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Support in the workplace for victims of domestic abuse – BEIS call for evidence

Response from the Employment Lawyers Association

8 September 2020

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INTRODUCTION

1. The Employment Lawyers Association (“ELA”) is an unaffiliated and non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and advise employees and employers. It is therefore not ELA’s role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. The ELA’s Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation and regulation.
2. A working party, co-chaired by Felicia Epstein and Jennifer Sole was set up by the Legislative and Policy Committee of ELA to respond to the request for response to questions in the open consultation “Support in the workplace for victims of domestic abuse - call for evidence” issued by the Department for Business, Energy and Industrial Strategy on 10 June 2020. Members of working party are listed at the end of this paper.
3. Please note that the masculine gender is referred to in the paper, but ELA recognises that abusers can be male or female and the use of the masculine is not intended to suggest otherwise.

QUESTION 1

What practical circumstances arise in relation to domestic abuse and work?

4. Domestic abuse is a very sensitive issue, and therefore challenging for employers to manage. While employers do wish to support their workers who are at risk of experiencing abuse they do not have the expertise of social services and the police to manage these difficult circumstances and may be naturally wary about what liabilities they assume, particularly if they are inexperienced at managing these issues.

5. At the outset it is important to note the challenges that employers may face on becoming aware of an employee being alleged to be an abuser. It may also be difficult for employers to be in possession of the full facts particularly where the abuse does not affect how the perpetrator operates in the workplace, or where an employee or victim is reticent to share information. This in itself can present employers with challenges where they have to balance the expectations of the workforce or others outside the workplace, including the victim, against the employment rights of the individual alleged abuse. Employers can find themselves in difficult situations if, for example they take disciplinary action against the perpetrator which could in fact make the situation worse for the victim, particularly if for example the perpetrator is dismissed and has more time at home or views the victim as being in some way responsible for their dismissal. Many employers will genuinely not know how to respond and may need further support. As we note below ELA welcomes further guidance on how to identify and manage these situations.

CIRCUMSTANCES ENCOUNTERED IN PRACTICE

1. Impact on performance leading to performance management, resignation or dismissal of the victim.

6. Domestic abuse can have far reaching consequences for victims. The impact of domestic abuse has been well documented (see for example <https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/the-nature-and-impact-of-domestic-abuse/>). Workers who are subjected to abuse may become depressed, ill, suffer from anxiety, lack of sleep, therefore an impact on physical and mental health with resulting impacts on performance at work. This can result in changes in behaviour at work, underperformance/poor performance issues impacting the wider team, business and requiring management and HR time to resolve possibly using the employer's formal procedures.
7. Stress and anxiety from domestic abuse can cause absenteeism, sick days, long term sickness absence or conversely presenteeism (potentially out of a desire to avoid returning to an abusive environment), again potentially leading to management and HR invoking internal procedures (and prior to that almost certainly involving management time trying to resolve the issue informally in the first instance).
8. Domestic abuse can be wide ranging (from physical or sexual abuse to coercive controlling behaviour). Workers who are subjected to domestic abuse may be persistently late, or have to leave work early, possibly unable to join work events (such as social team building events), may miss work to attend appointments

such as with support workers, GPs, lawyers or the police. All of this can also cause performance issues which may need to be managed by HR.

9. In some domestic abuse cases, such as financial/economic abuse, the abuser may seek to interfere with the worker's right to work hindering their ability to work at all, again leading to performance management issues.
10. A particular concern is that in situations of domestic abuse the employee may feel unable to disclose the cause of their performance issues. This may be for a variety of reasons, including but not limited to:
 - 10.1. fear of the disclosure getting back to the abuser;
 - 10.2. shame, denial or lack of understanding that the situation is domestic abuse;
 - 10.3. fear that they will not be taken seriously; and/or
 - 10.4. fear that the employer will think less of them or view them as "weak" as a result.
11. There is therefore a significant risk that an employer may not, without knowing how to recognise the signs of abuse and approach the subject in a manner that encourages disclosure, realise that an employee's performance issues are the result of domestic abuse. In such cases the employee will be subjected to ordinary performance management that may result in formal warnings or, ultimately, their dismissal.

2. Safety at work, risk to a worker whilst at work, employer liability.

12. Whilst work can be a place of safety for a victim and an opportunity to seek support, make appointments in private and so on, the abuser may seek to contact the victim whilst at work by persistent calls, emails, messages or even visits to the workplace, thus bringing domestic abuse very much into the workspace. This means that a worker is being harassed and abused whilst at work and is at risk of injury or harm whilst at work.
13. It is well known that one of the riskiest situations is when a victim leaves an abuser. In such a scenario, the victim's workplace may become the only reliable means by which an abuser can contact a victim.
14. Abusers can seek to exploit weak links in the victim's chain of support. The workplace can represent such a weak link - for example a perpetrator can make apparently innocuous queries to co-workers in order to track their victim's movements; or send or leave messages to the victim in the workplace that undermine their perception of it as a potential place of safety.

15. Workers who are victims, may be at more risk at work in businesses where perhaps security is lax, the employer is unaware of the abuse or not aware of Court Orders or a safety plan around a victim for example. In such a scenario, an abuser could gain entry to the workplace and harm the victim whilst at work. In these cases, an employer could be liable for harm or injuries sustained at work where they have not taken reasonable steps to protect the worker's health and safety. However, for the sake of clarity, employers would only have a liability to any worker where the employer hasn't taken reasonable steps to protect the worker's health and safety, i.e. a worker should be safe from harm at the workplace, regardless of who carries out the harm. By way of further example, if an employer was not aware of the risk of harm from domestic abuse in the workplace and ought not to have known then they would be unlikely to be fixed with any liability for failing to take any steps to prevent that particular harm.

3. Impact on co-workers, their performance and safety.

16. We have seen this threefold:

- 16.1. co-workers often want to help a victim but can inadvertently put themselves at risk of abusive behaviour. For example, taking calls and messages from the abuser may put a co-worker at risk of experiencing being abused or threatened themselves;
- 16.2. co-workers may absorb the victim's workload or have to 'cover' for them if they need time off for appointments for example, all of these places extra strain on a co-worker who may complain about this, raise a grievance, seek employment elsewhere or experience performance issues themselves;
- 16.3. equally, where abuse enters the workplace, co-workers may witness threatening or abusive behaviour which could be distressing. This could have an impact on these co-workers' own performance and potentially their mental health, given that they are unlikely to be experienced in knowing how to deal with domestic abuse issues, which may in turn lead to them requiring their own support from others, e.g. HR, counselling, EAPs etc and potentially place additional pressure on internal resources.

4. Employment of a perpetrator of domestic abuse, can they be disciplined and whether they remain suitable to fulfil certain roles.

17. Employing a domestic abuser can give rise to a plethora of issues including, questions as to whether the abuser is using his employer's equipment to harass and abuse the victim? Does the abuser pose a risk to others in the business? Does the abuser pose a reputational risk? An abuser may be acting in breach of an employer's code of conduct and could face disciplinary proceedings for domestic abuse. Equally, an abuser may seek help from his employer to change his behaviour. An employer would have to consider what to do should a worker have Court Orders made against him in respect of domestic abuse.
18. There are some roles where an employer would have to seriously consider whether an abuser is suitable to work in the particular role, for example, roles working directly with children, young people and vulnerable adults; front line services such as the police, mental health services, domestic violence services, safeguarding or HR roles. In such cases, an employer, following its internal procedures, would need to give careful thought to assessing the suitability of the abuser to carry on the role.
19. Similarly, if an employee is in a managerial role there is the potential risk of them abusing more junior members of staff through their position of authority.
20. It may be necessary for an employer to consider whether a DBS referral or referral to any regulator or professional association is necessary because of the abusive conduct depending on the role held and the nature of the allegations.

5. Employment of abuser and victim within the same workplace.

21. Where an abuser and their victim are in the same workplace, an employer is likely to face some or all of the following issues:
 - 21.1. their duty of care to provide a safe working environment is likely to extend protecting the victim from their abuser when at work or working. Further, the steps required for an employer to protect a person from abuse will depend on the employers' knowledge – whether the employer is, or ought to be, aware that an employee is a victim. The duty is informed by knowledge;
 - 21.2. a risk assessment is critical to carry out. The employer needs to be mindful that relocating a potentially abusive employee to another department or location may inadvertently put other colleagues at risk.

- 21.2.1. the implied term of trust and confidence means that an employer cannot, in effect, act to the detriment of either employee without reasonable and proper cause;
 - 21.2.2. additionally, measures such as separating two employees might clash with express terms in one or more of their contracts of employment (e.g. place of work, hours or duties). Varying these roles may technically amount to a termination of the contract and therefore require justification by reference to principles of unfair dismissal law;
 - 21.2.3. these difficulties are likely to be heightened if the allegations of abuse are either denied or both employees are accusing the other of abuse. The accused may seek to argue that the employer has taken the side of the accuser over them and to challenge this via litigation, either for breach of the above terms or by alleging that the employer's actions were tainted by discriminatory assumptions about sex (e.g. over who is more likely to be the victim);
 - 21.2.4. in dealing with this situation the employer therefore has to engage in a careful balancing act that respects the rights of both employees whilst ensuring that the workplace does not become an environment where abuse can take place or continue;
 - 21.2.5. moreover, if Court Orders are in place, the employer needs to comply in a manner which is as consistent as possible with the employees' contracts of employment whilst having regard to the risks and the employer's duties of care.
22. We would also like to note that obligations on the employer will depend on the level of awareness that it has of the abuse. If the victim has not made the employer aware, then the general H&S obligations arise. However, where the employer is aware of the allegations, then different obligations may apply – albeit that the abuser is not necessarily someone in the workplace, or under the employer's control.

6. Scenarios where a worker's immigration status is linked to their marriage to an abuser thus impacting their right to remain in the country and work.

23. In some situations, an employee's immigration status may be dependent on their partner (because for example of the partner's immigration status/citizenship). In such cases, the abuser may use this to exert power over the victim. Where the

victim's right to work or even remain in the country is under threat, employers may be asked to provide immigration support and a visa.

7. Financial dependence.

24. Abusers can try and make their victims financially dependent on them to limit their autonomy. The workplace impact can include:
- 24.1. seeking to make the victim pay their wages to a bank account under the control of the perpetrator;
 - 24.2. seeking to limit the victim's independent income in general by constraining their career choices or advancement;
 - 24.3. actively sabotaging the victim's employment and career prospects and progression (e.g. by encouraging or forcing them to act in a manner that will result in disciplinary, capability or attendance procedures being invoked, holding back or withdrawing applications for promotions and pay rises etc. They may even engage a victim in potentially criminal behaviour).
25. An employer may therefore be placed in a position in which they are unknowingly exacerbating an abusive situation, e.g. by dismissing the victim, failing to query a sudden withdrawal of a promotion application, cutting pay or imposing formal warnings.

QUESTION 2

What support can be offered in the workplace to victims of domestic abuse?

26. Members believe that practically speaking, where a worker is known to be at risk of domestic abuse at work, then an employer should carry out a risk assessment which will enable them to take reasonable steps to protect the employee at work. One way of discharging this duty is by way of a creation of a safety plan with discussion and consultation with the victim and, ideally, with other support services who may be involved in managing the situation. A safety plan looks at all aspects of the victim's day at work in an effort to minimise risk to the victim during work. It may be considered good practice for the safety plan also to address issues when travelling to and from work. Examples: the plan could include practical steps support, such as:
- 26.1. being accompanied to and from the public transport safely;
 - 26.2. instructing reception staff not to give out personal information on the telephone such as where the worker has gone for lunch;

- 26.3. changes to the worker's day or to their shift patterns, work location or, for example, temporarily taking the worker out of a public/client facing role;
 - 26.4. changing the worker's workplace contact details
 - 26.5. blocking email access;
 - 26.6. restricting direct calls; and
 - 26.7. informing security.
27. Other support that an employer could offer:
- 27.1. awareness raising about domestic abuse, including communicating the details of specialist, local agencies and helplines or having these on posters around the workplace or on the intranet.
28. Other more direct support for an employee:
- 28.1. short term flexible working;
 - 28.2. paid time off for appointments;
 - 28.3. paid leave for the period when the victim is leaving the abuser's household;
 - 28.4. access to a specialist domestic abuse support worker;
 - 28.5. involvement of the police;
 - 28.6. counselling services;
 - 28.7. access to the Employee Assistance Programme;
 - 28.8. agreeing with the worker that their pay can be paid into a different bank account;
 - 28.9. an advance on pay or emergency short term loan;
 - 28.10. support from a trade union official;
 - 28.11. adjustments to performance or attendance management to reflect the impact of abuse and the process of extraction and recovery;
 - 28.12. given the potentially hidden nature of domestic abuse, help for employers to know how to spot the signs, create the space for disclosure, and provide reassurance and support for victims of domestic abuse. This could include formal guidance from ACAS or the EHRC, or the creation of specific roles with knowledge and understanding of domestic abuse issues (in other contexts often called a "Champion" but obviously inappropriate in this context);
 - 28.13. communications/data protection policies that minimise or eliminate the risk of an abuser being able to keep tabs on or intimidating an employee through the workplace; and
 - 28.14. clear policies for recording and preserving evidence where a disclosure of domestic abuse is made. Such evidence or its absence or loss is likely to be relevant in a variety of proceedings, including criminal proceedings against the abuser, civil and family disputes between

abuser and victim, and litigation brought by an abuser against the employer

29. The steps taken would need to be kept under review, and if, for example, they could exacerbate existing situations, (for example the abuser may take out frustration at not being able to contact the victim directly, on the victim, or then try to find other ways to contact them, e.g. persistently calling their mobile phone etc) then they need to be changed.
30. All of this support is largely dependent on the generosity of the employer unless the employer is one that already has a developed strategy and policy on safeguarding workers from domestic abuse.

QUESTION 3

What is possible with the existing framework?

31. Although the existing legislative framework does not provide for express legal protections for employees or obligations on employers in relation to support for victims of domestic abuse in the workplace, there are a number of laws currently in place that are relevant to this issue. We have provided short summaries of the relevant laws as set out below. Generally speaking, though, employers are free to implement such policies and procedures as they wish in order to support victims of domestic abuse; accordingly, what is “possible” with the existing framework is largely dependent on the generosity of individual employers. Our responses to questions 2 (“what support can be offered in the workplace to victims of domestic abuse?”) and 4 (“what does current best practice look like?”) of this call for evidence consider in detail the practical support that employers can offer victims of domestic abuse in the workplace. In responding to this question, therefore, we have focused solely on employers’ *legal* obligations under the current legislative framework, which principally relate to health and safety at work, time off, flexible working and, potentially, a duty to make reasonable adjustments.
32. There is guidance available to employers on steps they can take to best ensure appropriate support in the workplace for victims of domestic abuse (see, for example: <https://www.bitc.org.uk/wp-content/uploads/2019/10/bitc-wellbeing-toolkit-domesticabuse-dec2018.pdf> and <https://www.equalityhumanrights.com/sites/default/files/domesticabuseguide.pdf>), and, in doing so, comply with their legal obligations as employers. However, these are, of course, only guidelines and do not impose any express legal obligations on employers
33. Overall, whilst the current legislative framework does offer some protections and rights that might benefit employees who are victims of domestic abuse, these protections and rights are relatively limited in scope and as such, in many cases employees who are victims of domestic abuse will have to rely on the generosity

of employers to go beyond their minimum statutory obligations. Moreover, in order to benefit from these rights and protections the employee will, in many cases, have to disclose the fact that they are a victim of domestic abuse to their employer. In the absence of a clear workplace policy or guide (which is not legally required) employees in such circumstances might not feel able to make such a disclosure.

34. Finally, we would note that statutory rights to sick pay, parental leave, time off to care for dependants and flexible working requests are only available to employees and are not available to non-employee members of the workforces such as workers and self-employed consultants.

A. The Health and Safety Framework

35. Employers' duties towards the health and safety of their workforce are principally prescribed in the following legislation (collectively, the "**H&S Legislation**"):
- 35.1. Health and Safety at Work Act 1974 (the "**1974 Act**");
 - 35.2. Health and Safety (Consultation with Employees) Regulations 1996 (the "**1996 Regulations**"); and
 - 35.3. Management of Health and Safety at Work Regulations 1999 (the "**1999 Regulations**").
 - 35.4. We briefly examine the most relevant provisions of each piece of legislation below in the context of ensuring the protection of victims of domestic abuse in the workplace. Failure to comply with these obligations resulting in injury to employees or workers can result in fines being issued to the company and, in some cases, criminal liability on the part of individual directors. The H&S Legislation will apply whether the employee is office-based or if they work from home, albeit in many cases it will be more difficult for employers to recognise risks to an employee's health and safety if they not physically in the office on a regular basis.

1. Health and Safety at Work Act 1974.

36. Under the 1974 Act, Employers have a "duty to ensure, as far as is reasonably practicable, the health, safety and welfare at work of all his employees."¹ This includes in particular:

¹ Section 2(1) Health and Safety at Work Act 1974.

- 36.1. “the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees”; and
- 36.2. “the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work”.²

37. In this context, ‘reasonably practicable’ means the employer does not have to enact measures if the time, trouble or cost is grossly disproportionate to the risk.³

2. Health and Safety (Consultation with Employees) Regulations 1996.

38. The 1996 Regulations provide for further implementation of Articles 10, 11 and 12 of Council Directive 89/391/EEC (see paragraph 41 below).
39. The 1996 Regulations require employers to consult with employees on matters relating to health and safety.⁴ Employers must consult either the employees directly or their elected representatives.⁵
40. The 1996 Regulations also amend the Employment Rights Act 1996 (“**ERA 1996**”) to protect an employee who takes part in consultation with an employer under the 1996 Regulations, or who takes part in an election, in cases of dismissal or other detriment arising out of such participation.⁶

3. Management of Health and Safety at Work Regulations 1999.

41. The 1999 Regulations give effect to the Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work and to Council Directive 91/383/EEC supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship.
42. Employers must consider the risks to their employees (including the risk of reasonably foreseeable violence).⁷ The 1999 Regulations state that employers must make “a suitable and sufficient assessment” of:
 - 42.1. “the risks to the health and safety of his employees to which they are exposed whilst they are at work; and

² Section 2(2)(e) Health and Safety at Work Act 1974.

³ <https://www.hse.gov.uk/pubns/hsc13.pdf>, page 1.

⁴ Regulation 3, Health and Safety (Consultation with Employees) Regulations 1996.

⁵ Regulation 4(1), Health and Safety (Consultation with Employees) Regulations 1996.

⁶ Regulation 8, Health and Safety (Consultation with Employees) Regulations 1996.

⁷ <https://www.hse.gov.uk/violence/law.htm>.

- 42.2. the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking”.⁸
43. This risk assessment is carried out so employers can evaluate how significant these risks are. Employers must then decide whether action should be taken to prevent or control such risks and develop a management plan to achieve this.⁹
44. Employers must also “ensure that his employees are provided with such health surveillance as is appropriate having regard to the risks to their health and safety which are identified by the assessment”.¹⁰
45. Employers must also “establish and where necessary give effect to appropriate procedures to be followed in the event of serious and imminent danger to persons at work in his undertaking”.¹¹

4. Relevance to victims of domestic abuse.

46. If an employee or worker discloses to their employer that they are experiencing domestic abuse, in order to comply with its obligations under the H&S Legislation the employer should conduct a domestic abuse risk assessment in consultation with the employee to identify steps it can take to ensure the safety of the employee whilst at work. This could include, for example, blocking emails and calls from the perpetrator and (with the employee’s agreement) notifying security of the situation to restrict the perpetrator’s access to the workplace. As part of this risk assessment, the employer must also consider the health and safety of co-workers.
47. In circumstances where the victim and the perpetrator work within the same organisation, the employer should carry out a risk assessment to consider what steps it must take to ensure the safety of the victim whilst at work (please see further discussion on this point in response to q. 4 (“What does current best practice look like?”)).
48. As noted, however, these obligations will generally only arise in the event that the employer has express knowledge that the employee in question is experiencing domestic abuse, which will require some form of disclosure by the employee. Whilst implementing an effective workplace policy and guidance for employees regarding the impact of domestic abuse and the support available to employees will likely help employers to ensure that they meet their obligations under the H&S

⁸ Regulation 3, Management of Health and Safety at Work Regulations 1999.

⁹ <https://www.hse.gov.uk/violence/law.htm>

¹⁰ Regulation 6, Management of Health and Safety at Work Regulations 1999.

¹¹ Regulation 8(1)(a), Management of Health and Safety at Work Regulations 1999.

Legislation,¹² there is currently no legal obligation to put any such policies or guidance in place.

B. The Right to Time Off

1. Sick Leave and Statutory Sick Pay.

49. Employees who are unfit for work may be entitled to statutory sick pay (“**SSP**”) after the third day of absence.¹³ Qualifying employees can receive a minimum weekly SSP payment for up to 28 weeks. In order to qualify for SSP an employee must be working under a contract of employment and be incapable (or deemed to be incapable) of work “by reason of some specific disease or bodily or mental disablement”.¹⁴
50. The physical and/or mental impact of domestic abuse will, in many cases, render the employee unfit to work in which case they will likely be eligible to receive SSP (currently £94.25 per week) or, if available, contractual sick pay. However, if, for example, an employee has to take time off work for other reasons resulting from domestic abuse such as, for example, attending court or moving house, this would not qualify them for SSP and any such time off would likely be unpaid (unless the employer agrees to continue to pay them during this period).

2. Parental Leave and Time-Off for Dependents.

51. Qualifying employees may also be entitled to take up to 18 weeks’ unpaid parental leave in order to care for a child.¹⁵ In order to be eligible for parental leave the employee must:
- 51.1. have been continuously employed for at least one year, unless the child is entitled to disability allowance;
 - 51.2. have, or expect to have, responsibility for a child;
 - 51.3. be taking the leave for the purpose of caring for a child; and
 - 51.4. be taking the leave before the child’s 18th birthday.
52. Employees who take a period of parental leave will be entitled to either return to either the same job or, if the employee has taken more than four weeks’ leave and it is not reasonably practicable to do so, a suitable alternative.
53. Again, employees who have been victims of domestic might need to rely on this statutory right (assuming they meet the eligibility criteria). Whilst this could be of

¹² <https://www.bitc.org.uk/wp-content/uploads/2019/10/bitc-wellbeing-toolkit-domesticabuse-dec2018.pdf>

¹³ The Social Security Contributions and Benefits Act 1992 as amended (SSCBA), and the Statutory Sick Pay (General) Regulations 1982 (SI 1982/894) as amended (SSP Regulations).

¹⁴ Section 151(4), SSCBA 1992

¹⁵ Sections 76-79 Employment Rights Act 1996; Maternity and Parental Leave etc. Regulations 1999.

assistance to employees in such circumstances, given that any such leave would be unpaid this might not be a feasible option for many and, in those cases – if the employer does not agree to continue to pay them for such time off – the employee might have to take the time as holiday.

3. Time off for dependants.

54. This legislation provides that an employee is entitled to take *reasonable, unpaid* time off where it is necessary¹⁶:

54.1. to provide assistance if a dependant falls ill, gives birth, is injured or assaulted;

54.2. to make care arrangements for the provision of care for a dependant who is ill or injured;

54.3. to deal with the unexpected disruption, termination or breakdown of arrangements for the care of a dependant;

54.4. to deal with an unexpected incident which involves the employee's child during school (or another educational establishment's) hours.

55. An employee only has a statutory right to take time off for dependants if the situation falls within one of those categories listed above. Further, the employer only has to agree to such time off if the employee tells the employer as soon as reasonably practicable about the reason for their absence and how long they expect to be away.¹⁷ However, as with parental leave, given that the statutory right is for such leave to be unpaid the employee will be negatively impacted financially if they rely on this right and so – unless the employer agrees to continue to pay the employee – the statutory right might be of little practical value to the employee.

56. Finally, given that the right to such time off will only apply if the employee has childcare responsibilities or other caring responsibilities, employees who are victims of domestic abuse but do not have such caring responsibilities will technically not be entitled to such leave.

C. Flexible Working

57. Once a year, employees may request flexible working from their employer, providing they have been continuously employed for over 26 weeks.¹⁸ An eligible employee can request: a change to the hours they work, a change to the times they are required to work and/or a change to their place of work.¹⁹ An employer does not have to agree to a request, although they must act reasonably in

¹⁶ Section 57A(1) Employment Rights Act 1996

¹⁷ Section 57A(2), Employment Rights Act 1996

¹⁸ Regulation 3, Flexible Working Regulations 2014

¹⁹ Section 80F(1), Employment Rights Act 1996

considering the request and can only refuse the request on specific grounds,²⁰ and an employee has a right to appeal. Failing to follow the correct procedure in considering a request, or unreasonably refusing a request could give rise to claims from employees – including potential claims of sex or disability discrimination and/or constructive dismissal - although the process for bringing any such claims can be costly and time consuming.

58. Employees who are victims of domestic abuse might well need to make a flexible working request under the statutory procedure. Whilst employees are entitled to some protection if their employer fails to deal with such a request in line with their statutory obligations, as noted, these protections can involve costly and time-consuming proceedings. Further, employees are only entitled to make one request per year and need to satisfy the service requirement in order to fall within the statutory procedure. Accordingly, employees making such requests are still reliant to some degree upon the goodwill of their employer in order to benefit from this statutory right.
59. Whilst some employers will operate the statutory scheme only, others may have a more generous policy approach and/or be willing to consider more frequent requests.

D. The Duty to Make Reasonable Adjustments

60. Tragically, in some circumstances the effects of domestic abuse could render a person disabled within the meaning of the Equality Act 2010 (“**EqA 2010**”) if the abuse gives rise to a “physical or mental impairment” that has a “substantial and long-term adverse effect on [their] ability to carry out normal day-to-day activities”.²¹ Rights under the EqA apply to employees and “workers”.
61. If such an employee or worker was classified as disabled under EqA they would be protected from discrimination against their disability. The employer must also make reasonable adjustments to the premises or working practices to avoid the disadvantage caused by the disability.²² Such adjustments could include:
- 61.1. changing a disabled worker’s hours to work flexible hours;
 - 61.2. assigning a disabled worker to a different place of work;
 - 61.3. allowing a disabled worker to be absent during working hours for rehabilitation, assessment or treatment; and
 - 61.4. allowing a disabled worker to take a period of disability leave.²³

²⁰ Section 80G(1), Employment Rights Act 1996

²¹ Section 6(1), Equality Act 2010.

²² Section 20, Equality Act 2010.

²³ EHRC Code, paragraph 6.33.

A failure to comply with this duty is, in itself, a form of discrimination.²⁴ However, an employer will only be under an obligation to make such adjustments if it knows, or ought reasonably to have known, that the individual in question has a disability.

QUESTION 4

What does current best practice look like?

62. ELA members have identified that employers have a range of practices in response to domestic abuse, ranging from no formal written policies or procedures to a formal Domestic Violence and Abuse Policy and Procedure. In our members' experience, best practice might include a policy and/or procedure, which should aim to create a safer workplace and help those involved in or experiencing, domestic violence and abuse, covering the following:

1. Scope.

63. The policy could adopt the Home Office definition of domestic violence as follows (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/142701/guide-on-definition-of-dv.pdf):

64. Any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass but is not limited to the following types of abuse:

- 64.1. psychological;
- 64.2. physical;
- 64.3. sexual;
- 64.4. financial; and
- 64.5. emotional.

65. Controlling behaviour is: a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

66. Coercive behaviour is: an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.²⁵

²⁴ Section 21, Equality Act 2010.

²⁵ This definition, which is not a legal definition, includes so called 'honour' based violence, female genital mutilation (FGM) and forced marriage, and is clear that victims are not confined to one gender or ethnic group.

67. The scope of the policy should cover not only those who are presently experiencing domestic violence, but also cover those who were previously victims of domestic violence and abuse, those currently experiencing domestic abuse, and secondary victims of domestic violence and abuse.

2. Awareness of the policy.

68. The employer should aim to create an environment which is alert and responsive to domestic violence and abuse and within which staff feel supported to disclose if they are experiencing or using abusive tactics of domestic violence and abuse.

69. All employees should be made aware of the policy through a range of methods including awareness raising and training as part of induction, as part of ongoing mandatory training for managers and all staff and through its inclusion in a Code of Conduct (if applicable).

3. Encouragement of reporting.

70. Employees who are suffering from domestic abuse should be encouraged to report the abuse and there should be systems in place to allow this to occur. No employee should be forced to make a disclosure.

71. Where a staff member has a reasonable suspicion that a colleague is a victim of domestic abuse, they should also be encouraged to report this.

4. Right to privacy.

72. The policy should emphasise that the employee has a right to privacy and confidentiality in relation to any disclosure that they might make. However, it should be noted in the policy that this does not represent an absolute right to confidentiality, and in certain, unusual/restricted circumstances, the employer may be unable to guarantee complete confidentiality (for example where there is a health and safety issue).

5. Ensure appropriate training of HR and managers.

73. Line managers and HR should undergo specific training relating to domestic violence and abuse. Managers and HR should be in a position to be able to identify suspected occurrences of domestic abuse and be aware of the potential impact that this could have on staff. Training of managers/HR should cover the

following:

- 73.1. identify what constitutes domestic violence and abuse;
- 73.2. identify domestic abuse by asking relevant questions;
- 73.3. identify the barriers and challenges victims face when disclosing domestic violence and abuse;
- 73.4. provide initial support and signpost the individual to further workplace support;
- 73.5. discuss how the employer can contribute to basic safety planning;
- 73.6. signpost the individual to specialist support available from other organisations; and
- 73.7. understand that they are not counsellors;

74. When approached by an employee who has experienced domestic abuse, the role of a manager/HR is to:

- 74.1. be available and approachable;
- 74.2. listen, reassure and support;
- 74.3. respond in a sensitive and non-judgmental manner;
- 74.4. consider any issues relating to confidentiality, safeguarding and information sharing;
- 74.5. undertake to ensure a risk assessment (if appropriate);
- 74.6. discuss how the employer can support the employee;
- 74.7. maintain appropriate records which will include details of support and signposting offered; and
- 74.8. ensure the employee knows what options are available to them and support them in signposting employees which could include to their local Independent Domestic Violence Advisor (IDVA) or Domestic Abuse Service.

6. Outline the support measures in place for staff.

75. Where it has been identified that an employee who is a victim of domestic abuse, the employer may offer certain support to that employee which may include:

- 75.1. paid leave for the employee for court appearances, moving address etc.;
- 75.2. taking into account the employee's situation in the context of performance management;
- 75.3. flexible working;
- 75.4. signposting and access to the Employee Assistance Programme;

- 75.5. signposting to other external agencies including Women's Aid and trade unions where they offer support (e.g. Unison has a support service for victims of domestic abuse); and
 - 75.6. an advance on pay or emergency short-term loan.
76. A DVA 'Support Person' could be appointed by the employer who can act as an independent point of contact for employees to make disclosures, signpost employees to external and internal support mechanisms and act as a support person in workplace meetings if required.

7. Risk assessments.

77. The employer will need to consider the safety of staff if they make it known that they are experiencing domestic abuse. The employer should undertake a risk assessment and work with the individual to identify what actions can be taken to increase their personal safety in the workplace as well as actions to address any risks there may be to colleagues.
78. The completed risk assessment will inform and support any necessary safety, planning or further assessment that might follow thereafter.
79. Perpetrators of domestic abuse who are employees
80. If an employee approaches the employer about their abusive behaviour, the employer should provide information about the services and support available to them. For example, information can be found at <http://respect.uk.net/>
81. In cases where both the victim and a person who uses abusive tactics of domestic violence or abuse work for the same employer, appropriate action will be taken. The employer should take steps to ensure that the victim has a safe workplace which may include that the perpetrator does not come into contact with that member of staff. Action may also be taken to minimise the potential for the perpetrator to use their position or work resources to find out details about the whereabouts of the victim. This may include a change of duties for one or both individuals, or withdrawing access to certain computer programs from a person who uses abusive tactics (as an aside it is noted that this is not necessarily straightforward from a legal perspective). This procedure is intended to be safety focused and supportive rather than punitive.

QUESTION 5

What is the potential to do more?

82. As stated at the outset of this paper, that whilst employers do wish to support their workers who are at risk of abuse they do not have the expertise of social services and the police to manage these difficult circumstances and may be naturally wary about what liabilities they assume, particularly if they are inexperienced at managing these issues. An appropriate balance has to be struck that encourages employers to support their staff without fear of being held liable for further incidents of abuse, e.g. where arrangements they put in place have not worked.
83. ELA members believe that legislating of rights and responsibilities in this area will be difficult to ensure only genuine victims are protected, particularly during a time when they are vulnerable. However, it is clear that employers could and should be encouraged to take a proactive and supportive approach which can help raise awareness and prevent domestic abuse, including:
- 1. Updated Guidance and signposting: raising awareness and breaking down stigma.**
84. The EHRC could take the lead in producing guidance and procedures, albeit recognising that abuse may not necessarily happen within the workplace but in private and domestic settings (which differentiates it from, say, work related sexual harassment). There is Welsh EHRC guidance on domestic abuse but it is not applicable in England.
85. Update and add to ACAS guidance for small organisations and for HR managers in this area of law and signpost in the guidance to other resources such as the Toolkit for Employers created by the Employer's Initiative on Domestic Abuse (EIDA) which can be found <https://www.eida.org.uk/resources>. EIDA has listed other resources such as sample policies dealing with domestic abuse, research reports on the area and guidance papers. We have made other references to guidance in our response to question 3 above. It would be helpful for an employer who is dealing with the effects of domestic abuse to understand the broad legal context including health and safety legislation and definitions of domestic abuse under the law. The Guidance should include a summary of these issues as we have set them out above.
86. It is essential that guidance is provided to small and medium sized enterprises (SMEs). As we know that SMEs can be disproportionately affected, both financially and emotionally, by issues such as domestic abuse that impact staff.

87. Within the context of the duty of care of employers there are a range of views amongst members as to what level of obligations should be placed on employers and businesses. Some members would support further guidance setting out a range of ways in which employers could support staff: these members would be concerned at both the expense and further potential liabilities that might be passed on to employers. Other members would suggest that the government may consider requiring employers to do the following:

- 87.1. that employers keep a record of any incidents of abuse in the workplace, including persistent telephone calls, emails or visits to the employee;
- 87.2. agree with the employee what to tell colleagues and how they should respond if the abusive partner/ ex-partner telephones or visits the workplace;
- 87.3. notify reception and security staff if the abuser is known to come to the workplace ;
- 87.4. provide a copy of any existing orders against the abuser and a photograph of the abuser to reception and security staff;
- 87.5. check that staff have arrangements for getting safely to and from home
- 87.6. review content of personal information, such as temporary or new addresses, bank or health care details; and
- 87.7. ask individuals to supply the employer with an up to date emergency contact number for a trusted friend or family member Review the employee's next of kin information (with their consent).

2. The government could consider proposals around offering paid special leave.

88. It will be difficult for employee victims to get advice, take necessary steps and possibly move if the victim cannot continue to remain financially secure. Leave may be needed in these circumstances. Again, there are a range of views on whether there should be an obligation both to give leave and or whether an employer should pay for that leave.

89. Members are divided as to whether it would be appropriate that a right to 2 weeks' paid leave (in addition to annual leave and paid sick leave) should be introduced for employee victims, with the right to make an application for the paid leave to be made retrospectively to allow the employee the ability to keep the situation confidential, and with penalties imposed for employers who unreasonably impede requests for such leave. The Members who are in favour of this proposal point to research which has shown that the most dangerous moment for a victim of domestic abuse is when the victim is leaving their house.

However, statutory leave rights can be particularly challenging, and would require statutory tests, eligibility requirements, qualification periods, notification requirements, payment arrangements, cost benefit impact assessments. The Members, who are against such proposals, are wary at the further cost and liabilities consequential on statutory obligations.

90. Alternatively, the Government could provide further guidance on this issue– i.e. that employers could consider offering a short period of paid time off as part of their family leave/benefits package may be appropriate for victims of domestic abuse. Employers will be live to the risk of fraudulent claims and may well prefer being allowed an element of discretion in managing this, and in fact, an obligation to have internal policies and procedures may increase such risk of fraudulent claims. On the other hand, the lack of definitive rights can mean that a victim is simply dependant on the attitude of their individual employer.

3. A form of time-bound reasonable adjustments for victims of domestic abuse.

91. The government could require reasonable adjustments similar to disability law. This proposal also divides the membership and it is a contentious subject.
92. Those against the proposal point to the fact that reasonable adjustments in the disability field (the only other area of employment law where the duty of making reasonable adjustments is imposed on employers) place significant costs and administrative burdens on employers and, on occasion, on other employees. Further, this constituency of the membership set out that many of the issues that arise from domestic abuse lie entirely outside the employers' control so any rights to reasonable adjustment would need to be closely circumscribed both to the knowledge of the employer and what was possible only at work. Further, this part of the membership point out that this would be a new and far reaching duty. It would require deep consultation, if not research, to understand its full impact. Better, this part of the membership argues to wait for guidance and assess its effect before deciding that legislative intervention is required.
93. Those for the proposal consider that it is a creative, low cost and effective way in which to help free victims from abuse when at work. Such a duty, they argue, would not create, given the limited scope of the adjustments that they propose below, any radical change to the law. It would make a significant difference to the victims of abuse at little cost to business. This constituency of the membership set out a list of possible reasonable adjustments that should be considered for a victim of domestic abuse:

- 93.1. where practical, consider offering a temporary or permanent change of workplace, working times/ patterns. Allow an individual to change work patterns or workload and allow flexible or more flexible working. Currently there is guidance and information that suggests that employers offer flexible working for an individual suffering from domestic abuse to enable individuals (or their children) to attend health appointments resulting from the abuse, such as seeing a counsellor. This may be needed for some time after the abuse has stopped;
- 93.2. the victim may also require special leave to facilitate any practical arrangements including but not limited to attending court attending mediation meeting or calling a solicitor viewing properties meeting teachers at school talking to their bank or getting advice from domestic violence organisations. The government should consider ensuring that temporary flexible working is a right for victims of domestic abuse;
- 93.3. where practical, offer changes in specific duties, such as not expecting the employee to answer telephones or sit on reception;
- 93.4. move the employee out of public view, ensuring that they are not visible from reception points or ground floor windows;
- 93.5. ensure that the employee does not work alone or in an isolated area;
- 93.6. if the abuser has an employees' work email and telephone details, consider diverting their phone calls and emails to help shield them from their abuser;
- 93.7. paying wages to a different bank account; and
- 93.8. providing emergency salary payments.

Members of ELA Working Party

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Benjamin	Gray	Littleton Chambers	
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