *Benefits of Breastfeeding*. <https://www.nhs.uk/Conditions/pregnancy-and-baby/Pages/benefits-breastfeeding.aspx>. Accessed 18th December 2017.

72 ACAS. *Accommodating breastfeeding employees in the workplace*. <http://m.acas.org.uk/media/pdf/b/s/Acas-guide-on-accommodating-breastfeeding-in-the-workplace.pdf>. Accessed 18th December 2017.

73 See – *Elda Otero Ramos v Servicio Galego de Saúde*, CJEU, Case C531/15, 19.10.17 which found that “in order to be in conformity with the requirements of Article 4(1) of Directive 92/85, the risk assessment of the work of a breastfeeding worker must include a specific assessment taking into account the individual situation of the worker in question in order to ascertain whether her health or safety or that of her child is exposed to a risk.”

A care worker informed her employer that she was pregnant and in order to avoid contact with violent patients she was given late shifts when more staff were available. However, she suffered from high blood pressure and diabetes and the late shifts caused problems with her health conditions. Despite asking to speak to her employer she was unable to get them to look at the risks to her health and her GP had to sign her off sick.

A veterinary nurse informed her employer that she was pregnant and asked for different shifts to avoid work that involved giving anaesthetic. She was unable to get a meeting to discuss her concerns and ended up having to reduce her hours to avoid working when surgery was undertaken. This reduced her earnings and affected her maternity pay.

Research conducted by the Equality and Human Rights Commission found that 4% of pregnant women left their jobs because of health and safety risks not being tackled.

However, it is now clear that employers must undertake an individual risk assessment for breast feeding mothers in order to ascertain⁷⁴ whether her health or safety or that of her child is exposed to a risk.

Individual health and safety risk assessments should be carried out for all pregnant women, women who have given birth in the last six months or are breastfeeding.

Recommendations

- ▶ The protection offered by section 18 of the Equality Act should be extended to a period of six months after maternity or parental leave.
- ▶ Employers could be required to consult with ACAS prior to making protected women redundant. This would require an expansion of resourcing and expertise in this area.
- ▶ The time limit for all discrimination and harassment claims linked to pregnancy and maternity should be increased to six months.
- ▶ Introduce a statutory right to reasonable time off and facilities for breastfeeding.
- ▶ Recognise that there is a requirement for employers to carry out an individual risk assessment for pregnant women, women who have given birth in the last six months or are breastfeeding.
- ▶ Enact specifically that women are protected at work from discrimination on the grounds of breastfeeding in accordance with European caselaw.

Support for Carers

Women are more likely to take on unpaid care responsibilities than men, and are more likely to be over 50 when doing so.⁷⁵ Women are also more likely than men to have given up work and be 'economically inactive' in order to provide this type of care.⁷⁶ The overlap of women having children later on in life and continuing to work longer means that many women find themselves part of the 'sandwich generation', where they are likely to be caring for grandchildren as well as their own elderly parents.

The Conservative Manifesto for the 2017 election proposed a period of statutory unpaid leave available to carers. This would be a step forward, but the poverty rate amongst people caring for 20 hours a week or

⁷⁴ See *Elda Otero Ramos v Servicio Galego de Saúde* cited above.

⁷⁵ Cory, G., (2012) *Unfinished Business: Barriers and opportunities for older workers*, Resolution Foundation

⁷⁶ Ben Galim, D., and Silim, A., (2013) *The sandwich generation: Older women balancing work and care*, IPPR

more is significantly higher than the general population, at 37%.⁷⁷ A statutory period should be introduced – and it should be paid.

Recommendation

- ▶ Introduce a statutory, paid period of carers' leave to enable carers, who are disproportionately women, to stay in touch with the labour market.

Statutory Maternity Pay and Maternity Allowance

Women are entitled to Statutory Maternity Pay (SMP) paid at a rate of 90% of their average weekly earnings for the first six weeks. It is then paid at a rate of £140.98 for the remaining 33 weeks or 90% of their average weekly earnings, whichever is lower.⁷⁸

However, to be entitled to SMP they must have worked for their employer continuously for 26 weeks up to the 15th week before the child's expected birth.⁷⁹ This means that pregnant women are effectively unable to change jobs if they wish to retain their SMP rights. This is restrictive for individual women and can also result in poorer outcomes for businesses as women are unable to move to jobs that maximise their productivity. Furthermore, women can find themselves ineligible for statutory maternity pay if they become pregnant after handing in their notice before moving to a new role. This can create significant hardship and insecurity and can make pregnant women more dependent on their existing employer and vulnerable to discrimination.

We recommend that the qualifying period for SMP is removed and it becomes a right for all employees from their first day of employment. The same is true of rights to Paternity and Shared Parental leave pay.

Those unable to claim SMP may be eligible for Maternity Allowance (MA). Some claimants are entitled to £140.98 per week or 90% of earnings, whichever is the lowest, for 39 weeks. However, others are entitled to a lower rate of £27 a week for 39 weeks or 14 weeks.⁸⁰ To be eligible, women must have been employed or self-employed for at least 26 of the 66 weeks before their baby is due. In the context of the increased casualisation of the jobs market, growing numbers of women may be ineligible for MA. This exposes them to the risk of genuine hardship and poverty during maternity leave. This is unacceptable. The requirement to have worked 26 weeks in the last 66 should be removed. No woman should have to face raising a new baby without a decent source of income.

The Panel is also concerned that rates of statutory pay are too low. SMP, MA, Statutory Paternity Pay (SPP) and Statutory Shared Parental Pay (ShPP) do not meet the national minimum wage and fall far short of the Real Living Wage. Caring for children is an important social and economic activity, it should not leave parents in a worse financial position than those in paid work. We recommend that SMP, MA, ShPP and SPP are paid at the equivalent of the Real Living Wage, as set by the Living Wage Foundation. This should be paid at a rate equivalent to at least 36 hours per week.

77 Aldridge, H., and Hughes, C., (2016), *Informal Care and Poverty in the UK*, New Policy Institute

78 Gov.uk. (2017). *Statutory Maternity Pay and Leave: employer guide*. <https://www.gov.uk/employers-maternity-pay-leave>. Accessed 29th November 2017.

79 *ibid*

80 Gov.uk. (2017). *Maternity Allowance: What You'll Get & Eligibility*. <https://www.gov.uk/maternity-allowance/what-youll-get>. Accessed 29th November 2017

Recommendations

- ▶ The qualifying period for SMP should be removed. SMP, ShPP and paternity pay should be a right for all employees from their first day of employment.
- ▶ The requirement to have worked 26 weeks in the 66 weeks before the baby is due to be eligible for Maternity Allowance should be removed. No parent should have to face raising a new baby without a decent source of income.
- ▶ The flat rate of Statutory Maternity Pay, Statutory Paternity Pay, Statutory Shared Parental Pay and Maternity Allowance should be paid at the equivalent of the Real Living Wage, as set by the Living Wage Foundation, for the equivalent of at least 36 hours a week.

Paternity and Shared parental leave

Fathers and partners are entitled to two weeks paid paternity leave, which must be taken within 56 days of the birth. Fathers and partners may also be entitled to take shared parental leave (SPL).⁸¹ If they do, mothers must still take the initial two weeks after birth (or four weeks for a factory worker), but they can then cut their maternity leave short and exchange it for SPL.⁸² Both parents will then have a flexible choice of how to split up the rest of the leave entitlement – of up to 50 weeks.

SPL is not just used to allow mothers to return to work and their partner take leave, it can be used concurrently or in sequence. Many couples will want to use SPL to allow partners to take more than the statutory two weeks' paternity leave after birth and spend time together as a family.

The introduction of SPL has been an important step forward, for the first time giving families the legal right to share time off work to care for a child during the first year of their life. However, there are a number of problematic areas concerning the implementation of SPL the Panel is concerned about.

The regulations underpinning SPL are complex to operate for both employers and employees and have not been widely used. Research by the Chartered Institute of Personnel and Development has found that, on average, only 5% of eligible fathers have taken up SPL and over half of organisations reported no take up at all.⁸³

Jamie Atkinson, Senior Lecturer at Manchester Law School, has argued that “the low level of remuneration available for parents taking SPL is a critical factor in poor take up rates”. He has also argued that SPL is based on the assumption that mothers are, and will remain, the primary carers for young children. He suggests that SPL will only be successful if “the policy is reformed to include a higher rate of pay and a period of leave reserved for fathers.”⁸⁴

Working Families have also recommended that pay should be levelled up for paternity or shared parental leave in line with the first weeks of maternity pay. Their submission to the Panel said:

81 Shared Parental Leave Regulations 2014

82 Ibid

83 CIPD. (2016). *Labour Market Outlook; Focus on Working Parents*. www.cipd.co.uk/Images/labour-market-outlook-focus-on-working-parents_tcm18-17048.pdf.

84 Atkinson, J. (2017). *Shared Parental leave in the UK; can it advance gender equality by changing fathers into co-parents?* International Journal of Law in Context, Vol. 13 No. 3, September, pp 356-368. [https://e-space.mmu.ac.uk/618374/3/revised%20SPL%20article%20march%2017%20\(1\).pdf](https://e-space.mmu.ac.uk/618374/3/revised%20SPL%20article%20march%2017%20(1).pdf)

Without pay at near wage-replacement levels fathers are unlikely to take paternity (or Shared Parental) leave. Other research shows that fathers who are able to take leave in the first year of their child's life are more likely to be involved with their children's care in subsequent years. Levelling up pay for paternity leave to be in line with the first weeks of maternity pay, and making paternity pay available to self-employed fathers, would help to ensure more fathers are able to spend time with their new families.⁸⁵

on paid leave for father Maternity Action observe:

We need a more nuanced approach to the design of leave and pay if we are to significantly increase take-up of leave by fathers while protecting the health and wellbeing of mothers.

European evidence shows that increased pay is not in itself sufficient to significantly increase take-up of leave by fathers. The health and safety function of maternity leave needs to be incorporated into rethinking of leave and pay policies.⁸⁶

The lower levels of remuneration for the first weeks of SPL compared to maternity leave are compounded by the gender pay gap.⁸⁷ The fact that women have lower on average earnings means that men in a household tend to earn more than female partners. In opposite sex partnerships this means that the comparatively lower levels of pay for the first weeks of SPL taken become additionally expensive as parents consider the impact of his missed earnings.

In addition to the lower levels of remuneration for fathers and co-parents, the current system creates a default that preserves the status quo where women undertake the majority of childcare responsibility. Women must sign over their leave to the second carer, so that the starting point remains that she will take the full period of time.

A review of the Shared Parental Leave policy is planned for 2018. Whilst we welcome the progress offered through the introduction of SPL it is clear that the review represents an opportunity to re-think the leave system to ensure it is structured in a way that more effectively achieves a range of policy goals.

The leave system for new parents should be structured to protect mothers after the birth of their child and ensure they have adequate time to recover. It must support and encourage the equal sharing of child care, in the first year and throughout a child's life. It should offer decent levels of pay, which enable all parents to spend time with their children. Finally, it should support parents' return to work. Achieving this will require an overhaul of the leave system.

To encourage fathers to play a greater role in child care now we recommend paternity leave is extended to six weeks and paid at a rate of 90% of earnings. This should be available to be taken at any time in the first year after the baby is born. In this way both parents will be entitled to six weeks' paid leave at 90% of earnings. A reformed system should ensure a period of leave dedicated to fathers or co-parents. The system should presume equal responsibility for the care of children and ensure that both parents have leave entitlements in their own right. One parent's entitlement should not be dependent upon the other.

⁸⁵ Working Families. Evidence submitted to the Review. (2017).

⁸⁶ Maternity Action. Evidence submitted to the Review. (2017)

⁸⁷ Office for National Statistics. (2017). *Annual Survey of Hours and Earnings 2017 Provisional Results*.

Recommendations

- ▶ Extend paternity leave to six weeks, paid at 90% of earnings, to be taken any time in the first year after the baby is born.
- ▶ The maternity, paternity and parental leave policy should be comprehensively reviewed to ensure that it is structured to presume equal responsibility for the care of children and ensures that both parents have leave entitlements in their own right. One parent's entitlement should not be dependent upon the other.
- ▶ Section 18 of the Equality Act should be amended to include those on Shared Parental Leave.

Workplace harassment

Background and context

Sexual harassment in the workplace creates misery for many women, leading to humiliation and intimidation. Recent coverage of harassment in Hollywood⁸⁸ and Westminster⁸⁹ has raised awareness of this issue but evidence of the prevalence of sexual harassment in the workplace is not new. A 2016 survey by the TUC found that over half of women polled had experienced some form of sexual harassment in the workplace.⁹⁰

The Equality Act 2010 defines sexual harassment as 'unwanted conduct of a sexual nature, which has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant or of violating the complainant's dignity.'⁹¹

In legal terms sexual harassment can occur in the workplace from three sources: employers, fellow employees and third parties. Third parties include all those with whom an employee comes into contact in the course of their work, such as clients, customers and outside business contacts such as contractors, their staff and agents.

Organisations must have effective policies in place encourage and support individuals who report sexual harassment.

Sexual harassment in the workplace

We were impressed by the recent TUC and Everyday Sexism Project report *Still just a bit of banter?*⁹² which exposed not only the extent of sexual harassment at work but also the reluctance of employees to report it or take any further action to remedy the situation.

The TUC found that 52% of all women polled had experienced some form of sexual harassment. Nearly one quarter of the women had experienced unwanted touching, such as a hand on the knee or lower back. More than 10% of women reported experiencing unwanted sexual touching or attempts to kiss them.

88 Bromwich, J.E. (2017). "The Silence Breakers" named Time's Person of the year for 2017. <https://www.nytimes.com/2017/12/06/business/media/silence-breakers-time-person-of-the-year.html>. Accessed 6th December 2017.

89 Observer Editorial. (2017). *The Observer view on sexual harassment in Westminster*. <https://www.theguardian.com/commentisfree/2017/nov/04/politics-westminster-sexual-harassment>

90 TUC. (2016). *Still just a bit of banter? Sexual harassment in the workplace in 2016*.

91 Equality Act (2010) Explanatory Notes, 9.8. <https://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/2/2/14> accessed 1st December 2017

92 TUC. (2016). *Still just a bit of banter? Sexual harassment in the workplace in 2016*.

In the vast majority of cases, the perpetrator was a male colleague, with nearly 20% reporting that their direct manager or someone else with direct authority over them was the perpetrator. The vast majority (80%) did not report the harassment to their employer. Worryingly, of those who did report the harassment only 7% said that it had been dealt with satisfactorily.

One lawyer, who asked to remain anonymous, has provided some recent examples to the Review from her direct experience. She has offered advice in cases where male managers gave female members of staff extra tasks and withdrew support when alleged sexual advances were rebuffed and female members of staff being ostracised by team members as a result.

She has heard examples of male managers making sexual innuendos when supervising female members of staff. She reported that a colleague advised a woman who was given the promise of a pay rise in exchange for a “blow job”.⁹³

Third party harassment

Perpetrators of sexual harassment or harassment on the basis of a protected characteristic are often third parties. Women working in retail, hospitality, healthcare, care, transport and many other sectors deal with clients, patients, and customers on a daily basis and currently have little protection from their employer when facing harassment. Third party harassment is also relevant where there has been contracting out of some functions or services so workers can be working alongside people who have a different employer.

The case of *Burton v De Vere Hotels Ltd*⁹⁴ sets out a typical scenario. In this case two black waitresses, clearing tables in the banqueting hall of a hotel, were made the butt of racist and sexist jibes by a guest speaker entertaining the assembled all-male company at a private dinner party. The case was decided in their favour and it was found that their employer could be held responsible for harassment from third parties. However, this precedent was later reversed by the House of Lords (Supreme Court) in the case of *Pearce v Governing Body of Mayfield Secondary School*.⁹⁵

It was as a result of this that section 40 was added to the Equality Act 2010, which provides for protection against third party harassment. However, following the Coalition Government’s “Red Tape Challenge” Section 40 was repealed by the Enterprise and Regulatory Reform Act 2013.

James Hand argued in his evidence to the Review that provision for third party harassment is unnecessary, and may be surplus and confusing.⁹⁶ He argues that the existing definition of harassment in Section 26 by using the expression unwanted conduct “related to” a protected characteristic can be interpreted to encompass third party harassment. There are differing Employee Appeal Tribunal decisions on this point.⁹⁷ The differing interpretations of this provision in the Courts means individuals cannot rely with certainty on the “related to” formulation as covering a failure to respond to third party harassment. We therefore consider that further provision to counter third party harassment is required and that section 40 should be reintroduced.

Under section 40, as originally drafted, an employer can be found to be responsible for third party harassment if they know of two previous incidents of harassment and have failed to take “reasonably

93 Anonymous. Evidence submitted to the Review. (2017).

94 [1996] IRLR 596

95 [2003] UKHL 34

96 Hand, J. *Employer’s Liability for Third-Party Harassment: An ‘Unworkable’ and Superfluous Provision?* Independent Law Journal, 2013; 42(1): 75-84. https://www.academia.edu/2185854/Employer_s_Liability_for_Third-Party_Harassment_An_Unworkable_and_Superfluous_Provision

97 *Conteh v Parking Partners Ltd* [2011] ICR 341. *Sheffield City Council v Norouzi* [2011] IRLR 897. *Unite the Union v Nailard* [2017] ICR 121 which is being appealed to the Court of Appeal.

practicable” steps to prevent the third party from harassing employees. This is excessive, a single incident of harassment should be sufficient to require action from an employer. We understand that there may be times when employers find it hard to prevent a certain level of third party harassment. For example, for people employed to look after those with severe mental health problems or cognitive disabilities, vulnerable children or prisoners. Some provision needs to be made to limit an employer’s liability in such circumstances.

We recommend that a revised section 40, requiring only one previous incident of third party harassment, is introduced.

Pregnancy and maternity is not one of the protected characteristics listed in section 26(5) which prohibits harassment. It is easy to envisage a situation where a woman is harassed because of pregnancy or maternity leave. Whilst she could rely on section 18 (assuming she is within the protected period), she would have no freestanding complaint of harassment. This should be addressed and we recommend that protection from harassment under section 26(5) is extended to pregnancy and maternity as well as marriage and civil partnership status.

Sexual harassment in the workplace has proved to be difficult to tackle but it does not mean it is an intractable problem. Action by employers, backed up by stronger legal protections for workers, better access to justice and strong unions, are all part of the solution.

Recommendations

- ▶ Reintroduce section 40 of the Equality Act to guarantee legal protection against harassment from third parties.
- ▶ Section 40 should be revised, requiring only one previous incident of third party harassment.
- ▶ Protection from harassment under section 26(5) should be extended to pregnancy and maternity as well as marriage and civil partnership status.

Dress codes

Background and context

Dress codes can create unequal burdens on employees and reinforce objectification or unnecessary distinctions between male and female employees. These might include requirements that women adhere to a particular standard of appearance (such as wearing make-up or having hair free legs) or that they must wear skirts or heeled shoes where men are able to wear trousers and flat shoes.

Under the provisions of the Equality Act 2010, employers are permitted to impose a dress code on their employees. These may be put in place for reasons of health and safety, in relation to the level of smartness required or to reflect a corporate image – all these are potentially permissible. However, employers will be acting in an unlawfully discriminatory way if they impose requirements which amount to less favourable treatment for women or for men. A dress code should not be discriminatory on any of the protected grounds whether sex, race, religion or belief, gender re-assignment or age and in the case of disability employees have the right to have reasonable adjustments made where it is necessary.

In 2015 the case of Nicola Thorp brought discussion about dress codes to the fore. She had arrived to work as a temporary receptionist and was told that she could not wear her smart flat shoes but she had to wear 2-4-inch heels. When she refused she was sent home.

Ms Thorp set up a petition calling for it to be illegal for a woman to be required to wear high heels at work. It received 152,420 signatures in six months.⁹⁸ In response, the House of Commons Women and Equalities Select Committee together with the Parliamentary Petitions Committee undertook an inquiry and called for evidence. They said that:

*In the course of gathering evidence we have also heard about other kinds of gendered dress codes. We heard from women who had been required to dye their hair blonde, to wear revealing outfits and to constantly reapply make-up.*⁹⁹

The Panel received a submission from Slater and Gordon Solicitors who had conducted a survey on dress codes. Their survey of 2,000 employees found that women experience additional pressure and judgement around their appearance. 19% of women surveyed said they felt more attention is paid to their appearance compared to male workers. 28% of women had been advised that changing their appearance would be better for business and 34% said comments on their appearance had been made in public or in front of junior colleagues.

A small but significant proportion of women had been directly required to conform to highly gendered norms. 7% had been told to wear high heels whilst in the office or with clients and 8% had been told to wear more make up so that they looked “prettier”. Many women said that they were told to dress more provocatively. Of these women, 12% said they felt belittled as a result, and 86% said that they felt their career might suffer if they didn’t comply.

By contrast, 54% of men surveyed said that they had never received comments about their appearance and were only occasionally told to dress more smartly. Some men had been told to remove hair dye, jewellery or cover any visible tattoos.¹⁰⁰

Dr Pete Jones, a psychologist who works with leaders in both the public and the private sector to address unconscious discrimination, commented:

*...there are implicit dress codes in most organisations which have gender overtones and gender differences. Women’s appearance at work is judged in a number of ways which are not applied to men, for example; make-up, hair, skirt length, fashion and footwear. Conversely, women are given much more latitude in what they wear than men in the sense that men are often constrained by colours and clothing type... none of these factors explicitly relate to job performance... if we have to have standards which clients support, a categorisation in terms of levels of formality which all staff follow. That standard should be in each job description and an equality impact scan be required at that point.*¹⁰¹

The Panel considered the needs of different types of women and considered that they were not necessarily opposed to dress codes. There is no reason why an employer cannot require employees to be smartly dressed. However, demands from employers for high heels, low cut dresses, short skirts and make up are likely to amount to less favourable treatment contrary to the Equality Act 2010. The test that applies in cases of direct discrimination is whether there is an equivalent requirement for men. It is unlikely that an employer would be able to establish an equivalent requirement, in particular in the cases of high heels and make-up. A requirement to be clean shaven and to wear formal shoes for example, are not likely to be equivalent.

98 UK Parliament petition. *Make it illegal for a company to require women to wear high heels at work*. <https://petition.parliament.uk/archived/petitions/129823>. Accessed 7th December 2017.

99 Women and Equalities Select Committee and House of Commons Petitions Committee. (2017). *High heels and workplace dress codes*.

100 Slater and Gordon. Evidence submitted to the Review. (2017).

101 Dr Pete Jones. Evidence submitted to the Review. (2017).

Some organisations do take an alternative approach. For example:

*We strongly believe that there is no place for sexist dress codes. Virgin Money has only one dress code which applies to both men and women.*¹⁰²

We consider that the law does not need to be changed but a clear Code of Practice is required to inform employers about the permissible limits to influencing their employees' dress. The Government has committed to bringing forward new guidance on dress codes at work. It is vital that this guidance is entirely clear about dress code requirements on women that are unlikely to have an equivalent requirement for men and therefore are likely to constitute direct sex discrimination. This guidance must make clear that both policy and practice by employers in terms of dress codes must be non-discriminatory.

Recommendations

- ▶ The Government should bring forward guidance on dress codes at work which makes clear when a dress code is imposing a requirement on women where there is unlikely to be an equivalent requirement placed on men and women. It must also make clear that both policy and practice by employers in terms of dress codes must be non-discriminatory. This guidance must be well publicised and kept under review.

¹⁰² Virgin Money. Evidence submitted to the Review. (2017).

CHAPTER 3

VIOLENCE AGAINST WOMEN AND GIRLS

Violence against women and girls must be prevented through Relationships and Sex Education and perpetrator programmes with additional funding supplied.

Secure, long-term funding for services that support women to access justice and services must be backed up by a resourced Independent VAWG Commissioner.

Domestic violence protections must be strengthened, including extending coercive control laws, criminalising the breach of all domestic violence orders and banning cross-examination of victims by perpetrators in all courts.

The criminal justice system must be more effective in both supporting survivors and holding perpetrators to account.

Background and Context

The definition of violence against women in the UN Declaration on the Elimination of Violence Against Women 1993¹⁰³ includes “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women.” That includes domestic violence, sexual violence, FGM (female genital mutilation), forced marriage, so-called “honour based violence”, trafficking and prostitution and everyday misogyny and sexual harassment. These forms of abuse are committed disproportionately against women and girls and are disproportionately committed by men.

Violence against women and girls (VAWG) is intimately linked with women’s inequality. It impacts women and girls from the beginning of their lives, with girls in schools in the UK experiencing high levels of sexual violence and harassment, as evidenced by Parliament’s Women and Equalities Select Committee.¹⁰⁴ The scale of VAWG crimes is endemic and that is increasingly being realised in criminal convictions – in 2007-08 VAWG crimes¹⁰⁵ accounted for 7.1% of the Crown Prosecution Service (CPS) caseload, but by 2016-17 that had risen to 19.3%.¹⁰⁶

Ensuring that the criminal and civil law relating to VAWG is comprehensive, effective and accessible is vital to combatting this stain on our society. This chapter outlines some of the legal changes we believe must be made in order to bring us closer to the long-held ambition of feminists, to end VAWG.

Preventing VAWG

There is much that can be done to prevent violence against women and girls and mitigate its negative impact on young people who come into contact with it. This Review focuses on issues relating to the law, rather than the public services that more commonly enable prevention, but they are noted here briefly given their importance.

¹⁰³ Expanded to violence against women and girls (VAWG) in this report and commonly elsewhere.

¹⁰⁴ Women and Equalities Select Committee. (2016). *Sexual harassment and sexual violence in schools*. <https://publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/91/9102.htm>

¹⁰⁵ This statistic includes domestic abuse, rape and serious sexual offences.

¹⁰⁶ CPS. (2017). *Violence Against Women and Girls Report: Tenth Edition*.

Starting early, through education, is key. The implementation of mandatory, age appropriate, good quality Relationships and Sex Education (RSE) in schools is vital and this should start in primary school to be most effective.¹⁰⁷ We welcome the Government's commitment to requiring all secondary schools to teach RSE and await the new guidance that will be issued accordingly. But in order for compulsory RSE to meet its aims, it needs to approach the issue with a gendered lens and specifically enable conversations about gender-based violence.

Reported sexual offences on school premises doubled from 2011/12 to 2014/15 to reach an average of 10 each school day.¹⁰⁸ It is vital that the new RSE guidance teaches boys as well as girls about enthusiastic consent from a young age, which describes the importance of ongoing consent and actively ensuring that your partner feels positive and enthusiastic about sexual activity.¹⁰⁹ RSE must challenge the damaging narratives around gender found in pornography and speak to the diversity of young people. We also call on the Government to ensure that RSE is taught to as many young people as possible.

Currently, parents can opt out of all sex and relationships education apart from elements that are on the science curriculum.¹¹⁰ We welcome the Government's commitment to limit this opt-out. Under the new opt-outs, parents will still be able to remove their children from sex education (except for those elements which are part of the science curriculum). However, parents will not be able to remove their children from the relationships element of RSE. We encourage the Government to define the age when children have the right to make their own decisions on the issue.¹¹¹

As Rights of Women outlined in their submission to the Review:

Very little is done in the UK to tackle the root causes of gender violence. Political discussion focuses on the prosecution of perpetrators and resources for survivors. Whilst these are important aspects of the UK's response to gender violence, it is only through state funded campaigns and the inclusion of healthy relationship education on the school national curriculum that we can begin to reduce domestic abuse statistics for the next generation.¹¹²

In the context of domestic violence and abuse, work with perpetrators as well as victims is vital to shift the discussion from "what can she do to avoid harm?" to "why does he feel entitled to harm her?" Less than 1% of perpetrators get any specialist intervention to change their behaviour and prevent them from moving on to abuse future victims.¹¹³ Yet, there is an increasingly strong evidence base of the effectiveness of programmes, in particular those certified by the organisation Respect.¹¹⁴ Some of the more violent or persistent perpetrators are not engaging in behaviour change programmes and so receive no support to change at all. Perpetrator services must be provided with additional funding and never through a reallocation of scarce VAWG funding. It would be a travesty if better support for perpetrators was to the detriment of women escaping abuse.

107 Pound, P, Denford S, Shucksmith J, et. al. (2017). "What is best practice in sex and relationship education? A synthesis of evidence, including stakeholders' views" *BMJ Open* e014791

108 Plan UK. *It's my right! Success! Sex and Relationships Education made mandatory in schools in England*. <https://plan-uk.org/act-for-girls/sex-and-relationships-education-its-my-right>. Accessed 9th November 2017.

109 See The Mix, 'Enthusiastic Consent', accessed 4/1/2018 at <http://www.themix.org.uk/sex-and-relationships/having-sex/enthusiastic-consent-22964.html>

110 Gov.uk. *The National Curriculum*. <https://www.gov.uk/national-curriculum/other-compulsory-subjects>. Accessed 6th December 2017.

111 Department for Education. (2017). *Policy Statement: Relationships education, relationships and sex education and personal, social, health and economic education*.

112 Rights of Women. Evidence submitted to the Review. (2017).

113 SafeLives. (2014). *SafeLives Feasibility Study (unpublished)*. In SafeLives submission to the Review (2017).

114 Johnson, K. and Westmarland, N. (2015). *Domestic Violence Perpetrator Programmes: Steps towards change*; See <http://respectphoneline.org.uk/> for more information

Recommendations

- ▶ The forthcoming guidelines for relationships and sex education (RSE) must cover gendered violence, address consent from an early age and limit opt-outs.
- ▶ Domestic violence perpetrator programmes should be expanded with additional, not reallocated, funding.

Services for Women and Girls

An Independent Violence against Women and Girls Commissioner

The End Violence Against Women (EVAW) coalition has argued for an Independent Violence against Women and Girls Commissioner, which the Government has stated will be included in the Domestic Violence and Abuse Bill announced in the 2017 Queen's Speech. We believe the Commissioner should have a broad remit with oversight of how existing law and practice across the spectrum of VAWG issues is delivered throughout the country.

The Commissioner's role and office should be practical and visible. The Commissioner should have the resources and expertise to work with specialist services, local commissioners, policy makers and, crucially, with survivors. The Commissioner should be able to intervene in litigation and needs to have both the legitimacy and sufficient resources to drive forward change.

A key challenge faced by the VAWG sector is the increasing localisation of domestic and sexual violence service commissioning, combined with cuts to local authority funding, meaning that women can face a patchwork of provision, rather than a holistic approach to service provision.¹¹⁵ The Bureau of Investigative Journalism found that council funding for refuges across England dropped from £31.2 million in 2010/11 to just £23.9 million in 2016/17. Their survey of 40 refuge managers across England revealed that 95% of these refuges had turned women away in the last six months.¹¹⁶ Local Authorities have a responsibility to prioritise VAWG spending that can save lives. However, it is important to note the pressure local authorities are under to deliver a range of vital services in an environment where their budgets have been cut in real terms by £18 billion between 2010 and 2015.¹¹⁷

The VAWG commissioner must be able to address the funding issue, acting as a mechanism for scrutinising local implementation of the Home Office's National Statement of Expectations, as introduced through the 2016 VAWG strategy¹¹⁸ and funding levels. This must include the power to investigate and make recommendations locally and nationally.

Funding for IDVA and ISVA services

Independent Domestic Violence Advisors (IDVAs) and Independent Sexual Violence Advisers (ISVAs) provide services to women who are victims and survivors of VAWG, enabling them to access public services to ensure their safety and justice under the law.

IDVAs are trained specialists who support and advise victims who are at most risk of serious injury or death. An IDVA carries out a risk-assessment to identify a victim's level of risk and supports them with

115 APPG on Domestic Violence. (2015). *The Changing Landscape of Domestic and Sexual Violence Services*.

116 McClenaghan, M. and Andersson, J. (2017). Revealed: Thousands of vulnerable women turned away as refuge funding is cut. <https://www.thebureauinvestigates.com/stories/2017-10-16/a-system-at-breaking-point>. Accessed 14th December 2017.

117 Gainsbury, S. and Neville, S. (2015). *Austerity's £18bn impact on local services*. <https://www.ft.com/content/5fcbd0c4-2948-11e5-8db8-c033edba8a6e>. Accessed 14th December 2017.

118 Home Office. (2016). *Violence Against Women and Girls: National Statement of Expectations*.

immediate safety plans, such as helping to increase security at their home and implementing longer term interventions to ensure their safety, such as accessing counselling or mental health services. They represent the victim's voice in multi-agency working.

SafeLives calculate that over 1,000 IDVAs are required to support the current number of known victims at risk of the most severe forms of domestic abuse, but we currently have just over half that number working in the UK. Their 2015 survey of IDVAs found that as a result of high referrals and under-resourcing they are carrying excessive caseloads – 110 cases on average, almost double the recommended number. This impacts on the quality of services, in particular through reducing the duration of support offered.¹¹⁹

Independent Sexual Violence Advisers provide impartial information to victims/survivors of sexual violence about all of their options following rape and/or sexual assault, from reporting to the police to accessing services. They provide continuity of support, advocacy and impartial information and advice.¹²⁰ In recent years, sustained funding through the Rape Support Fund stemmed the pattern of closure of sexual violence support services,¹²¹ but funding for those services including ISVAs remains precarious.

Specialist services often do not operate in isolation but rather within other public services such as health. Submissions to the Review advocated for this approach, saying it is vital and should be extended. Frontline public service professionals should be trained to respond to possible cases of domestic and sexual violence and supported by co-located IDVAs and ISVAs. EAW advocated in favour of the “Ask and Act” model in place in Wales under the Women, Domestic Abuse and Sexual Violence (Wales) Act 2015, where organisations have a duty to encourage relevant professionals to “Ask” victims in certain circumstances about VAWG and “Act” to reduce harm.

Recommendations

- ▶ We recommend the establishment of an Independent Violence against Women and Girls Commissioner to review existing law and practice. They must have the standing and resources to drive forward change.
- ▶ The Government should provide secure, long-term funding so that women who report domestic or sexual violence can be supported by domestic violence advocates or an Independent Sexual Violence Advisor for as long as they need one.

Domestic Violence and the Law

Background and Context

Domestic violence crosses all barriers of class, race and religion; it can occur in the UK or to UK citizens abroad. In 2016, there were over one million female victims of domestic violence in England and Wales.¹²² Two women in England and Wales are killed every week by a current or ex-partner or a close relative.¹²³

119 SafeLives. Evidence submitted to the Review (2017).

120 Home Office. (2017). *The role of the Independent Sexual Violence Adviser: Essential elements*. <https://www.gov.uk/government/publications/the-role-of-the-independent-sexual-violence-adviser-isva>

121 APPG on Domestic Violence. (2015). *The Changing Landscape of Domestic and Sexual Violence Services*.

122 EAW. Evidence to the Review. (2017). The figures are available at <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2016>

123 CPS. (2016). *VAWG Report 2015/2016*. http://www.cps.gov.uk/publications/docs/cps_vawg_report_2016.pdf

As well as its often devastating direct impact, domestic violence exerts a shocking constraint on women fulfilling their potential. Figures from 2009 compiled by Sylvia Walby found a £15.7 billion cost to the UK economy when the human, economic and public service costs were accounted for.¹²⁴

BAME (Black and minority ethnic) women suffer disproportionately from violence and face multiple barriers to reporting (including heightened forms of shame, stigma, cultural and religious constraints, racism, immigration insecurities and lack of awareness of their rights). BAME victims typically suffer abuse for 1.5 times longer before getting help than those who identify as White, British, or Irish.¹²⁵ More than 100,000 women and girls in the UK are at risk of and/or are living with the consequences of female genital mutilation, forced marriage and so-called “honour-based” violence.¹²⁶ Disabled women are twice as likely to experience gender-based violence as non-disabled women.¹²⁷

The Government states that its planned Domestic Violence and Abuse Bill, in addition to the Independent VAWG Commissioner, will establish a definition of domestic abuse in law, as well as enable the UK to ratify the Istanbul Convention. At the time of writing, the bill remained imminent. We welcome that commitment, call on the Government to heed the input of the women’s sector when drafting and amending the Bill and make specific recommendations as to its detail within this chapter.

The law can do much to address such violence but it cannot do everything. A determined political will to find adequate resources to address this problem and good administrative practice are just as important.

Improving reporting of offences and access to justice are key to this (the latter is explored further in a separate chapter of this review). Only 15% of serious sexual offences and 21% of partner abuse incidents are reported to the police.¹²⁸ Legal aid has shrunk and abused women are often unable to obtain legal advice and representation which has meant that some women find themselves face to face with their perpetrators in courts.¹²⁹

Domestic violence can involve physical or sexual abuse, rape, emotional abuse and isolation, coercion, threats, intimidation, economic abuse, financial control, forced marriage and “honour-based” violence. It can happen online as well as offline. The law deals with violence against women in a number of ways, through criminal, civil and family law and in provisions that cross these labels in the prevention of harassment legislation.

Enforcing the law

It has been argued that the Police and Crown Prosecution Service should do more to protect victims and punish perpetrators. Evidence from EAW to the Review stated that:

Many women who want to pursue justice are still deterred from reporting because they fear they won’t be believed. There is still serious prejudice and abuses within the system... Much remains to be done to improve the criminal justice response to women affected by violence.¹³⁰

124 Walby, S. (2009). *The Cost of Domestic Violence Up-date 2009*. www.lanacs.ac.uk/fass/doc_library/sociology/Cost_of_domestic_violence_update.doc

125 Crenshaw, K. (1991). *Mapping the Margins*. SafeLives. (2015). *Supporting B&ME Victims – what the data shows*. http://safelives.org.uk/practice_blog/supporting-bme-victims-%E2%80%93-what-data-shows

126 Forward UK. *FGM*. <http://forwarduk.org.uk/key-issues/fgm/>

127 Hague, G, et. al. (2008). *Making the links: Disabled women and domestic violence*.

128 ONS. (2015). *Crime Survey of England and Wales*.

129 Rights of Women. (2014). *Evidencing Legal Aid nearly 3 years on*. <http://rightsofwomen.org.uk/wp-content/uploads/2014/09/Evidencing-domestic-violence-V.pdf>

130 EAW. Evidence submitted to the Review. (2017).

There is much work to do, but there are some positive signs of change. Her Majesty's Inspectorate of Constabulary (HMIC) conducted an inspection in 2013 on the police response to domestic violence and abuse,¹³¹ finding that there were fundamental weaknesses in the service provided to victims of domestic abuse. This was a trigger for reform and the progress report published in 2014 identified a 31% increase in the number of domestic abuse related crimes recorded in England and Wales and noted a determined effort to make domestic abuse a priority.

Recent data shows that compared to 2007/08, in 2016/17, there were more reported domestic abuse crimes, 26,876 more convictions for domestic abuse related offences and a reduction in unsuccessful prosecutions.¹³² Her Majesty's Inspectorate of Constabulary and Fire & Rescue Service (HMICFRS) is responsible for independently assessing the effectiveness and efficiency of police forces. The most recent HMICFRS inspection report found that reporting and recording has increased and there have been considerable improvements. However, they also find that responses to domestic violence vary unacceptably between forces. The report raises the concern that there is a risk that as reporting increases, forces may artificially suppress "demand" for cases being taken forward. It also observed a reduction in the proportion of recorded crime leading to arrest, suggesting that justice is not being sought consistently enough.¹³³

As well as the specific legal changes described below, respondents to our call for evidence highlighted the importance of adequate training for the efficacy of police responses to domestic and sexual violence. Every officer who responds to these crimes must be adequately trained.

Build cases based on evidence beyond victim statements

There is a need to move away from building cases against perpetrators based solely on victim testimony, with a greater focus on building a case from other evidence such as 999 tapes, statements and photographs taken at the scene. ONS data drawn from police reports shows that the police are far more likely to log evidential difficulties in proceeding with prosecutions for violent domestic abuse (62% of offences) compared with other violent offences (46%).¹³⁴ The joint Justice Inspectorates' progress report on the police response to domestic abuse states that they are "concerned that an increased number of cases are being closed because evidential difficulties prevent further action".¹³⁵

Respondents to the All Party Parliamentary Group (APPG) on Domestic and Sexual Violence's inquiry into access to justice said that, coupled with the continuing prevalence of a culture of disbelief of women victims, there is often too little focus on evidence from third parties such as GPs or social workers, which can also limit the police's ability to take coercive control cases forward.

The APPG's report cites evidence of some positive practices amongst police forces, including the use of body worn cameras to capture evidence in-the-moment and reports of cases being built for victimless prosecutions.¹³⁶

Recommendation

- ▶ Police forces should move away from evidence based solely on victim testimony in domestic violence cases and maximise the evidence they collect at the scene of the crime.

131 HMIC. (2014). *Everyone's Business: Improving the Police Response to Domestic Abuse*. <https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/2014/04/improving-the-police-response-to-domestic-abuse.pdf>

132 CPS. (2017). *Violence against Women and Girls Report – Tenth Edition*.

133 HMICFRS. (2017). *A progress report on the police response to domestic abuse*.

134 ONS. (2016). *Domestic abuse in England and Wales: Year ending March 2016*.

135 HMICFRS. (2017). *A progress report on the police response to domestic abuse*.

136 Women's Aid/APPG on Domestic and Sexual Violence. (2014). *Women's Access to Justice: From reporting to sentencing*.

Domestic violence and restorative justice

“Restorative justice”, or “out of court resolutions”, describes a number of practices which are often used for low-level offences, or where victims do not wish to proceed through the criminal justice system. These practices bring together victims and offenders to consider the impact of wrongdoing so the offender can acknowledge their responsibility and make amends. They are used widely across the criminal justice system generally and have clear advantages, provided that their use is voluntary on the part of the victim. However, several contributors raised concerns about their use in domestic violence cases.¹³⁷

The College of Policing says that “restorative justice is rarely appropriate in domestic abuse cases and not recommended in cases involving intimate partner abuse”.¹³⁸ This has been restated in a parliamentary written answer from the Ministry of Justice.¹³⁹ Nevertheless, evidence received by the Panel showed that it is too often used in domestic violence cases.

Research carried out by Clare McGlynn, Kelly Johnson and Nicole Westmarland¹⁴⁰ into the use of restorative justice measures in domestic violence cases found that in contradiction to official police guidance, every police force in the UK, except Police Scotland, used “out of court resolutions” to respond to a total of over 5,000 domestic abuse incidents (including intimate partner abuse) in 2014. Proportions varied significantly across different police forces. Looking specifically at domestic abuse offences, in North Wales, 0.3% were dealt with using restorative justice, while in Greater Manchester, 4.5% (a total of 837 offences) were disposed of this way.

These have occurred under the radar and contrary to best practice. Restorative justice was used, in these cases, almost exclusively as a diversion from criminal prosecution rather than in addition to it. The majority of uses of restorative justice were Level One, or “street level” responses, which involve an “instant disposal” of the issue by police officers. This level of response can often be little more than an apology.

In their evidence, McGlynn and Westmarland conclude that:

...with appropriate safeguards, specialist support for survivors (and perpetrators), appropriately trained facilitators and with the consent of all those involved, restorative justice may enable us to hear survivors’ stories in their own words, giving voice to the real harms of sexual violence. It may empower survivors by giving them greater control. It may encourage admissions of offending, offering validation and in focussing on the offender, reduce victim-blaming.¹⁴¹

Evidence from EAW on this topic was cautious on this point and recommended that restorative justice in domestic abuse cases should not be rolled out until women’s organisations are confident it will not do harm.

137 EAW, Clare McGlynn.

138 College of Policing. *Major investigation and public protection – Domestic abuse guidance*. <https://www.app.college.police.uk/app-content/major-investigation-and-public-protection/domestic-abuse/arrest-and-other-positive-approaches/>. Accessed 9th November 2017. See also IPCC. (2013). *Mrs Susan Anne Forster – Independent Investigation National Learning Report*. https://www.ipcc.gov.uk/sites/default/files/Documents/investigation_commissioner_reports/NATIONAL%20LEARNING%20REPORT%20-%20Susan%20Forster.pdf

139 Sam Gyimah responding to Gloria De Piero. HC Deb. 20 October 2017, c108212 W

140 Westmarland, N, Johnson, K. and McGlynn, C. (2017). *Under the radar: the widespread use of ‘out of court’ resolutions in policing domestic violence and abuse in the UK*. *British Journal of Criminology* vol 58:1 pp1-16

141 McGlynn, C. and Westmarland, N. Evidence Submitted to the Review. (2017).

Recommendations

- ▶ “Street level” restorative approaches should not be used in cases of domestic abuse or sexual violence; the College of Policing and National Police Chief Guidance needs to be strengthened with regard to this issue.
- ▶ There must be greater transparency about the use of restorative approaches in domestic abuse cases to enable police forces to develop best practice and share experiences – positive and negative. Data should be routinely collected and held centrally and forces should answer for any use of resolutions that are contra-indicated by College of Policing guidance.
- ▶ Restorative justice measures above street level should not be used in cases of domestic abuse until women’s organisations are confident that they are being delivered in a way which will not harm victims or survivors. Women’s organisations should be consulted in their future development.

Domestic Violence – extraterritorial jurisdiction

The UK currently has extraterritorial jurisdiction for certain child sex offences, forced marriage and female genital mutilation offences. This means that certain UK laws can be applied within the UK to offences that took place outside the UK. Rights of Women raised concerns about the need to extend extraterritorial jurisdiction:

The UK needs to extend its extraterritorial jurisdiction to include all sexual offences and incidents of domestic violence and abuse. That a couple ordinarily resident in the UK may go on holiday and extreme acts of domestic and sexual violence be perpetrated with no legal consequences upon their return to the UK is a clear gap in our legislative framework to protect women and girls from violence and abuse.¹⁴²

Southall Black Sisters highlighted the problem of transnational violence against women, when perpetrators of domestic violence and abuse deliberately remove women who have no secure immigration status from the safety, protection and scrutiny of this country’s laws, in order to continue to abuse and even murder women in those parts of the world where such crimes are not taken seriously. Two forms of such violence were highlighted to us.

The first is transnational abandonment, where foreign national wives, following marriage, are abused and then deliberately abandoned by their British national husbands. This involves large numbers of women from India, but increasingly also from Pakistan and Bangladesh. This abandonment can be in the UK (when the woman has migrated to the UK and is then thrown out of the matrimonial home), in the wives’ country of origin following a period of residence in the UK and abandonment in the country of origin having never been sponsored in the UK. These problems exclusively apply to BAME women being abused and stripped of their rights, protection and dignity.

During the course of this Review, a Practice Direction was issued which expanded the definition of domestic violence to include domestic abuse, with transnational marriage abandonment included within that definition.¹⁴³ This development is to be warmly welcomed – but there is still work to be done within the family justice system and in immigration law and policy to ensure that the state response to transnational abandonment protects women’s rights.

¹⁴² Rights of Women. Evidence submitted to the Review. (2017).

¹⁴³ Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm.

Within the family justice system, Southall Black Sisters submitted that there needs to be more awareness of transnational abandonment and training for the judiciary, legal professionals and Cafcass (the Children and Family Court Advisory and Support Service). Cases should be heard by judges with an appropriate level of seniority and with effective liaison taking place between the family court and immigration authorities. In terms of divorce and financial remedy, there needs to be greater scrutiny of divorce cases where the wife cannot respond as she is out of the country, to ensure that if she has been abandoned there she can seek a remedy. There must also be a more streamlined process to enforce the Maintenance Orders (Reciprocal Enforcement) Act 1972 so that an abandoned wife can enforce maintenance orders issued in her country of origin.

Within immigration law, it is vital that transnational marriage abandonment is recognised in the cross-Government definition of domestic violence and abuse (and any definition included in the forthcoming bill) and specifically in immigration policy and guidance. More must be done to ensure that spouses who have been subject to transnational abandonment are able to access the immigration system as victims of domestic violence or to participate in family proceedings. For example, currently a woman who is abandoned in her country of origin cannot apply for indefinite leave to remain (ILR) under the domestic violence rule, yet she would be able to if the marriage had broken down due to domestic violence that occurred within the UK. These women should be able to apply for ILR and should not be subjected to “no recourse to public funds” restrictions if they have re-entered the UK.

There is also a clear need for the UK’s immigration system to act in a way that acknowledges and combats transnational abandonment. There needs to be clearer guidance for entry clearance officers when considering visa applications from abandoned spouses, acquiescence to Family Court requests for the return of abandoned mothers to the UK and more attention being paid by immigration services to ensure that husbands cannot abusively revoke their spouses’ visas with ease.

The second form of transnational violence is “honour” based violence against women. Examples include the recent “honour” killings of Samia Shahid and Seeta Kaur, both British women who were tricked into going to India and Pakistan and then murdered. The lack of extraterritorial jurisdiction with respect to “honour” based violence is illogical and inconsistent with the fact that laws around forced marriage and FGM recognise the need for law enforcement beyond geographical borders.

The Preventing and Combating Violence Against Women and Domestic Violence (Ratification of Convention) Act 2017 requires the Government to set out a timetable for the ratification of the Istanbul Convention. The Government believes this primarily means extending its extraterritorial jurisdiction to a number of VAWG offences including rape and so-called “honour” based crimes. We urge the Government to ensure that these crimes are fully covered within the forthcoming Domestic Violence and Abuse Bill.

Recommendations

- ▶ Training is needed for all parties within the family justice system to ensure transnational marriage abandonment is treated appropriately.
- ▶ Transnational marriage abandonment must be recognised in cross-governmental and immigration policy definitions of domestic violence and women who are abandoned in another country should be able to access the domestic violence route to indefinite leave to remain.
- ▶ The Government should extend its extraterritorial jurisdiction to include all sexual offences and incidents of domestic violence and abuse that take place abroad.

Protection orders and criminal offences

Women who have suffered domestic violence also have a range of possible civil law remedies against their partners, as well as criminal ones. They may seek injunctions or non-molestation orders to prevent their partners abusing them, or orders for their partners to leave their shared home. They and the police forces that they come into contact with can also apply for Domestic Violence Protection Orders (DVPOs) and Domestic Violence Protection Notices (DVPN).

These are civil orders that enable protective measures to be put in place after a domestic violence incident, even if there may be insufficient evidence to charge a perpetrator and provide protection to a victim through bail conditions. A breach of a DVPO or DVPN is, however, not currently a criminal offence. A number of other civil orders with comparable functions, such as the superseded Anti-Social Behaviour Orders, non-molestation orders and perhaps more relevant, Restraining Orders under the Protection from Harassment Act 1997, all result in criminal offences when they are breached. In addition, DVPOs last for just 14-28 days, which is often insufficient for the victim/survivor to apply for other forms of protection.

The Panel heard that the lack of a criminal penalty in relation to DVPNs or DVPOs meant that these orders are often viewed as meaningless by perpetrators of domestic violence. The Government has indicated that the forthcoming Domestic Violence and Abuse Bill will replace some existing orders with a “consolidated domestic abuse civil prevention and protection order”.¹⁴⁴

In order for either the current protection order measures, or any new replacement order, to be effective and instill confidence in victims, it is essential that they are sanctioned effectively. A breach of any domestic abuse order should be a criminal offence.

DVPOs are also under-used. Rights of Women’s submission to the review stated that 2,500 DVPOs were made between March 2014 and March 2015. Compared to over 1 million calls being made to the police reporting domestic abuse incidents, this figure is low. A Women’s Aid Annual Survey also found that just 2.5% of women who had reported domestic violence to the police had a DVPO issued.¹⁴⁵

Recommendations

- ▶ A breach of any domestic abuse order, including a DVPO, should be made a criminal offence.

Coercive control in separated relationships and in the Family Court

The introduction of a new offence of coercive control is very welcome.¹⁴⁶ However, it does not apply in cases where two parties formerly in a relationship have split up and are no longer living together but the abuse is continuing.

Rights of Women’s Submission said:

The women who call our advice line tell us that after they separate from abusive partners the abuse and control continues through financial and child arrangements. This form of abuse is hugely damaging and dangerous for women and children and it can carry on for

¹⁴⁴ Rt. Hon. Amber Rudd MP. (2017). *Speech to the Women’s Aid National Conference*. <https://www.gov.uk/government/speeches/amber-rudd-speech-on-tackling-violence-against-women-and-girls>

¹⁴⁵ Rights of Women. Evidence submitted to the Review. (2017).

¹⁴⁶ Serious Crime Act 2015 as introduced, s.76.

many years with no way out. Although behaviour after separation can be prosecuted under the Protection from Harassment Act 1997 the police will often not deal with reports made as they are seen as issues for the Family Court. The Family Court frequently avoids addressing ongoing abuse and control enacted through child contact arrangements against mothers through its deference to maintaining contact between children and fathers.¹⁴⁷

We endorse the recommendations of Rights of Women, namely that:

- The criminal offence of coercive control should apply in circumstances where the parties have separated and no longer live together.
- There should be a comprehensive review of the ways in which abusers use the family justice system and child contact arrangements to continue to abuse survivors and what can be done to address these issues.

Wider domestic violence issues in the Family Court

The Panel also considered the importance of safe child contact. The Istanbul Convention states that significant incidents of violence should be taken into account when deciding contact and custody rights for children.

The Panel received evidence that suggests that some Family Court Judges are not taking domestic violence seriously enough¹⁴⁸ and that judges sometimes order unsupervised contact in cases where the father has abused the mother in the presence of the child. Research has shown that the current family justice system in England supports a “pro-contact” approach – which can undermine the best interests of children and the safety and wellbeing of children and the parent with care.¹⁴⁹ The impact on children of witnessing previous or continuing domestic abuse, which is in itself a form of child abuse, can sometimes be minimised within the family court system.

On average, only 1% of applications for contact (under the Children Act 1989) are refused.¹⁵⁰ However, domestic abuse is alleged in 62% of child contact cases, with fathers more likely than mothers to be the subject of allegations.¹⁵¹ Where contact is issued, it is often unsupervised. One study raised with the Panel found that contact in a supervised centre was issued in only 4% of private family proceedings.¹⁵²

The new Practice Direction 12J, cited above,¹⁵³ which came about following significant lobbying activity by Women’s Aid, begins to address this issue. It recommends no contact with a parent who is a domestic abuser where a risk assessment flags an ongoing risk to a child. But more must be done. We consider that there should be compulsory and ongoing training for the judiciary on the new Practice Direction and on domestic abuse more widely. The impact of the Practice Direction should also be reviewed after it has been in place for a reasonable duration.

147 Rights of Women. Evidence submitted to the Review. (2017).

148 Rights of Women and Women’s Aid. Evidence submitted to the Review. (2017). See also Women’s Aid. (2016). *Nineteen Child Homicides*. <https://1q7dqy2unor827bqjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2016/01/Child-First-Nineteen-Child-Homicides-Report.pdf>

149 Women’s Aid. Evidence submitted to the Review. (2017).

150 Aris, R. and Harrison, C. (2007). *Domestic Violence and the Supplemental Information Form C1A*. See also Giovanni, E. (2011). *Outcomes of Family Justice Children’s Proceedings – a Review of the Evidence*.

151 CAFCASS and Women’s Aid. (2017). *Allegations of domestic abuse in child contact cases*.

152 Thiara, R. and Harrison, C. (2016). *Safe Not Sorry*.

153 Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm.

Rights of Women told the Panel that in some cases where a woman has applied for a non-molestation order against her perpetrator and her perpetrator chooses to defend the application, judges seek to persuade the parties that the perpetrator should give undertakings to the court not to harass the woman further, and that she should accept this in place of an order to avoid going to a contested hearing. However, if he then breaches the undertaking it is not a criminal offence and the woman's only redress will be to try to enforce the breached undertaking through a very complicated committal application to the court. If the woman is a litigant in person (i.e. she is representing herself in court) she is unlikely to be able to successfully make this application and is thus unprotected by the undertaking.¹⁵⁴

A further issue that has been identified is that currently in the Family Court a perpetrator of domestic violence can still cross-examine their victim, a practice that has long been banned in the criminal court.¹⁵⁵ This is obviously unacceptable. The SDLR has been advised that some judges will direct that the alleged perpetrator puts the questions through them so that they can control the questions and any inappropriate impact that they might have. The need to go further had been recognized. The Prisons and Courts Bill 2016/17, which was dropped at the 2017 election, contained provisions to ban this practice in certain circumstances (when there is a conviction or outstanding charge, or when there is an on-notice injunction against the would-be cross-examiner). However this provision was not brought before Parliament following the election. It is very much needed to ensure that all judges are fully enabled to control fair justice in their courts. It must be included in the new Domestic Violence and Abuse Bill.

Alongside this legal change, practical changes to the functioning of the courts to protect domestic violence victims and survivors are needed. These include dedicated safe waiting rooms and separate entrances and exits.

Recommendations

- ▶ Judges should have compulsory and ongoing training on domestic violence and abuse in all its forms and on the new Practice Direction 12J. The impact of the new Practice Direction should be regularly reviewed.
- ▶ Government must legislate to ban cross-examination of a victim or alleged victim by the perpetrator in the Family Court.

Domestic Violence and the Duty to Protect

A separate issue raised with the Panel was the use of written agreements by local authorities. Where a child comes into contact with the local authority's safeguarding processes and there is domestic violence or abuse involved in the case, the council will in some cases require the victim/survivor to sign a written agreement accepting a duty to protect the child from the abusive partner.

This approach, when taken, implies that the victim/survivor, usually the mother, has control over whether further domestic violence occurs. If it does occur, then the "failure" to adhere to the written agreement can result in the local authority pursuing fast-track care proceedings for the child involved. This sends entirely the wrong message about who is responsible for domestic violence.

¹⁵⁴ Rights of Women. Evidence submitted to the Review. (2017).

¹⁵⁵ APPG on Domestic Violence. (2016). *Domestic Abuse, Child Contact and the Family Courts*.

The Joint Inspectorates and Ofsted joint report of 2017 identifies this trend and warns that:

*The use of written agreements in two of the six local authorities [inspected] was widespread. However, we saw no evidence that they are effective.*¹⁵⁶

However, we also heard evidence that where women are properly legally represented, these undertakings can be drafted that shift the duty to protect onto the local authority and provide women with additional support to escape abuse or reduce harm.

Recommendations

- ▶ The use of written agreements by local authorities in child safeguarding cases where there is domestic violence should be reviewed. In the meantime, they should not be used unless the victim involved has access to advocacy support from a lawyer or qualified IDVA. They should never be used to make the victim responsible for a violent partner's abuse.

Parallel Legal Systems (Sharia Courts and Beth Din)

Southall Black Sisters' submission to the Review, drawing on their research and experience of parallel legal systems such as Sharia Councils, identifies that within these bodies women are often pressured into giving up rights that they hold under mainstream civil law:

*...our research and experience of parallel legal systems such as Sharia Councils that "adjudicate" on family matters are growing in significance. Their workings, however, show that women and children are rendered highly vulnerable and often placed at risk ... Examples include women being pressured into "forgiving" domestic violence perpetrated by their husbands; only being granted a religious divorce if they give up their rights to maintenance, property and even their children. Such Councils more often than not ignore or deliberately act in contravention of existing civil/family court orders preventing contact between the husband and his wife and/or children in cases of abuse and violence.*¹⁵⁷

There are currently two separate inquiries operating into the activity of Sharia Courts – the Home Affairs Select Committee's inquiry and the Government's independent review. In anticipation of the more comprehensive work conducted by these two bodies we do not at this time make recommendations in relation to parallel legal systems. However, we are concerned by the objections raised by a number of women's organisations and campaigners that the chair of the Government's review is a theologian rather than a lawyer, that its terms of reference are drawn too narrowly, and that the advisors to the panel include two imams but no women's rights advocates or human rights lawyers.¹⁵⁸

¹⁵⁶ Ofsted, HMIP, HMICFRS and Care Quality Commission. (2017). *The multi-agency response to children living with domestic abuse: Prevent, protect and repair*.

¹⁵⁷ Southall Black Sisters. *Parallel legal systems*. <http://www.southallblacksisters.org.uk/tag/parallel-legal-systems> . See also Menea, E. (2016). *Women and Sharia Law: The Impact of Legal Pluralism in the UK*. The latter source documents the harmful consequences for vulnerable minority women who are denied the right to equality before the law.

¹⁵⁸ Open letter to Theresa May. (2016). <https://www.opendemocracy.net/pragna-patel-gita-sahgal/whitewashing-sharia-councils-in-uk>

Sexual Violence and the Law

Background and Context

Sexual violence can occur both within and outside of intimate partner violence. The Crime Survey of England and Wales estimates that 19.9% of women aged over 16 (nearly five times the proportion of men) have experienced sexual assault and 3.2% have experienced it in the last year.¹⁵⁹ This figure has remained fairly consistent since accurate recording began in 2005. However, convictions have increased over the same period. Estimates show that half a million women in England and Wales were sexually assaulted in the last year alone.¹⁶⁰

These serious crimes do not exist in a vacuum but rather are part of an environment of misogynistic abuse and harassment. 59% of girls and young women aged 13-21 have faced some form of sexual harassment at school or college in the past year.¹⁶¹ A TUC poll found that over half of women have experienced sexual harassment at work.¹⁶² 64% of women of all ages have experienced unwanted sexual harassment in public places.¹⁶³ The Fawcett Society's own 2016 poll found that 38% of all men and 34% of all women said that if a woman goes out late at night, wearing a short skirt, gets drunk and is the victim of a sexual assault she is "totally" or "partly" to blame.¹⁶⁴

Image-based sexual abuse and revenge porn

The taking and distribution of private sexual images is not new. However, what is new is the availability of technology and media which facilitates and intensifies these activities.

The Panel welcomes the creation of the new offence, created by the Criminal Justice and Courts Act 2015,¹⁶⁵ of disclosing private sexual photographs and films with intent to cause distress. This is commonly known as "revenge porn".

"My ex posted topless pictures of me on a website, along with details of my Twitter and Facebook accounts, the town I live in (which is a small town) and where I work. I have never been so embarrassed in my whole life. I could have lost my job, but thankfully my employers were extremely understanding. That didn't stop the whispers and rumours going round the office though. People would stop my parents in the street and talk to them about it. It got to the stage where I didn't even want to leave the house. Meanwhile he was walking about completely scot free because there was nothing the police could really do about it."¹⁶⁶

A number of contributors to the Review argued for the use of the expression "image-based sexual abuse" as an alternative to "revenge porn". This argument was made on two grounds. Firstly, pornography is legally defined as an image produced "solely or principally for the purpose of sexual arousal", which is inadequate to describe the harm intended by this crime. Secondly, "revenge porn" only describes one type of act which should be criminalised.

159 ONS. (2017). *Compendium: Domestic abuse, sexual assault and stalking*.

160 ONS. (2017). *Focus on: Violent Crime and Sexual Offences, year ending March 2016 – Appendix Tables*.

161 Women and Equalities Select Committee. (2016). *Sexual harassment and sexual violence in schools*.

162 TUC. (2016), *Still Just a Bit of Banter?*

163 YouGov/EVAW. (2016). *Survey results*. https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/m5gapykjuh/EVAW_Results_160301_GB_Website.pdf

164 Taaffe, H. (2017). *Sounds Familiar?* (London: Fawcett Society).

165 S.33-35.

166 Scottish Women's Convention. Evidence submitted to the Review. (2017).

Image-based sexual abuse should be defined as the “non-consensual creation and/or distribution of private, sexual images” which would include typical “revenge pornography”, as well as consensually taken images that have been hacked or stolen and then shared. But it should also go beyond distribution and cover the non-consensual *creation* of sexual imagery, for example, photos and videos created by means of “upskirting”, forms of voyeurism and sextortion (using sexual images to demand money or actions from other individuals) or recording sexual assaults. Other forms of image-based sexual abuse include perpetrators threatening to share images, commonly part of a pattern of coercive behaviour in abusive relationships¹⁶⁷ and pornographic photoshopping which entails taking someone’s image then superimposing explicit images on her body and uploading it.

Evidence submitted by Claire McGlynn explains:

One recent case involved a man who took a Facebook photo of a 15-year-old girl, superimposed on her body an explicit image and then uploaded it to a porn website inviting comments. Such acts are not covered by English “revenge porn” laws which exclude pornographic photoshopped images (unlike Scots law).¹⁶⁸

The full range of these acts is not properly covered in England and Wales by the current law on disclosing private sexual photographs and films. In Scotland, the Criminal Justice and Licensing (Scotland) Act 2010 amended existing laws to cover “upskirting” and “downblousing”. In response to the Gina Martin case, where police did not prosecute a man who took up-skirt photos of a woman at a music festival,¹⁶⁹ the UK Justice Secretary has indicated he has taken advice on whether to legislate similarly in England and Wales.

In addition, the current requirement to prove “an intention to cause distress” when private sexual photographs have been disclosed is inadequate. Often image-based sexual abuse will be perpetrated “for a laugh” or for financial gain. The law should be amended to remove this requirement, or change it to reckless intention to cause distress. Clare McGlynn and Erika Rackley observe that the harm caused by this type of abuse is:

...deeply gendered. Not only are victims mostly women and girls, but the abuse and harassment to which they are subjected is sexualised and misogynistic. The persistence of sexual double standards enables offenders to shame and humiliate victims – with families, friends, employers and strangers commonly blaming victims.¹⁷⁰

These include serious mental and physical impacts, breaches of the rights to privacy and dignity, inhibiting sexual expression and causing cultural harm.

This harm necessitates a further change to the law beyond the creation of additional offences. The Sexual Offences (Amendment) Act 1992 as amended provides for the anonymity of victims of many sexual offences, but the new image-based sexual assault offence is currently excluded. The Panel heard that although the CPS prosecuted 206 cases of image-based sexual abuse in 2015, there were estimated to be at least 1,160 reported incidents, indicating that a change in the law may be necessary.¹⁷¹ Anonymity for the current offence and the new offences we recommend are created, would help begin to close that gap.

167 McGlynn, C. and Rackley, E. (2016). *Image-based sexual abuse: more than just ‘revenge porn’*. In Research Spotlight. See also McGlynn, C. and Rackley, E. (2017). *Image-Based Sexual Abuse*. Oxford Journal of Legal Studies. PP.1-28.

168 McGlynn, C. and Rackley, E. (2016). *Image-based sexual abuse: more than just ‘revenge porn’*. In Research Spotlight.

169 BBC. (2017). *Upskirting – how one victim is fighting back*. <http://www.bbc.co.uk/news/magazine-40861875>

170 McGlynn, C. and Rackley, E. (2016). *Image-based sexual abuse: more than just ‘revenge porn’*. In Research Spotlight.

171 Women’s Aid. Evidence submitted to the Review. (2017).

Recommendations

- ▶ The law should be changed to provide for anonymity for all victims in cases of image-based sexual abuse. Without anonymity few will want to report cases to the Police.
- ▶ The current law on disclosing private sexual photographs or films should be amended to remove the requirement of an intention to cause distress or extended to cover reckless intention to cause distress.
- ▶ The law should be extended to cover threats to distribute private sexual images without consent.
- ▶ The creation and distribution of up skirt images and sexualised photoshopping, should be criminalised.

Sexual History Evidence

Currently, the law restricts the use of the complainant's sexual history as defence evidence in sexual offence cases. Under Section 41 of the Youth Justice and Criminal Evidence Act 1999, in order to use such evidence an application must be made to the court. The Court will need to consider the nature of the evidence and the risk that the use of the evidence would prejudice the jury.¹⁷² The criteria include that the behaviour took place at or about the same time as the alleged offence, or that it is so similar to the complainant's behaviour at the time of the alleged offence that it cannot be reasonably explained as a coincidence.

This law recognises that in the past, the use of sexual history evidence, despite incremental legislative improvements, has enabled unfair attacks on women complainants' character and it has deterred victims of sexual offences from coming forward. The current law makes the presumption that evidence of sexual history is not admissible, unless established otherwise. The Criminal Procedure Rules set out a strict process to be followed in determining whether to admit this type of evidence.

However, evidence from LimeCulture's survey of 36 Independent Sexual Violence Advisors (ISVAs) across England and Wales found that across 550 trials in a two-year period, four ISVAs (11%) said that 50-74% of cases they were involved with had included sexual history evidence. Seven (19.5%) said that between 25-49% of their cases had included sexual history evidence and 16 (44.5%) said that 1-24% of their cases had. Only nine (25%) said that they had not seen sexual history evidence used.¹⁷³

These numbers are high, but they could represent legitimate uses of the section 41 process. However, LimeCulture also asked ISVAs, in cases where a victim was questioned about their previous sexual history, whether the victim was informed that such a line of questioning would be pursued, either before or during the trial (suggesting possible compliance with the section 41 process). Of 32 ISVAs responding to this question, 21 said that they had seen cases in which "the complainant was not aware that they would be questioned about their previous sexual history." This is in contravention of the Criminal Procedure Rules. Thirteen ISVAs said that more than half of complainants they saw were unaware they would be questioned.

A report published by Dame Vera Baird QC, Northumbria Police and Crime Commissioner, drawing on observations of 30 rape cases, found that the complainant's previous sexual conduct was used in eleven of those cases. In seven of these eleven the proper procedure was not followed and in two of those seven, defence barristers made allegations with no application or consent at all.¹⁷⁴

¹⁷² Youth Justice and Criminal Evidence Act 1999.

¹⁷³ LimeCulture CIC. (2017). *Application of Section 41 Youth Justice and Criminal Evidence Act 1999: A Survey of Independent Sexual Violence Advisors (ISVAs)*.

¹⁷⁴ Baird, V. et. al. (2017). *Seeing is Believing: The Northumbria Court Observers Panel. Report on 30 rape trials 2015-16*.

These figures, alongside the experience of women's sector organisations, demonstrate that it is likely that sexual history evidence is being frequently introduced without a proper application under section 41 being made.

It is clear that CPS and court procedures must be improved to ensure proper application of section 41. In addition, independent legal representation and advice must be made available for the complainant where the defence wishes to introduce sexual history evidence or questioning.

The Rt. Hon. Harriet Harman MP advocates a further change to the law, to prohibit the admission of evidence of any sexual behaviour of the complainant with a third party to show consent, whilst leaving it admissible if it is relevant to any other issue in the case.

We are aware of concerns amongst lawyers of the potential breadth of this change. However, given the widespread inappropriate use of sexual history evidence even with the restrictions of section 41, there are good reasons to believe it is necessary. This proposal should be taken seriously and the Government should immediately review the law on the inclusion of sexual history and publish its findings.

Recommendations

- ▶ In any case where a section 41 application to use sexual history evidence is made, the victim should have a right to legal representation.
- ▶ The Government must review the law on the use of sexual history evidence.

Prostitution and the Nordic Model

The Home Affairs Select Committee estimates that 2.3 million British men aged 16-74 have paid for sex and that there are around 72,800 people working in the sex trade in the UK.¹⁷⁵ Home Office research from 2004 found that 50% of women in prostitution in the UK started being paid for sex before they were aged 18 and other research has found that over half of women involved in street prostitution in the UK have been raped or sexually assaulted.¹⁷⁶

Fawcett's position is that the prostitution trade and the trafficking of women into it, is underpinned by demand from a minority of men and the £130m annual worth of the trafficking trade to abusers in England and Wales.¹⁷⁷ Fawcett continues to support the Nordic model adopted in Sweden, Iceland and Denmark, as part of the End Demand campaign, which criminalises the purchase of sex while decriminalising its sale. This report supports this approach.

Recommendations

- ▶ The Government should introduce the Nordic Model and end demand for the sex trade.

175 Home Affairs Select Committee. (2016). *Prostitution: Third report of session 2016-17*.

176 Home Office. (2004). *Paying the Price: A consultation paper on prostitution*. Hester, M. and Westmarland, N. (2004). *Tackling Street Prostitution: Towards an Holistic Approach*.

177 Mills, H, Skodbo, S. and Blyth, P. (2013). *Understanding organised crime: estimating the scale and the social and economic costs*. <https://www.gov.uk/government/publications/understanding-organised-crime-estimating-the-scale-and-the-social-and-economic-costs>

Hate Crime and Misogyny

Background and Context

Hate crime, as defined by the CPS and National Police Chiefs' Council, is:

...any criminal offence which is perceived by the victim or any other person, to be motivated by a hostility or prejudice based on a person's race or perceived race; religion or perceived religion; sexual orientation or perceived sexual orientation; disability or perceived disability and any crime motivated by a hostility or prejudice against a person who is transgender or perceived to be transgender.¹⁷⁸

Criminal offences can be categorised as hate crime. But police can also record an incident as a hate incident if the victim perceives that it was similarly motivated, regardless of whether it proceeds to prosecution. Police are required to monitor the five strands of hate crime listed above. However, agencies are also free to extend the hostilities that they monitor. On this basis, Nottinghamshire Police now record incidents of misogyny. Greater Manchester has extended monitoring to include hostility towards alternative cultures and Merseyside to hostility to sex workers.¹⁷⁹

Currently the law treats hate crimes relating to the various protected characteristics differently. It makes provision for hate crime as a ground for enhanced sentencing in relation to race, religion, disability, sexual orientation or transgender identity.¹⁸⁰ It makes provision for certain offences such as assault to be prosecuted as an aggravated offence in relation to race or religion, with longer maximum sentences.¹⁸¹ It also provides for "stirring up hatred" offences in relation to race and religion.¹⁸²

The Law Commission examined and reported on hate crime offences in 2014. They supported the principle of applying aggravated offences to the current five characteristics and recommended that a further, fuller review be set up to examine hate crime offences, their rationale and effect as well as whether they should be extended to cover further grounds such as gender.¹⁸³

Recording misogyny hate crime

Hate crime against women and girls is a cause and consequence of gender inequality and should be treated as unlawful. It is important that the hate crime in question is misogyny hate crime, not gender hate crime, recognising the direction of the power imbalance within society and the reality of the endemic scale of violence against women and girls. This is consistent with the one-directional nature within law of for example, hate crime committed against disabled people or on the basis of transgender identity.

The recording of hate crime incidents against women and girls, which has the lowest level of hate crime recognition, has already begun in some police forces.

The Review received evidence about the way that Nottinghamshire Police have worked with the Nottingham Women's Centre to implement the recording of misogyny hate crime and hate incidents, as

178 CPS. (2017). *CPS Fact Sheet: Hate Crime*. http://www.cps.gov.uk/news/fact_sheets/hate-crime/. Accessed 23rd November 2017.

179 College of Policing. (2014). *Hate Crime Operational Guidance*.

180 Criminal Justice Act 2003, s.146-147.

181 Crime and Disorder Act 1998.

182 Public Order Act 1986.

183 The Law Commission. (2014). *Hate Crime: Should the current offences be extended?* <http://www.lawcom.gov.uk/project/hate-crime/>

part of a strategy to tackle misogyny. The police began to recognise misogyny as a hate crime on the 4th April 2016. They define misogyny hate crime as follows:

Misogyny hate crime may be understood as incidents against women that are motivated by the attitude of men towards women and includes behaviour targeted at women by men simply because they are women. Examples of this may include unwanted or uninvited sexual advances; physical or verbal assault; unwanted or uninvited physical or verbal contact or engagement; use of mobile devices to send unwanted or uninvited messages or take photographs without consent or permission. Domestic abuse is not included within the scope of Misogyny hate crime in this procedure as it is dealt with comprehensively within its own procedure.¹⁸⁴

The hate element of the incident or crime constitutes a flag or “qualifier” on the incident log, but does not change the offence or incident itself. This change was accompanied by training for all police staff, carried out by the Women’s Centre. The work has also been used by other local organisations, such as Equation, who have used misogyny hate crime as a way to add weight to their existing domestic violence prevention work in schools.

The intention of recording incidents in this way is that the police will be able to raise awareness of the seriousness of these incidences and encourage women to report them. This will enable them to gather better intelligence, to disrupt activities and perpetrators, improve risk management and support the women affected. The long-term aim is to nudge people towards a culture shift and to reframe misogynist behaviour as socially undesirable.

North Yorkshire police have now also followed Nottinghamshire’s lead, Avon and Somerset have plans in place to do so¹⁸⁵ and other police forces are considering following suit.

Stonewall’s research clearly shows that LGBT people, including LGBT women, face high levels of hate crime, as well as significant barriers to reporting and patchy recording procedures across police forces. The current lack of legal parity in hate crime sentencing also perpetuates a lack of confidence that LGBT-related hate crimes will be taken seriously. In addition, an online survey of over 450 LGBT people found that many victims faced additional and unique barriers to accessing services within the criminal justice system.¹⁸⁶

In their submission to the Review, Stonewall commented that:

...recording mechanisms and police forces do not always capture the specific nature of hate crimes, nor the fact that hate crime may be based on multiple actual or perceived identity facets.¹⁸⁷

Often, due to the structure of computer systems, officers must choose to flag a single identity towards which hostility is perceived. This means that hate crime against LGBT women, Muslim women, or trans women is not accurately reported.

184 Nottingham Women’s Centre. Evidence submitted to the Review. (2017).

185 ITV News. (2017). *Avon & Somerset Police to officially recognise gender-based hate as a crime*. <http://www.itv.com/news/westcountry/2017-10-16/avon-somerset-police-to-officially-recognise-gender-based-hate-as-a-crime/>

186 Galop. (2016). *The Hate Crime Report 2016*. <http://www.galop.org.uk/wp-content/uploads/2016/10/The-Hate-Crime-Report-2016.pdf>

187 Stonewall. Evidence submitted to the Review. (2017).

Recommendations

- ▶ Police forces should be required to recognise misogyny as a hate crime for recording purposes alongside the existing five grounds.
- ▶ Hate crime recording systems should be reviewed to ensure they can capture intersectional experiences of hate crime.

Prosecuting Misogyny as a Hate Crime

We do not believe, however, that incorporation of misogyny as a hate crime category for recording purposes alone is sufficient. For other protected characteristics, enhanced sentencing provisions and aggravated offences reflect the fact that offences motivated by hostility towards people with those characteristics are especially harmful to those individuals and to society as a whole.

Given the scale of violence against women and girls illustrated in this report, this argument surely applies to misogyny as well. A case could be made that existing provisions around domestic violence and abuse are sufficient. However, while it may be that sentencing regimes around these offences need to be treated separately, there are many instances of crimes which are motivated by hatred of women, outside of intimate relationships, which should be prosecuted accordingly – ranging from harassment to rape.

Recommendations

- ▶ Misogyny should be legally introduced as a hate crime; initially for enhanced sentencing purposes and potentially as an aggravated crime subject to decisions about the wider hate crime framework.

Abortion clinic buffer zones

The British Pregnancy Advice Service (BPAS) is a charity that sees almost 80,000 women a year with an unplanned pregnancy or a pregnancy they decide they cannot continue. They responded to the review with concerns about the particular harassment experienced by women visiting or working at their clinics.

In BPAS' submission to the review, they reported that:

There are many recent examples of intimidating behaviour outside clinics. Outside a London clinic an activist breached patient confidentiality and, at his request, informed a violent partner that a woman was at the clinic for treatment. At BPAS Bournemouth a staff member was followed to her car. At many clinics activists display graphic banners of dismembered fetuses and patrol clinic entrances with cameras strapped to their chests, approaching and following women trying to enter clinics. Tens of thousands of women in the UK have now been subjected to this activity.¹⁸⁸

These activities represent an organised campaign of harassment targeted at a vulnerable group of women, falling outside the traditional limits of a “protest” in that it harasses individual women rather than seeking to change minds or the law. BPAS' submission stated that police are sometimes called but there is a limited amount that they can do.

¹⁸⁸ BPAS. Evidence submitted to the Review. (2017).

A possible remedy that BPAS have proposed is the establishment of buffer zones outside abortion clinics and pregnancy advisory bureaux¹⁸⁹ similar to those established around vivisection clinics and to those established in a number of other countries. These would ensure women could access clinics without unsolicited interaction with anti-abortion activists. Although this has been proposed to the Government no action has been taken.

BPAS say:

BPAS has no desire to restrict freedom of speech or the right to protest. The type of legislation we are proposing would apply very specifically to abortion clinics and pregnancy advisory bureaux. The Department of Health holds a list of these facilities. As with animal rights legislation this could be tightly drafted to deal with the behaviour of activists in these settings. Anti-abortion activists are using freedom of expression as a smokescreen to intimidate and frighten women and healthcare staff. It is possible, as we have seen in other cases where a group of people consistently feels threatened, to construct legislation to protect them without obstructing our freedom to protest... [It] is an ongoing threat to the safety of women accessing pregnancy advice or abortion in every nation of the UK.¹⁹⁰

Further, BPAS have obtained a legal opinion to the effect that Government failure to provide buffer zones may breach women's Article 8 rights under the Human Rights Act 1998. Their evidence argues:

The right to respect for private and family life includes protection of someone's physical and psychological integrity and includes the right to healthcare and medical treatment, as well as the right to privacy. As a result, women have the right to access abortion services without being harassed and intimidated by protestors. If the state fails to ensure women can access reproductive health services without harassment this is likely to be a breach of Article 8.¹⁹¹

That opinion also takes the view that failing to introduce buffer zones is likely to be in breach of the public sector equality duty.

Local councils including the London Borough of Ealing and Portsmouth Council have made commitments to explore other avenues to effect buffer zones, such as the use of Public Spaces Protection Orders.¹⁹² These may however be open to legal challenge. Buffer zones for abortion clinics should be made universal and put on a firmer legal footing.

Recommendations

- ▶ Government should legislate for the adoption of buffer zones around the peripheries of abortion clinics.

189 Serious Organised Crime and Police Act 2005, s.145-146.

190 BPAS. Evidence submitted to the Review. (2017).

191 Whitfield, L. of Deighton Pierce Glynn. (2016). BPAS. Legal opinion submitted to the Review. (2017).

192 sEaling Council. (2017). *Ealing Council full council decision*. <http://ealing.cmis.uk.com/ealing/Meetings/tabid/70/ctl/ViewMeetingPublic/mid/397/Meeting/4994/Committee/2/Default.aspx>. Portsmouth Council. (2017). *Portsmouth Council full council decision*. <http://democracy.portsmouth.gov.uk/ieListDocuments.aspx?CId=146&MIId=3444>

Online Abuse

Online abuse of women and girls, through interaction on social media sites, represents a new challenge for the law and one that has not yet been comprehensively met. Parity of protection between the online and off-line worlds is required; behaviour which would be unacceptable and/or illegal face-to-face is often commonplace online and meets with a different reaction from the criminal justice system.

The Fawcett Society and the campaign Reclaim the Internet conducted an open-access online survey to hear from women who use social media about their experiences of online harassment and abuse. Between the 23rd February 2017 and the 9th March 2017, they heard from 182 people, 97% of whom were women. For these people, Facebook was the most commonly used platform (87% reported using it), followed by Twitter (69%), WhatsApp (54%) and Instagram (40%). Those using Facebook or Twitter were most likely to receive abuse. On Facebook and Twitter, sexist messages were the most common type of harassment or abuse experienced, with 64% of those receiving abuse on Facebook and 70% of those receiving abuse on Twitter saying that was the type they had seen. Around a third of women had experienced politically extremist hate messages, unwanted sexual messages or images, stalking and threats of violence. Half of Facebook users who experienced abuse said they did not report it to the platform, nor did 43% of Twitter users. When they did, few reported the platform taking action.¹⁹³

Research by Amnesty International supports this picture of widespread online abuse of women. Their poll of women aged 18-55 across six nations found that almost a quarter (23%) had experienced online abuse or harassment, with 26% of them experiencing threats of physical or sexual assault. This had a real censoring impact, with three quarters of those who had experienced abuse changing how they used the platform as a result.¹⁹⁴

Few of the women who had experienced abuse on social media had reported it to the police. 79% agreed that “The Government should increase the penalties for people who send threatening messages online” and a net figure of 53% agreed that “The Government should increase the penalties for people who send grossly offensive messages online”. At present, existing laws relating to electronic communications are used to prosecute online abuse, including the Malicious Communications Act 1988 and the Communications Act 2003, in relation to threats and communications which are “grossly offensive, indecent, obscene, or false”. The latter category saw almost 2,000 people convicted and a further 1,125 cautioned in the previous year.¹⁹⁵

It is important that more resources are brought to bear in ensuring criminal prosecutions are brought to emphasize the seriousness of online abuse. However, given the scale of online abuse this may be insufficient and greater action from the platforms themselves is necessary. The Panel recognises that one hurdle is that the websites and social media platforms that people use are often operated by international companies and therefore cannot be regulated by UK law.

The Review heard from a number of submissions that most social media users are unaware that their social media activity is being tracked as a result of most platforms and apps having geolocation “on” by default. Many women and girls do not realise that by using these sites their movements can be tracked, leaving them vulnerable to abusive men. SafeLives’ “Tech vs Abuse” research project found, after

193 Fawcett Society. (2017). *Online Abuse and Harassment Survey – Results: note to the Home Affairs Select Committee enquiry into hate crime and its violent consequences*. <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/hate-crime-and-its-violent-consequences/written/48761.html>

194 Dhrodia, A. (2017). *Unsocial Media: The real toll of online abuse against women*. <https://medium.com/amnesty-insights/unsocial-media-the-real-toll-of-online-abuse-against-women-37134ddab3f4>

195 Ministry of Justice. (2016). *Criminal Justice System statistics quarterly: December 2016*. <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2016>

interviewing over 200 survivors of domestic abuse, that almost half of women had been monitored online or with technology. 90% of practitioners interviewed felt technology was a tool for abuse.¹⁹⁶

Geolocation is by no means the sum of women's experience of coercive control or violent abuse through social media or technology.¹⁹⁷ But auto-"on" geolocation does represent an unnecessary risk to women's safety. We recommend that the default setting for geo-location needs to be removed on apps and legislated for if platforms do not comply.

Recommendations

- ▶ Social media platforms and apps should remove the automatic "on" setting for geo-location.

196 SafeLives, Snook and Chayn. (2017). *Tech vs Abuse: Research Findings*.

197 Williams, R. (2015). *Spyware and smartphones: how abusive men track their partners*. <https://www.theguardian.com/lifeandstyle/2015/jan/25/spyware-smartphone-abusive-men-track-partners-domestic-violence>. (London: Guardian).

CHAPTER 4

PROMOTING EQUALITY

The equality duty has the potential to be a very effective way of ensuring fairness and equality. However, currently those with protected characteristics often lose out as a result of policy choices or spending decisions.

There are valuable lessons to be learnt from the implementation of the duty in Wales.

It is time to require large employers to take steps to prevent discrimination and harassment in their workplaces.

Background and Context

The public sector equality duty (PSED) is a statutory duty that applies to public bodies and to other bodies where they are conducting public functions. It requires them to have regard to the need to eliminate all forms of discrimination, advance equality of opportunity and foster good relations between those with and without protected characteristics when, for example, they make policy, deliver services, buy goods and services and employ people.¹⁹⁸ The equality duty is intended to prevent institutional discrimination and to advance equality in practice.

The PSED should work as a tool that helps public bodies deliver their services fairly and more effectively. When operated correctly, the duty should help public bodies understand their users' needs. When difficult choices must be made about the allocation of resources, there is a significant risk that groups of people with protected characteristics will be disproportionately affected unless active consideration is given to how resources can be allocated as fairly as possible. Women's Budget Group and Runnymede Trust's recent analysis of the impact of welfare reform and spending cuts illustrates this very clearly, showing that BAME women have been disproportionately adversely affected when compared to men and white women.¹⁹⁹ The equality duty has the potential to be a very effective means of ensuring fairness and equality.

The need for specific duties

The equality duty has two parts, a general duty (which is in the Act and applies across Britain) and specific duties (which are in regulations and are different in England, Scotland and Wales). Under the PSED, listed bodies are required to have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other conduct that is prohibited by the Act.
- Advance equality of opportunity between people who share a relevant protected characteristic and those who do not.
- Foster good relations between people who share a protected characteristic and those who do not.

¹⁹⁸ The PSED applies to all functions of public bodies listed in the schedule to the Act, but only to the public functions of other bodies.

¹⁹⁹ Women's Budget Group & Runnymede. (2017). *Intersecting Inequalities*. <https://www.intersecting-inequalities.com/>

The specific duties in England are limited to a duty to publish information to demonstrate compliance with the general duty and a duty to prepare and publish one or more equality objective(s) the body aims to achieve (but not a duty to meet the objective or create/publish an action plan).

By contrast, in both Scotland and Wales specific duties are set out in a more extensive way. These duties include:

- Duties to prepare and publish equality objectives
- Duties to develop and report on plans to meet equality objectives
- Duties to carry out equality impact assessments of policies and for on-going monitoring of the equality impact of policies and practice
- Duties to consult and involve affected groups in the development and implementation of policies
- A duty to ensure proper training and resourcing for those responsible for equality advancement and monitoring.

The Equality and Human Rights Commission in Wales commented that the equality duty is working well in Wales and that the Welsh-specific duties are supporting and helping progress on equalities work.²⁰⁰ In particular, the Commission found that public bodies valued the duty because it raises the profile of the equality agenda, it provides a clear structure and focus for equality work and it promotes cultures of inclusivity, fairness and respect.

The more detailed duties implemented in Wales make it easier for public bodies to understand what is required of them and help them actively work to promote equality. Therefore, we recommend England adopt the same specific duties as Wales so that public bodies can understand what is needed to comply properly with the equality duty.

There is no doubt that generally, the equality duty has had a positive impact on equality practice within public authorities. However, the aim of the duty was to bring about a transformative approach to equality by going beyond simply outlawing discrimination to tackle inequality at a structural level. Regrettably this is yet to be achieved.

Evidence gathered on the early implementation of the PSED and its predecessors, the race, gender, disability and equality duties, suggests that placing a duty on public bodies had a positive impact on the way some of them delivered services and fulfilled their public functions. However, commitment to it remained weak and some saw it as a tick box exercise.²⁰¹

Messages from the senior level in Government and public bodies make a significant difference to the way that law is applied. For instance, after its decision to scrap the Building Schools for the Future programme in 2011, six Local Authorities successfully challenged the Government's decision, in part because they had failed to properly consider its equality duty.²⁰² This was followed by high level political criticism of the equality duty, with some questioning the need for equality impact assessments prior to decisions being taken altogether.

200 Equality and Human Rights Commission. *Public Sector Equality Duty in Wales*. <https://www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty-wales>

201 Clayton-Hathway, K. (2013). *The public sector equality duty: analysis of supporting evidence*. (Oxford: Oxford Brookes University).

202 *R (Luton and others) v Secretary of State for Education* [2011] EWHC 217 (Admin)

Added to this, the Equality Act was included in the Coalition Government's "Red Tape Challenge" of 2012.²⁰³ This included a review of the effectiveness of the PSED. A key intervention came from the then Prime Minister, David Cameron, speaking at a CBI conference in 2012 when he said that he was "calling time" on equality impact assessments and that they were unnecessary, describing them as "red tape."²⁰⁴ These comments sent a clear signal across Whitehall and public authorities that although the law required them to promote equality (and that required them to understand the impact of a given policy on any particular protected characteristic), carrying out an impact assessment was a waste of time.

Leadership is important if we are to promote equality and encourage others to take action to address inequality. But political leadership at the time had the opposite effect. In parallel with this, local authorities have had fewer resources to invest in applying the duty. Reductions in local authority spending have resulted in women's organisations closing down or being forced to greatly restrict their activity. Consequently, they are less able to hold public bodies to account for their failures to meet the equality duty.

Recommendations

- ▶ England should adopt the same specific duties as Wales so that public bodies can understand what is needed to comply properly with the equality duty.

Making the equality duty work

The Panel received evidence from Dr. Mary-Ann Stephenson who researched the effectiveness of the public sector equality duty. In her evidence, Dr. Stephenson presented a number of ways in which the use of the public sector duty could be improved. In addition to strengthening the specific duties, she argued that political leadership, strong communication, resources and training need to be in place if the duty is to be effective. We agree with her analysis and her recommendations are set out below.

- There must be positive and visible leadership from both elected leaders and those in management positions that focuses on goals that will advance equality of outcomes.
- Decision making must take robust but proportionate account of the likely impact of a decision on the three goals of the equality duty.
- Ensure organisations have the capacity to implement the equality duty effectively. This normally includes increasing staff understanding and awareness, the proliferation of up to date information to aid consideration of equality issues and policy and decision-making processes that enable equality implications to be considered before decisions are made.
- An organisation must commit itself to achieving clear equality outcomes and objectives that inform its business planning. These should reflect priorities that are based on evidence and community engagement.
- There must be active engagement with service users, residents and employees, particularly those from protected groups. This is likely to lead to better quality and more appropriate decision-making.
- Organisations must make active use of qualitative and quantitative evidence to inform understanding of the likely impact of policy, service and employment decisions. Collecting information is not an

203 Home Office. (2012). *Equalities red tape challenge and reform of the Equality and Human Rights Commission: outcome*. <https://www.gov.uk/government/speeches/equalities-red-tape-challenge-and-reform-of-the-equality-and-human-rights-commission-outcome>

204 Speech from Rt. Hon. David Cameron. (2012). *Prime Minister's speech to CBI*. <https://www.gov.uk/government/speeches/prime-ministers-speech-to-cbi>

end in itself but must inform action. Although there are challenges involved in collecting evidence on certain issues (such as on the cumulative impact of a series of fiscal and spending decisions) much of the information that public bodies need should be routinely available to public bodies that understand and are in touch with their communities.

- Organisations must be open and transparent, including by making clear information about progress a public body is making towards the equality duty's three goals publicly available.
- Regulatory regimes that have equality and diversity embedded in their assessment criteria and should be assessed rigorously.
- The understanding and capacity of public bodies must be improved to meet the requirements of the equality duty.
- Civil society, including women's organisations, must be meaningfully engaged with during policy development.
- A national campaign to demonstrate the importance of the duty and to promote a more vigorous use of it as a valuable analytical tool for good policy making should be carried out.

Enforcement

The Equality and Human Rights Commission (EHRC) is the body responsible for monitoring and enforcement of the equality duty. It has had both its budget and remit cut since 2010.²⁰⁵ While their powers to enforce the equality duty remain in place, the cuts are substantial and significantly reduce the Commission's ability both to publicise examples of good practice and to enforce the equality duty. Public authorities need appropriate guidance to ensure that they do not adopt risk-averse practices, such as collecting more information than they really need or not putting data they have collected to good use.

The other way the equality duty can be enforced is through an action for Judicial Review (JR) after a decision has been taken. This form of enforcement is taken seriously by public authorities.

The Panel heard oral evidence from legal expert Louise Whitfield who argued that a number of the early JR cases were very important as they set the criteria for how the equality duty should be applied in practice.²⁰⁶ Now there are very few cases where a public authority has not considered its duty at all and these cases are likely to settle before they reach the Court. Cases brought are more likely to involve instances where the equality duty has been noted but not properly met, where the negative impact on equality has not been confronted or the appropriate consultation and evidence gathering has not been undertaken.

Louise Whitfield went on to argue that new JR procedural rules have had a seriously chilling and adverse effect on the availability of Judicial Review. These rules:

- Require the court to consider the likelihood of whether there would have been a substantially different outcome for the applicant.²⁰⁷
- Establish a presumption that those who intervene in a JR case will have to pay any costs they have caused to the parties to the hearing that arise from their intervention, even when the points they make in their intervention are accepted by the Court.²⁰⁸

205 From £63.6 million in 2008-9 to £20.4 million in 2016-7.

206 R (Chavda) v Harrow LBC [2007] EWHC 3064 (Admin); R (Baker) v Secretary of State for Communities and Local Government [2008] EWCA Civ 141; R (on the application of Kaur and Shah) v London Borough of Ealing [2008] EWHC 2062 (Admin); R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin).

207 Criminal Justice and Courts Act 2015, s.84

208 Criminal Justice and Courts Act 2015, s.87

- Mean that a cost capping order can only be made at the permission stage of proceedings.²⁰⁹ At this point, considerable costs could have been accrued for which the applicant could be made liable. For a costs capping order to be useful to an applicant, and to genuinely facilitate access to justice for women's organisations bringing important public interest cases, it would need to be available at an earlier stage.

Louise Whitfield also said that new legal aid rules have further limited the accessibility of JR.²¹⁰ Broadly, these new regulations mean that a legal aid payment is not allowed unless the court gives permission to bring judicial review proceedings, orders an oral hearing or the defendant withdraws the decision to which the application for judicial review applies. Each of these circumstances would require a solicitor to put in work on a case with no certainty that their work would be paid for.

Often the only way for women to challenge discriminatory laws and practice is to bring a judicial review, so it is crucial that they can access funding and the courts to enforce their rights. The availability of JR for applicants and interveners has been seriously constrained and consequently access to justice seriously limited.

Recommendations

- ▶ The new procedural rules in the Criminal Justice and Courts Act 2015 sections 84-89 must be repealed together with the Civil Legal Aid (Remuneration) (Amendment) Regulations 2015.
- ▶ The EHRC must be properly resourced enabling it to meaningfully promote and enforce the public sector equality duty.

Socio-economic status

It was intended that the equality duty cover "socio-economic status" (social class) as well as the other "protected characteristics". This is important for women and gender equality because we know that women are more likely to be adversely affected by austerity, welfare changes and spending cuts from repeated analysis in recent years carried out by the Fawcett Society, Women's Budget Group and the House of Commons Library.²¹¹ However, the provision was not implemented by the Coalition Government. Nevertheless, some local authorities, such as Islington Borough Council, decided to consider socio-economic status when carrying out equality impact assessments.²¹² This means that they analyse the impact of their policies and practices on the poorest people in their Borough and consider whether these policies will increase or reduce economic inequality. Section 1 of the Equality Act, which deals with socio-economic status, has not yet been commenced. Given that equality impact assessments clearly show the disproportionate impact of austerity on the poorest households, section 1 is directly relevant.

Recommendations

- ▶ Commence section 1 of the Equality Act.

209 Criminal Justice and Courts Act 2015, s.88

210 Civil Legal Aid (Remuneration) (Amendment) Regulations 2015. http://www.legislation.gov.uk/ukxi/2015/898/pdfs/ukxi_20150898_en.pdf

211 For examples Ariss et. al. (2015) *Where's the Benefit?*, Fawcett Society; Women's Budget Group, Women and Austerity in the UK, Resources ONLINE <https://wbg.org.uk/resources/women-and-austerity/> accessed 4th January 2018.

212 Islington Council. *Our Approach: Our approach to making Islington a fairer place*. <https://www.islington.gov.uk/about-the-council/equality-and-diversity/our-approach>

Political representation

Section 106 of the Equality Act 2010 has not yet been brought into force. This would require political parties to collect and report on equality monitoring data of candidates for Parliament. Without it there is no way for us to know for example how many women, Black and Minority Ethnic (BAME), disabled or Lesbian, Gay, Bisexual or Trans (LGBT) candidates have been selected. This legislation is long overdue and should be implemented. It also needs to be amended to include candidates who are selected to stand in devolved and local government elections.

Recommendations

- ▶ Commence section 106 of the Equality Act and amend it to include candidates who stand in devolved and local government elections.

Public Procurement

All public bodies, large and small, local and national, spend significant parts of their budgets to purchase goods, works and services from external contractors. Public procurement is the term used to describe how public bodies undertake such purchases including planning and drafting contracts, selecting tenderers, awarding contracts and monitoring and managing contract performance. This gives public bodies real leverage in the market. One third of public spending is procurement spending. In 2013/14 this spending was worth £242 billion.²¹³ Public authorities can use their purchasing power to advance equality and comply with the public sector equality duty. The impact could be considerable.

For example, tenders and bid evaluation processes should include requirements that providers comply with pay gap reporting requirements where applicable. Larger value contracts could give weight to employers with a strong record on gender equality during the decision-making process.

Furthermore, employers with equal pay judgements against them in the last two years should be ineligible for public sector contracts unless they have a high quality action plan in place to achieve equal pay.

Recommendations

- ▶ Harness the power of public procurement. Employers with equal pay judgements against them in the last two years should be ineligible for public sector contracts unless they have a high quality action plan in place to address equal pay.
- ▶ All public authorities should include relevant equality conditions in their procurement processes.

Preventing discrimination and harassment in the workplace

The public sector duty is clearly limited to public sector bodies and organisations but we have considered whether it is now time to require larger organisations in the public *and* private sector to take steps in their employment practices to prevent discrimination and harassment. We know from evidence cited in this report that discrimination and harassment occur, yet it is very difficult for individuals to challenge. EHRC research has found that just 1% of pregnancy discrimination claims go to tribunal.²¹⁴ The perpetrator

²¹³ House of Commons Library. (2015). *Public Procurement*. <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06029>

²¹⁴ Equality and Human Rights Commission. (2016). *Pregnancy and maternity-related discrimination and disadvantage experiences of mothers*.

almost certainly goes unchallenged and the behaviour unchecked. Half of women at work say they have experienced sexual harassment, yet the vast majority of them do not make a complaint.²¹⁵ We know that it takes many years to bring an equal pay claim; most women either settle or give up long before it gets to tribunal. So while this review is concerned to ensure that the individual has access to justice, we must also acknowledge that an individual legal challenge is not necessarily the most effective way to improve practice more widely. Fundamentally, when we consider that it is often hidden, how do we prevent harassment and discrimination in the first place?

If we accept that equality and diversity is good for business, then we must also agree that harassment and discrimination are bad for business. So preventing this practice in our organisations makes sense both ethically and commercially. Many private sector organisations accept the business case for promoting equality. But it is also clear that the incidence of sex discrimination at work are still worryingly high. The time is right to consider a new requirement on employers to take steps to prevent discrimination and harassment in their workplaces. As a result of this requirement, they would be expected to proactively set out what they are doing to address the risk of discrimination and publish this plan as part of their reporting requirements. Gender pay gap reporting similarly requires large employers to publish their gender pay gaps and advisably, to have an action plan in place to address it. This new legal requirement would build on gender pay gap reporting and form part of an employer's strategy for promoting gender equality in their workplace. For public sector employers it would be consistent with public sector duty requirements.

Section 124 of the Equality Act 2010 gave Employment Tribunals the power to make wider recommendations to benefit the wider workforce, not just the individual claimant, in relation to discrimination claims. This power was removed by the Deregulation Act 2015. We recommend that it is re-instated.

Recommendations

- ▶ The time is right to introduce a new requirement on employers to take steps to prevent discrimination and harassment in their workplaces.
- ▶ The new duty should require organisations with 250 or more staff to publish a diversity and inclusion review of their workplace every three years. Organisations should also be required to report on their action plan to prevent discrimination and harassment and promote equality.
- ▶ Section 124 of the Equality Act should be reinstated in order to permit Employment Tribunals to make wider recommendations to employers to improve their workplace practices.

²¹⁵ TUC. (2016). *Still just a bit of banter? Sexual harassment in the workplace in 2016*.

CHAPTER 5

ACCESS TO JUSTICE

The pursuit of equality is significantly undermined by the lack of access to justice.

Between 2005 and 2015 the number of not-for-profit legal advice centres has halved.

The introduction of Employment Tribunal fees significantly reduced access to justice and resulted in discrimination going unchallenged. The number of sex discrimination cases brought to Employment Tribunals fell by 80%.

Background and context

Legal rights that cannot be exercised are not rights at all; they become devalued, ignored and seen as merely theoretical. Without the resources to access quality legal advice and representation, many are left voiceless and vulnerable to exploitation. The reforms introduced by the Legal Aid Sentencing and Punishment of Offenders (LASPO) Act 2012 removed multiple areas of civil law from the scope of legal aid, rendered many individuals ineligible for financial support for their legal costs. These include cases entailing:

- Asylum support
- Clinical negligence (except when the injury occurred within 8 weeks of birth)
- Compensation from the Criminal Injuries Compensation Authority
- Debt
- Education (except for special educational need cases)
- Employment
- Family law (financial relief and private child law)
- Proceedings before the Higher Courts
- Housing (except eviction cases)
- Immigration and welfare benefits (except for the second tier tribunal, higher courts and for the first tier tribunal on “points of law” only).

The Government estimated that the state would save £450 million a year due to LASPO changes.²¹⁶ However, the Government spent £950 million less on legal aid than in 2010.²¹⁷ Some of this underspend could be re-allocated.

This has left many without the protection of the law, with growing numbers forced to represent themselves legally, including in court. In a 2015 inquiry, the House of Commons Justice Select Committee found that there had been a rise in the number of litigants in person (litigants who are not represented by

216 Ministry of Justice. (2013). *Transforming Legal Aid: next steps*. https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/supporting_documents/transforminglegalaidnextsteps.pdf

217 Ministry of Justice. (2017). *Legal Aid Statistics, England and Wales Apr-Jun 2017*. <https://www.gov.uk/government/statistics/legal-aid-statistics-april-to-june-2017>. See also Justice Select Committee. (2015). *8th Report of 2014-15: Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on the underspend of legal aid*. Paras 12-56. <https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/31102.htm>

a solicitor or barrister) since the introduction of LASPO. The Committee also found that litigants in person are increasingly people who are least able to effectively represent themselves. They are therefore being denied effective legal representation.²¹⁸ Court hearings involving litigants in person inevitably take much longer, both at the case management stage and during the substantive hearing. This holds up hearings in other cases, increasing court costs and leading to unnecessary complexity and delay. Common law, the European Convention on Human Rights (ECHR),²¹⁹ and the International Covenant on Civil and Political Rights (ICCPR)²²⁰ all expressly recognise the right to access legal aid in complex legal proceedings. In the words of the late Lord Bingham, "...denial of legal protection to the poor litigant who cannot afford to pay is [the] enemy of the rule of law."²²¹

Yet there is no doubt that for some years there has been a climate of hostility to the enforcement of equality rights. Since 2011, successive Governments have been rhetorically committed to equality, but public policy has in fact undermined the effectiveness of those rights. The last six years have seen a progressive reduction in legal rights and access to legal remedies, advice and help.

Legal aid and domestic abuse survivors

The LASPO reforms, took most private law children and family proceedings out of scope for legal aid. However, accompanying this Act, the Civil Legal Aid (Procedure) Regulations made provision for legal aid to continue to be available where there is sufficient evidence of domestic abuse. This evidence requirement has been a severe constraint for many women seeking legal aid, but in February 2017 the Government announced that it was going to widen the rules on who could provide the evidence and extend the relevant period to the last 5 years.²²² Restrictions on access to legal aid in domestic violence cases have led to women being forced to confront their abusers in court without any legal representation. It is to be hoped that this will improve the accessibility of legal aid for those most in need of legal assistance.

There are three major barriers to justice for domestic violence survivors:

- (1) women who are eligible for legal aid but have difficulty providing one or more of the required forms of evidence of domestic violence;
- (2) survivors of domestic violence who are not financially eligible for legal aid but do not have the means to pay for legal advice and representation (the gap between those who are deemed financially eligible and those who can actually afford to pay is vast, due to the incredibly stringent and irrational means test) and;
- (3) survivors who are eligible for legal aid but cannot find a lawyer in their locality to take their case – law firms are finding it unaffordable to continue to provide legal aid, creating ‘advice deserts’ around the country. The inconsistency of resourcing is a major concern.

218 Justice Select Committee. (2015). *8th Report of 2014-15: Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on the underspend of legal aid*. Para 98. <https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/31102.htm>

219 Article 6(3)(c). Also see *Airey v Ireland* (1979) 2 EHRR 305.

220 International Covenant on Civil and Political Rights, article 14(3)(d).

221 Bingham, T. (2010). *The Rule of Law*. (London: Allen Lane): p88.

222 Ministry of Justice. (2017). *More legal aid support for victims of violence*. <https://www.gov.uk/government/news/more-legal-aid-support-for-victims-of-domestic-violence>

Access to Courts and Tribunals

Employment Tribunals (ETs) were set up as an accessible, speedy and cheap remedy for those who felt they had been unfairly treated at work. Their object was to prevent industrial unrest and provide a process for resolving workplace industrial disputes, to prevent employees resorting to direct action. Women who complained about sex discrimination at work were able to bring claims before ETs without having to pay a fee and could expect to have them judicially determined within a reasonable time and be awarded the appropriate remedy.

In December 2011, the Coalition Government announced it was consulting on whether to introduce fees for ETs.²²³ The majority of respondents were strongly opposed to the charging of fees and argued that it would have a discriminatory effect. Nevertheless, the Government decided to introduce fees, in 2013.²²⁴ This led to a steep drop in the number of cases being brought to ETs. For example, 80% fewer sex discrimination claims were brought to Tribunal in the quarter January – March 2014 compared to the same quarter in 2013.²²⁵ The discriminatory effect of the fees was widely criticised but no action had been taken by the Ministry of Justice (MOJ) to reduce or limit the fees until July 2017 when the Supreme Court ruled that the fees were unlawful and discriminatory after a case was brought by the Trade Union UNISON.²²⁶

The Supreme Court concluded that the right of access to justice, meaning access to the courts and tribunals, is a constitutional right inherent in the rule of law and is therefore of fundamental importance, not only to those who seek such access but to society as a whole. The fees were therefore found to be inconsistent with this principle. The introduction of fees resulted in a substantial fall in the number of claims being brought and they were also contrary to the Equality Act 2010 due to their disproportionate effect on women. The MOJ therefore agreed to repay all fees that had already been paid.

It is clear that ET fees have had a chilling effect on access to justice. As a result, it will undoubtedly be the case that discrimination has gone unchallenged in many places since their introduction in 2013. If this were to continue then the protections under the Equality Act would be seriously undermined.

County Court fees have increased since 2011 but unfortunately there are no statistics on the number of discrimination cases arising in the County Court and there is certainly no historical record of these. It is therefore impossible to assess to what extent the number of discrimination cases being brought to the County Courts has fallen due to increasing fees.

Access to advice and help

Fees are only part of the picture when considering whether there is effective access to justice. Since 2010 there has been a drastic reduction in the number of sources of legal advice and help, including from Law Centres, Citizens Advice, solicitors or other advice centres. For example, research from the MOJ shows that the number of not-for-profit legal advice centres fell from around 3,226 in 2005 to 1,462 by 2015.²²⁷

223 Ministry of Justice. (2011). *Charging Fees in the Employment Tribunals and the Employment Appeal Tribunal*. https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011/supporting_documents/chargingfeesinetandeat1.pdf

224 Ministry of Justice. (2012). *Charging Fees in the Employment Tribunals and the Employment Appeal Tribunal – Consultation response*. <https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011/results/employment-tribunal-fees-consultation-response.pdf>

225 TUC (2014) *At what price justice?*

226 *R (on the application of UNISON) v Lord Chancellor*, [2017] UKSC 51. <http://www.bailii.org/uk/cases/UKSC/2017/51.html>

227 Ministry of Justice. (2015). *Survey of Not for Profit Legal Advice Providers in England and Wales*. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/485636/not-for-profit-la-providers-survey.pdf

An injection of substantial resourcing is urgently needed into the legal advice sector. The Law Commission called for the Government to establish a ten-year National Advice and Legal Support Fund of £50 million per annum, to be administered by the Big Lottery Fund, to help develop provision of information, advice and legal support on social welfare law.²²⁸ The Bach Commission suggested the Government create a new, ring-fenced fund for advice providers who are able to evidence the effectiveness of their approach to delivering advice to people within their communities.²²⁹ The Panel considered that the Civil Legal Assistance Offices set up by the Scottish Legal Aid Board could provide a model for the provision of legal advice and assistance.²³⁰

The 2010 Coalition Government introduced a wide range of policies to curtail public expenditure. In some cases, this reduction in spending gave rise to increased demand for legal help, for example in the area of welfare reform. As part of its austerity agenda, the Government decided to reduce Ministry of Justice expenditure by 34% between 2010-11 to 2015-16.^{231 232}

Provision needs to be made for legal advice as a matter of urgency. The Panel notes the work of the Fabian Society Bach Commission and their recommendations on legal aid for children and family law.²³³

Recommendations

- ▶ Provision for legal advice must be made as a matter of urgency. The Civil Legal Assistance Offices set up by the Scottish Legal Aid Board could provide a model for the provision of legal advice and assistance.
- ▶ Legal aid should be restored to cover asylum support, clinical negligence, compensation from the Criminal Injuries Compensation Authority, debt, education, employment, family law, housing, immigration and welfare benefits.
- ▶ Fees for employment tribunals must not be reintroduced.

228 Low Commission. (2014). *Tackling the Advice Deficit*. <https://www.lowcommission.org.uk/dyn/1389221772932/Low-Commission-Report-FINAL-VERSION.pdf>

229 Fabian Society. (2017). *The Right to Justice: Final Report of the Bach Commission September 2017*.

230 Scottish Legal Aid Board. *Civil Legal Assistance Office*. <http://www.clao.org.uk/home>

231 HM Treasury. (2015). *Public Expenditure, Statistical Analyses 2015*. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/446716/50600_PESA2015_PRINT.pdf

232 Institute of Fiscal Studies. (2015). *Recent cuts to public spending*. https://www.ifs.org.uk/tools_and_resources/fiscal_facts/public_spending_survey/cuts_to_public_spending

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CHAPTER 6

MULTIPLE DISCRIMINATION

We increasingly expect our multiple identities to be recognised in policy and practice, however our law fails to do so. It needs to catch up.

Other countries such as Canada, Germany, Austria and Poland have, to varying degrees, recognised multiple discrimination in their laws.

Background and Context

We all have complex, multiple identities. Increasingly, the discourse about equality recognises intersectionality and the importance of language and data that reflects the reality of diverse life experiences. Women in all their diversity must be included and must be seen.

However, our law does not reflect this. The provisions of the Equality Act (2010) that have been brought into force only recognise discrimination on the basis of one characteristic at a time, not a combination. Yet it is clear that, for instance, women experience discrimination because they are older women, Black women, women with a disability, Muslim women or lesbian women, or indeed on more than two grounds. Section 14 of the Equality Act (2010) provides for protection from *dual* discrimination, on the basis of any two protected characteristics in combination, but this has not been commenced. An older black woman, for example, who could show that she had not been fairly considered for promotion because of that combination of characteristics, when both black women and older women had been, might not be protected. Furthermore, section 14 only applies to direct discrimination; it offers no protection from indirect discrimination, harassment or victimisation.

Multiple discrimination has been widely recognized for some time by those working in the equality sector as an issue that must be addressed. Yet the law and public policy have not kept up with this ambition, failing to take multiple discrimination into account.

The Panel received a number of submissions highlighting the need for the law to respond to this complexity.

The need for legal recognition of multiple discrimination

Multiple discrimination is experienced by Black, Asian and Minority Ethnic (BAME) women and this has been known for some time.²³⁴ Recent evidence shows that fewer than 1% of the most powerful positions in the country are held by BAME women,²³⁵ that Pakistani and Bangladeshi women experience the largest pay gap of 26%²³⁶ and that the pay gap of 20% for Black African women has seen no progress in twenty

234 Fredman, S. and Szyszczak, E. (1992). The Interaction of Race and Gender. In Hepple, B. and Szyszczak, E. (Eds.). *Discrimination: The Limits of Law*. (London: Mansell): 214-226. See also Mirza, H. S. (1992). *Young, Female and Black*. (London: Routledge).

235 Operation Black Vote & Green Park. (2017). *Colour of Power*. <http://www.thecolourofpower.com/colour-of-power/>

236 Li, Y. and Breach, A. (2017). *Gender Pay Gap by Ethnicity – Briefing*. (London: Fawcett Society). <https://www.fawcettsociety.org.uk/Handlers/Download.ashx?IDMF=f31d6adc-9e0e-4bfe-a3df-3e85605ee4a9>

years.²³⁷ BAME women are also disproportionately adversely impacted by welfare reform and public spending cuts.²³⁸

As our awareness of the interplay of multiple identities has expanded, so has recognition of the possible combinations of characteristics which can act as grounds for discrimination claims. We need our equality law to be able to respond appropriately to cases such as older women newsreaders who suddenly find that their contracts are not renewed,²³⁹ or lesbian school teachers whose schools fail to protect them from pupils' abusive behaviour,²⁴⁰ or female soldiers of Caribbean origin needing child care.²⁴¹

In their evidence to the Law Review Panel, Stonewall commented that many lesbian and bi women in the workplace face dual-discrimination for both their sexual orientation and gender. Drawing on in-depth interviews with lesbian and bi women for their 2008 report "The double-glazed ceiling: lesbians in the workplace", they identified that even participants who felt unashamed and confident about their sexual orientation felt that being a lesbian or bi woman gave them a distinct disadvantage in the workplace. Some spoke of being able to hide their sexual orientation in the workplace, but not their gender or ethnicity, and therefore choosing to hide their sexuality so as not to "put their hand up twice".²⁴² Whilst completely understandable that some women may choose to do this, no one should feel unsafe or uncomfortable at work as a result of who they are.

These examples show how this discussion has deepened the public awareness of the specific, complex and multi-layered identities of every human being.

At an individual rights level, multiple discrimination should be recognised by the Courts. To some extent the Courts have already done so in cases such as *Tilern deBique v. Ministry of Justice*,²⁴³ *Nwoke v (1) Government Legal Service and (2) Civil Service Commissioners*,²⁴⁴ *Burton & Rhule v De Vere Hotels*,²⁴⁵ and *Mandla v Dowell Lee* (where only a male Sikh would be disadvantaged).²⁴⁶ On the other hand, in the case of *Bahl v Law Society*, the Court of Appeal explicitly ruled that each ground for discrimination had to be separately considered and a ruling made in respect of each, even if the claimant had experienced them as inextricably linked. It is the Panel's view that the law would benefit from being clarified in this area.

In Canada, they have a different definition of discrimination compared to that used by the United Kingdom. The Canadian Human Rights Act 1998 clarified that a discriminatory practice includes one that is based on more than one ground:

For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.²⁴⁷

237 Ibid

238 Women's Budget Group and Runnymede Trust. (2017). *New research shows Universal Credit failing the 'just about managing': with women and BME households hardest hit*. <https://wbg.org.uk/wp-content/uploads/2017/11/pre-budget-press-release-nov-2017-15-11.pdf>

239 For example, BBC. (2007). *Newsreader Moira Stuart quits BBC*. <http://news.bbc.co.uk/1/hi/entertainment/7026111.stm>. Accessed 18th December 2017.

240 *Pearce v Governing Body of Mayfield Secondary School* [2003] IRLR 215

241 *Tilern deBique v. Ministry of Justice* [2010] IRLR 471

243 [2010] IRLR 471

244 [1996] 28 EOR 6, [1996] IT/43021/94

245 [1997] ICR 1, [1996] IRLR 596

246 [1983] 2 AC 584

247 [1983] 2 AC 584

However, it may be that the existence of different exclusions, scope and level of protection for some of the prohibited grounds could give rise to problems with this solution. Each prohibited ground for discrimination has developed its own different set of exceptions. Whilst there are some, such as the genuine occupational requirement provisions, which are common to all the grounds there are others, such as age discrimination that have a much wider set of exclusions.

The German solution to this problem is to say that any justification must apply to each of the grounds in question:

***Discrimination based on several of the grounds... is only capable of being justified ... if the justification applies to all the grounds liable for the difference of treatment.*²⁴⁸**

The German provisions for establishing direct and indirect discrimination are the same for all the named grounds, although the General Non-Discrimination Act does have differential justification requirements, both for religion or belief and for age. Thus any combined grounds justification will need to be established to the highest standard of justification.

The Panel suggests that similar provisions be adopted here. The inclusion of a provision similar to that in the Canadian Human Rights Act, clearly permitting action to be taken in respect of discrimination based on several grounds, would be welcome.

As the comparison becomes more complex with each additional ground, it might be prudent, at least initially, to limit the number of grounds that could be combined to a maximum of three. It should also be clarified that in awarding damages for multiple discrimination cases, the amount awarded in relation to injury to feelings may be increased to reflect the number of grounds involved, if that is appropriate in the light of the facts.²⁴⁹

The problems that have been identified need to be addressed in a number of different ways. Whilst enabling individual legal claims is important, so too is the need for the recognition of *groups* experiencing multiple discrimination. More sophisticated data collection would assist in identifying the size and geography of different groups, which will in turn assist in the formation of more targeted and effective policy responses.

There is a clear need for greater awareness and understanding of intersectional identities. The Panel would like to see more research carried out across public services so that analysis of monitoring data, reporting and recording mechanisms and staff training consider the impact of having multiple protected characteristics.

Recommendations

- ▶ The Equality Act should be amended to include a multiple discrimination provision in respect of direct and indirect discrimination, harassment and victimisation for all of the protected characteristics. It should be clear that any justification applying to one ground must apply to each of the grounds engaged and that in awarding damages for cases of multiple discrimination, the amount awarded in relation to injury to feelings may be increased to reflect the number of grounds in question if that is appropriate in the light of the facts.
- ▶ More research must be undertaken so that analysis of monitoring data, reporting and recording mechanisms and staff training consider the impact of having multiple protected characteristics.

²⁴⁸ General Non-Discrimination Act 2006 (AGG), Article 1, chapter 1, paragraph 4.

²⁴⁹ As in Austria: §9(4), Federal Disability Equality Act, §7(j), Act on the Employment of People with Disabilities, §12, section 13, Equal Treatment Act (private sector) and §19(a), Federal Equal Treatment Act (Federal Public Sector).

CHAPTER 7

SEX EQUALITY IN NORTHERN IRELAND

Sex equality law in Northern Ireland is significantly behind the rest of the UK.

Northern Ireland's courts are more directly reliant on EU law than courts in the rest of the UK.

The human rights of women in Northern Ireland are violated and disregarded due to lack of access to abortion services.

Background and Context

When the Equality Act 2010 was introduced for Great Britain (GB) its effect could not be extended to Northern Ireland. Equality is a devolved matter in Northern Ireland so only the Northern Ireland Assembly can legislate in this area. It was hoped that Northern Ireland would introduce parallel provisions to mirror those in GB but this has not happened. Consequently, the structure of sex discrimination law in Northern Ireland is different from that in Great Britain.

The Panel has not examined the Northern Ireland provisions in the same detail as those applying in Great Britain. However, there is no reason in principle why there should be any significant variation in the protection from discrimination enjoyed depending on which part of the country you happen to find yourself in. There should be no race to the bottom – in relation to protection from sex discrimination the aspiration of all nations should be to achieve the highest possible level of protection.

We received evidence from the Equality Commission for Northern Ireland (ECNI) and their recommendations are reflected in those we make here. The ECNI also submitted a shadow report to the UN Committee on the Convention on the Elimination of All Forms of Discrimination against Women.²⁵⁰ The ECNI is seeking a time-tabled commitment to reform their sex discrimination and equal pay legislation.

The Panel also received a submission from the Women's Policy Group which echoed many of the concerns expressed by the ECNI and agreed with their recommendations. The Women's Policy Group also called for the introduction of a Single Equality Act to bring Northern Ireland in line with the rest of the UK, which we also recommend.

However, the Women's Policy Group is concerned that the ECNI's recommendation to "strengthen protection against discrimination or harassment by private clubs/associations on the grounds of sex..." could be used not only to address barriers to women's full participation, but also to enable men's participation in women-only spaces such as community-based women's centres. We consider that this objection would be dealt with if appropriate positive action measures were adopted in line with those in the Equality Act 2010.

The Northern Ireland Executive allowed the Gender Equality Strategy 2006-2016 to expire without replacing it. Northern Ireland urgently needs a new Gender Equality Strategy which should contain

²⁵⁰ Equality Commission for Northern Ireland. (2013). *Shadow Report to the Committee on the Elimination of Discrimination against Women*. http://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/CEDAW_2013.pdf. Accessed 6th December 2017.

targeted measures, action plans, a budget that is adequate to ensure effectiveness of the strategy and a framework to assess the success of the strategy.

Northern Ireland and the European Union

As the Northern Ireland equality provisions have not been updated in line with the GB Equality Act 2010 there are some provisions that are not fully compliant with EU equality directives. This means that the Northern Irish courts must interpret equality provisions in such a way as to make them compliant with the directives. Therefore, Northern Ireland can be seen as more reliant on EU law than the rest of the UK. This means Northern Ireland is particularly vulnerable to adverse consequences of Brexit, giving them an added interest in ensuring that EU equality provisions are fully incorporated into their law.

There are a number of unique factors relating to Northern Ireland which have to be considered as a priority in light of Brexit. These include the highly significant question of the border between Northern Ireland and the Republic and the reciprocal arrangements that are in place between the Republic and Northern Ireland.²⁵¹

However, the Panel is concerned that the rights of women in Northern Ireland and the need for greater progress on gender equality is often marginalised by the dominant political narrative and the legacy of sectarian division. It is essential that gender inequality and women's rights in Northern Ireland are made a political priority and women's voices are heard.

The Northern Ireland Executive

It became clear to the Panel during the course of the Review that the absence of a functioning executive in Northern Ireland is having a significant adverse impact on the ability of officials in the Nation to progress key pieces of legislation such as gender pay gap reporting regulations. If this situation remains unresolved, direct rule may become necessary. If so, progress must be made on a number of legislative gaps relating to gender equality.

Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and Northern Ireland

The Panel noted that CEDAW has made a number of important recommendations regarding gender equality in Northern Ireland which have not been implemented.²⁵² These include:

- Ratification of the Istanbul Convention
- Ensuring fertility treatment is available to lesbians
- Decriminalising abortion
- Action to close the gender pay gap and promote flexible working
- Putting legislation in Northern Ireland on an equal footing with GB.

A number of these issues are highlighted in this report. Post-Brexit, other international treaties assume a greater significance but remain a poor substitute for the protections afforded by EU membership. Nevertheless, CEDAW recommendations should be taken seriously and acted upon.

²⁵¹ These include: the right to enter and reside in each others' state; the right to work; the right to study; access to social welfare entitlements and benefits; access to health services; and the right to vote in local and parliamentary elections.

²⁵² Equality Commission for Northern Ireland. *UN Convention on the Elimination of All Forms of Discrimination against Women*. <http://www.equalityni.org/CEDAW>. Accessed 6th December 2017.

Pregnancy discrimination

GB law is very clear on the issue of pregnancy discrimination. If a woman experiences discrimination at work as a result of a pregnancy this constitutes direct sex discrimination and no male comparator is required. In their evidence to the Review, the ECNI argued that women in Northern Ireland may not have the same protection in the law because the definition of direct sex discrimination does not make that clear. For the avoidance of doubt, the ECNI argue that this should be addressed. We agree that the law should be clarified.

Abortion

Abortion remains prohibited in Northern Ireland unless it is necessary to preserve a woman's life. In November 2015, the Northern Ireland Human Rights Commission brought a case to court with the hope of securing access to abortion in cases of fatal foetal abnormality and serious malformation of the foetus. Lord Justice Horner ruled that abortion law in Northern Ireland constituted a breach of article eight of the European Convention on Human Rights with "one law for the rich and another for the poor."²⁵³ The case is ongoing with an appeal having been heard in the UK Supreme Court.²⁵⁴

As a result of the extreme restrictions in place, many women are forced to travel to England or Wales to access abortions. In 2016, 724 women living in Northern Ireland had an abortion in England or Wales.²⁵⁵ Until recently, women travelling from Northern Ireland to the mainland to access abortion services had to fund both their own travel and the cost of the termination. These women would not have been charged for other health treatments accessed. A recent change secured by Stella Creasy MP, funded by the Government Equalities Office means that women from Northern Ireland can now obtain publicly funded abortions in England and Wales. The Scottish Government has also committed to funding abortions for women from Northern Ireland.

Northern Ireland has the harshest criminal penalty in Europe for obtaining an illegal abortion with a maximum punishment of life imprisonment. Recent prosecutions include a mother who was seeking abortion pills for her fifteen year old daughter (although this is being challenged).²⁵⁶ Until recently, medical staff referring women for abortions in the rest of the UK also risked prosecution. However, human rights organisations have reported that the Public Prosecution Service for Northern Ireland has now clarified that medical staff will not face prosecution for making referrals.²⁵⁷

The law must be changed as a matter of urgency to ensure that women in Northern Ireland have access to abortion on the same terms as women in the rest of the UK.

253 In the matter of an application for judicial review by the Northern Ireland Human Rights Commission; In the matter of the law on termination of pregnancy in Northern Ireland (2015) NIQB 96 (The High Court Of Justice in Northern Ireland, Queen's Bench Division (Judicial Review) https://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2015/%5B2015%5D%20NIQB%2096/j_j_HOR9740Final.htm. Accessed 6th December 2017. As per Lord Justice Horner

254 Northern Ireland Human Rights Commission. (2017). *UK Supreme Court to hear Commission's Appeal on N.I Termination of Pregnancy Laws*. <http://www.nihrc.org/news/detail/uk-supreme-court-to-hear-our-appeal-case-on-termination-of-pregnancy-laws>. Accessed 6th December 2017.

255 Department of Health. (2017). *Abortion Statistics, England and Wales: 2016*. www.gov.uk/government/uploads/system/uploads/attachment_data/file/652083/Abortion_stats_England_Wales_2016.pdf. Table 12a Abortion statistics, England & Wales. Accessed 6th December 2017

256 Erwin, A. (2017). *Mother facing Belfast trial for allegedly procuring teen daughter's abortion wins permission to challenge prosecution*. Belfast Telegraph. <https://www.belfasttelegraph.co.uk/news/northern-ireland/mother-facing-belfast-trial-for-allegedly-procuring-teen-daughters-abortion-wins-permission-to-challenge-prosecution-35400387.html>. Accessed 6th December 2017.

257 Amnesty International UK. (2017). *Northern Ireland: Threat of prosecution lifted for medical profession on abortion referrals*. <https://www.amnesty.org.uk/press-releases/northern-ireland-threat-prosecution-lifted-medical-profession-abortion-referrals>. Accessed 6th December 2017.

Recommendations

We recommend that the law in Northern Ireland is amended to improve the recognition of women's human rights and the protection against sex discrimination and harassment. These recommendations draw strongly on the evidence submitted by the ECNI and their wider advocacy:

- ▶ The Northern Ireland Executive should ensure that women in Northern Ireland have the same rights as those in the rest of the UK and in line with wider recommendations in this report. Give women in Northern Ireland access to abortion services on the same terms as women in the rest of the UK.
- ▶ Introduce a Single Equality Act to bring Northern Ireland in line with the rest of the UK.
- ▶ Clarify the definition of direct sex discrimination to include discrimination on grounds of pregnancy.
- ▶ Prohibit discrimination and harassment by public bodies on grounds of sex when carrying out their public functions.
- ▶ Change the laws relating to private clubs and associations, to include discrimination on grounds of pregnancy, maternity and gender reassignment.
- ▶ Extend the scope of voluntary positive action that employers, service providers and public bodies can take in order to promote sex equality so that the sex equality legislation includes an exception that permits associations (including private clubs) to restrict their membership in certain circumstances to people of a certain gender (or gender identity).
- ▶ Provide greater protection for employees against harassment on grounds of sex by a third party such as a customer or client, when the employer ought to have been reasonably aware of the risk of harassment, current provisions are insufficient because it requires 2 or more occasions when the harassment has taken place.
- ▶ Prohibit “pay secrecy clauses”.
- ▶ Introduce measures to require large private and voluntary sector employers to publish gender pay information.
- ▶ Require tribunals to order a respondent found in breach of an equal pay provision to carry out an equal pay audit.
- ▶ Give powers to tribunals to make wide recommendations that benefit the whole workforce.
- ▶ Prohibit multiple or intersectional discrimination.
- ▶ Improve the remedies available under the current legislation.
- ▶ Introduce a new Gender Equality Strategy which should include targeted measures, action plans, a budget that is adequate to ensure effectiveness and a framework to assess the success of the strategy.
- ▶ Introduce coercive control legislation in line with the rest of the UK.
- ▶ Amend Section 75 of the Northern Ireland Act 1998 to improve data collection to address structural inequalities.

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Mark was formerly head of local government for UNISON and Stefan has been fighting equal pay cases for over 30 years and has been involved in more than 60 and reported cases and litigation against more than 100 employers. Stefan is the son of a home help, has been a Home help himself, has been a trade union official, labour councillor, and trade union lawyer and litigator and tribunal judge. He commenced and won the equal pay litigation against Birmingham City Council and is currently involved in leading 10,000 claims against Glasgow City Council.



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