Written submission from Professor Clare McGlynn (SHW0008)

Executive Summary

1. Recommendations on Guidance for Employer/ees on Sexual Harassment reports and investigations
   a) Vital importance of respecting complainant choice as to whether or not to report to the police action which may constitute a criminal offence;
   b) Importance of terminology and not minimising sexual harassment by reference to ‘serious/less serious’ behaviours;
   c) Greater clarity on overlap between sexual harassment and criminal offences;
   d) Employers must not report to police against complainant’s wishes;
2. Caution on use of ‘informal solutions’ and restorative justice for sexual harassment
3. Recognise ‘continuum of sexual harassment’ (beyond ‘public’ and ‘workplace’)

1. Improve Understanding of Overlap Sexual Harassment and Criminal Offences

1.1 Many acts of sexual harassment may also constitute criminal offences, such as unwanted touching (which can constitute sexual assault), communications offences (such as obscene emails or other forms of image-based sexual abuse) and repeated harassment. It is important that employers and employees recognize these overlaps and that, for example, many instances of sexual harassment, minimized by language such as ‘groping’, are potentially criminal offences.

1.2 It is also important that employers and employees understand that where behaviour may constitute a criminal offence, this does not obviate the employer taking action. In such circumstances, the employer is dealing with a potential breach of employment policies and conditions, not the investigation of a potential criminal offence. Equally, where an employee chooses not to report behaviour to the police, the employer is still obligated to respond to the complaint, and investigate where necessary, if this is the chosen course of action of the complainant.

2. Importance of Complainant choice to report to police

2.1 All guidance for employers, and employer policies, must make clear that it is for each complainant to decide whether or not to report actions to the police. It may also be helpful to provide guidance that it is known that many (indeed most) victims choose not to report to the police for a whole variety of understandable reasons.

2.2 One of the major harms and impacts of sexual violence and abuse is the loss of control and power felt by the victim. Therefore, if an employer reports the incident to the police, or pressurizes (or is perceived to pressurize) the victim to report, this may compound the loss of power and therefore the harm of the original conduct.

3 Employers must not report to police or pressurize complainants to report
3.1 Best practice will be for the employer to provide support to a complainant in making a decision as to whether to report to the police and/or pursue an employer-led investigation, emphasizing that it is their decision, and whatever they decide will not impact on their employment. There should be no obligation on employers to report to the police and guidance should not encourage such reporting where in contravention of the complainant’s wishes.

3.2 Any guidance should also state that, nonetheless, there may be exceptional circumstances where an employer does report an incident to the police without the consent of the victim. This would be where there is an immediate risk to the victim or other employees/public. Even in such cases, best practice would be to inform the victim, in advance, so that they are forewarned that this action was being taken and to explain why. It should be emphasized that such situations are likely to be the exception and not the norm or default.

4.1 Recognise ‘continuum of sexual harassment’ (not ‘serious/less serious’)
4.2 It is very important when discussing sexual harassment not to minimize certain behaviours and/or to assume that some acts are more ‘serious’ than others (see further below on recognising the ‘continuum of sexual harassment’). Choosing the most appropriate language and terminology in this field is always a challenge and there are often no definitive approaches. However, in cases of sexual harassment and misconduct what might seem less serious to some, may be very serious and harmful to the victim. There is also a risk that an employer makes the assumption as to what is ‘less serious’ without understanding a complainant’s perspective. In essence, the nature of the harm must be understood from the complainant’s perspective.

4.3 It would be advisable, therefore, for employer policies and guidelines to reiterate that how a complainant perceives conduct is key. Currently published EHRC Guidance for employers is currently being reviewed and changes to sections referring to ‘less serious’ complaints is recommended (p 5).

5.1 ACAS Guidance and respecting complainant choices
5.2 ACAS guidance on sexual harassment (19 November 2017) states that ‘criminal matters should be reported to the police’. It continues that where a complaint is made to the police, ‘an employer must still investigate the complaint as an employment matter’.

5.3 This guidance should be revised to give more appropriate consideration to the interests and wishes of a complainant. There are a multitude of understandable reasons why victims choose not to report to the police, and these should be respected by an employer. Further, an employer should only investigate a complaint formally where the complainant wishes to pursue such a route.

5.4 The ACAS guidance would also benefit from including sources of support for victims from specialist organisations such as rape crisis. Currently, only the police and Samaritans are listed.

6.1 Revising Equality and Human Rights Commission (EHRC) guidance
6.2 The EHRC issued guidance to employers on sexual harassment in November 2017 which states that ‘if you believe that a criminal offence may have been committed, you should advise the victim
to report the matter to the police as soon as possible’ (p 6). At the time of writing, this guidance is being revised in line with earlier comments about this issue.3

7.1 Requirement for Specialist policies on sexual harassment

7.2 The EHRC Guidance understandably suggests that employers may use existing grievance or anti-harassment procedures for sexual harassment complaints. This is likely to be the most expeditious approach for employers. Ideally, however, there would be a separate policy, due to the specific nature of sexual harassment and to the training required by those involved in such complaints. This is recommended as a separate policy would enable specific guidance to be provided, including, for example, dealing with ‘informal’ resolutions (see below), as well as providing detailed information on support and the overlap with criminal offences.

8.1 Caution regarding ‘Informal solutions’ and ‘restorative justice’ in cases of sexual harassment

8.2 It is important to distinguish between ‘informal solutions’ to employment disputes and more formal processes of ‘restorative justice’. Both approaches require careful consideration in the context of sexual harassment.

8.3 The EHRC Guidance (as currently published) states that any policy should: ‘Provide opportunity for quick and informal resolution of less serious complaints’ (p 4). This may be common practice for harassment and other employment policies. In the context of sexual harassment, it may be worth considering whether this approach needs to be ameliorated to reflect the specifics and sensitivities of sexual harassment cases. It might be helpful to suggest that ‘quick and informal’ resolutions are to be pursued only where appropriate and following advice, and this may be rare in cases of sexual harassment. It is important that complaints of sexual harassment are not minimized and complainants pressurized into an ‘informal’ solution.

8.4 Many harassment and other policies often suggest a complainant make informal but direct contact with the accused to try to ‘resolve’ the issue. Again, it may be suitable to offer guidance on this as, in my view, this is not appropriate in cases of sexual harassment unless and until the complainant has sought advice and support.

8.5 Restorative justice is a more formal practice and crucially involves the perpetrator taking responsibility for the conduct at issue. It therefore differs significantly from forms of mediation (seeking compromise). It may be that restorative justice processes are sought by a complainant in cases of sexual harassment, in preference to a more formal tribunal claim or report to the police. Such cases would require careful support and guidance, including specialist advice and training (on sexual harassment) for those involved in any restorative process. My research with colleagues on the use of restorative justice in cases of sexual violence shows that it can be valuable for some victims, but that it requires significant support, expertise and resources.4

9.1 Recognise ‘continuum of sexual harassment’ (beyond ‘public’ and ‘workplace’)

9.2 As noted in my evidence to the inquiry into Sexual Harassment of Women and Girls in Public Spaces, it is vital that public policy recognizes that women experience sexual harassment in all areas of their lives and in many different ways: we might helpfully call this the ‘continuum of sexual harassment’.5
9.3 In terms of *where and when* they experience sexual harassment, for example, they may experience sexual harassment while at home in ‘private’ (for example from a partner, family or voyeur), at work (from employers and third parties), in public spaces (transport, supermarket) as well as online (in public, private and in the workplace). Recognising the continuum of sexual harassment means we can focus on the nature and extent of the harms which women experience, rather than on the place - workplace - or situation where or when these harms occur.

9.4 Thinking of a ‘continuum of sexual harassment’ also helps us to acknowledge the *variety of ways* in which sexual harassment is experienced and perpetrated, but without creating a hierarchy of serious/less serious behaviours. For example, it is important to acknowledge that experiencing sexual harassment in education is not ‘less serious’ than in the workplace; offline harassment is not ‘worse’ than online; physical harassment is not ‘more severe’ than verbal/online abuse.

9.5 Further, we must understand that women make sense of specific incidents of what we think of as ‘sexual harassment’ as part of their *overall experiences* (on a continuum) of harassment, abuse and sexual violence, across their lifespan. Sexual harassment, therefore, is on a continuum of sexual violence.

9.6 **Policy implications of recognizing ‘continuum of sexual harassment’:**

9.7 **Focus on harm to victims:** The impact of recognizing the ‘continuum of sexual harassment’ is that we focus on the harms women experience, rather than where/when, seeing the links between differing experiences, and we remove distinctions based on assumptions about serious/less serious forms of harassment. This is not about seeking equivalences, but about seeing connections.

9.8 **Resist dichotomous thinking:** Approaching policy in this way – what Karen Boyle refers to as ‘continuum thinking’⁶ – means that we resist dichotomies which often privilege some experiences over others, eg workplace/home, public/private, offline/online, physical/emotional, stranger/acquaintance, repeated/one-off.

9.9 **Enable focus on root causes:** In resisting dichotomies, we aim to strengthen policy responses to tackle root causes (rather than isolating specific behaviours) and respect victims’ experiences. This means focusing on the systemic inequalities facing women and tackling all forms of gender discrimination.

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5. The idea of a ‘continuum’ of sexual violence was developed by Liz Kelly (*Surviving Sexual Violence*, 1988). The
concept has since been developed and used in a variety of situations, including areas relating to 'public sexual harassment' such as my work with colleagues on the 'continuum of image-based sexual abuse' (Clare McGlynn, Erika Rackley, Ruth Houghton, 'Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse' (2017) 25 Feminist legal studies 25-46.