

## **Agenda – Standards of Conduct Committee**

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Meeting Venue:

**Committee Room 5 – Tŷ Hywel**

Meeting date: 15 May 2018

Meeting time: 09.30

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### **1 Introductions, apologies, substitutions and declarations of interest**

(09.30)

### **2 Paper(s) to note**

(09.30)

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#### **2.1 Code of Conduct – Review: Additional information from the Equalities and Human Rights Commission**

### **3 Code of Conduct – Review: Ministerial Codes in other Legislatures**

(09.35 – 10.30)

SoC(5)–10–18 Paper 1 – Ministerial Codes in other Legislatures

### **4 Work Programme update**

(10.30 – 11.00)

SoC(5)–10–18 Paper 2 – Work programme





Jayne Bryant AM, Chair, Standards of Conduct Committee  
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May 2, 2018

Dear Chairperson,

Thank you for the recent opportunity to provide oral evidence to the Committee's Inquiry into the Review of the Code of Conduct for Assembly Members.

During the session, I undertook to share with you our then upcoming report: [Turning the tables: ending sexual harassment at work](#). We recently published this report, which you can view at the above link.

This report shares evidence about sexual harassment in the workplace gathered from individuals and employers. It makes recommendations about how to end sexual harassment at work.

I hope this report can inform the Committee's work. If you would find it helpful to discuss the report, please let me know.

We look forward to continuing to assist the Committee on the Review and in your wider work.

Yours sincerely,

Ruth Coombs

Head of Wales  
Equality and Human Rights Commission,

Turning  
the tables

Ending sexual  
harassment at  
work



## Introduction

**Employers should protect their employees from sexual harassment at work. Yet the evidence we have gathered about British workplaces shows this isn't happening. Too many people are being silenced by toxic workplace cultures and very real fears of victimisation, and employers' responses are inconsistent and, in many cases, risk being ineffective.**

The Equality and Human Rights Commission was established by Parliament under the Equality Act 2006 to help safeguard and enforce the laws that protect all our rights to fairness, dignity and respect. We use our unique powers to help make Britain a fair society in which everyone has an equal opportunity to fulfil their potential. As a United Nations (UN) accredited National Human Rights Institution and a National Equality Body, we work with similar bodies in Scotland and Northern Ireland, across Europe and internationally, to protect and promote equality and human rights.

Recent high-profile testimonies have shown pervasive sexual harassment in contexts as diverse as Hollywood and Westminster, and highlighted the real barriers that many people experience in reporting it. No workplace is immune to sexual harassment, and a lack of reported cases does not necessarily mean they have not occurred. Employers are responsible for ensuring that employees do not face harassment in their workplace. They should take reasonable steps to protect their employees and will be legally liable for harassment by their staff if they fail to do so.

We wanted to discover how sexual harassment is dealt with by employers, and to draw on the insights of individuals who have experienced sexual harassment at work. Our aim was to learn what had happened when individuals reported cases of sexual harassment and what they felt should be done to improve practice. Between December 2017 and February 2018, we gathered evidence from around 1,000 individuals and employers. We uncovered the shocking and stark reality of individuals whose careers and mental and physical health have been damaged by corrosive cultures which silence individuals and normalise harassment. We also found a lack of consistent, effective action on the part of too many employers.

transforming workplace cultures, promoting transparency  
strengthening legal protections.

## What is sexual harassment?

- Sexual harassment is unwanted conduct of a sexual nature, which is intended to, or has the effect of, violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.
- Examples include unwelcome physical contact, sexual comments, promises in return for sexual favours and displaying sexually graphic pictures.
- Even if unwanted conduct is not intended to cause distress, it can still have the effect of violating a person's dignity or creating an offensive environment.
- Whether or not unwanted sexual conduct violates a person's dignity or creates an offensive environment depends on the victim's perspective and whether their reaction is reasonable in all the circumstances.

## The employee's experience

In December 2017, we asked for evidence from individuals who had experienced sexual harassment at work. We received 750 responses to an online survey. The aim was not to describe the scale of the problem, but to draw on a wide range of experience to support practical solutions and potential improvements. Three-quarters of people who responded had experienced sexual harassment at work; the rest had witnessed harassment or supported others.

Nearly all of the people who had been sexually harassed were women. Male respondents were more likely to state that they had supported a colleague or witnessed harassment, or that they had not experienced sexual harassment at work. While sexual harassment can be perpetrated by both men and women, we know that women are most often the

### **Turning the tables: Ending sexual harassment at work**

targets. Harassment in the workplace reflects power imbalances based on gender and is part of a spectrum of disrespect and inequality that women face in everyday life.

The most common perpetrator of harassment was a senior colleague. However, just under a quarter reported being harassed by customers, clients or service users.

Most of the responses were from permanent employees. Around one in five were on zero hours, fixed term or temporary contracts. A small number described harassment occurring during a recruitment process prior to employment. One respondent stated: 'I wasn't employed at this point. I was propositioned after an interview for a job and told that if I did what was requested then the job was mine. I didn't report it.'

## Harassment by customers and clients

Around a quarter of those reporting harassment said that the perpetrators were third parties such as customers or clients. Respondents reported that this type of sexual harassment was dealt with particularly poorly. Many of these submissions were from individuals working in the hospitality industry, although other industry sectors were also represented. A common theme was a lack of management support, with sexual harassment and assault apparently being viewed by some employers as a 'normal' part of the job. A number of those experiencing sexual harassment by customers felt that they had no option but to put up with this if they wanted to continue in their job.

### Experiences of individuals harassed by customers

'We've been told nothing can be done for harassment with customers except if we see someone who stalks you, [then] we are allowed to hide out back.'

'[I was] basically told putting up with sexual harassment from customers was part of the job.'

'I worked in a bar and one of the customers pinned me up against the wall and tried to put his hands in my underwear – in a packed bar, in full view of everyone.'

'I was repeatedly harassed by a male customer, I was told to just deal with it – and had to continue serving him daily.'

## Harassment by managers or senior colleagues

Another common theme in responses was the existence of a power imbalance between the perpetrator of the sexual harassment and the person being harassed. Many individuals believed that senior colleagues, due to their position of influence within organisations, were not challenged by HR departments or other colleagues, with some describing these individuals as ‘untouchable’. Fears of victimisation as a result of reporting were particularly acute where the alleged perpetrator held decision-making power over the individual who had been harassed.

## Reluctance to report

Around half our respondents hadn’t reported their experience of harassment to anyone in the workplace. Barriers to reporting included:

- the view that raising the issue was useless as the organisation did not take the issue seriously
- a belief that alleged perpetrators, particularly senior staff, would be protected
- fear of victimisation, and
- a lack of appropriate reporting procedures.

One respondent told us that they ‘felt too intimidated to go to senior management as all were male and colluded with harassment’. A number of respondents, in particular younger workers and those not on permanent contracts, believed they would be risking their jobs if they complained.

Inexperienced, unsupportive managers were also seen as barriers to reporting harassment. In many cases, sexual harassment was viewed as a problem that the individual – rather than the employer – had to deal with. Some people were advised against reporting incidents by managers or HR. One respondent said: ‘I was advised against reporting an incident as it would “damage my brand”.’

A number of male respondents who reported being sexually harassed at work by both men and women said that they faced particular barriers in reporting their experiences. A few felt that their experiences wouldn’t be taken seriously because they were men. One individual, who described repeated experiences of sexual harassment, highlighted the male-dominated culture of his workplace and ‘stigma’ attached to being sexually harassed by another man as barriers to reporting, stating: ‘My experience was in a very macho environment and reporting it was unimaginable to me’.

## Consequences of reporting

### Lack of employer action

In around half of the cases where individuals did report the incident, respondents said that employers took no action as a result. Many other respondents described instances



## Turning the tables: Ending sexual harassment at work

where their employers' response to a report of sexual harassment was to try to minimise their complaint or silence them. One person said: 'I was called in to a meeting with the accused and his boss, and told it was a misunderstanding.' Another respondent who had supported a colleague described a situation where 'the company acted as if the victim was the problem and tried to get her not to make a formal complaint'. A number of people who reported sexual harassment were treated as 'trouble makers'. One individual told us: '[Managers] said I was the problem. I need to rein my neck in.'

A common theme among individuals who reported sexual harassment was a feeling that their employer did not take them seriously, dismissing the reported case as merely 'a bit of fun' or 'laughing it off as boys being boys'. In a number of these cases, it was clear that other people had complained about the same person previously and that the perpetrator's actions were widely known. One respondent said her line manager told her: 'Well you know how he is, just stay out of his way.' This example mirrors other responses, which described situations where harassment was tacitly accepted, with the onus put on the person who had been harassed to avoid contact with the perpetrator; often difficult in a work situation.

A number of female respondents described being blamed for 'encouraging' the sexual harassment and were told that their clothes or actions must have been the cause. One individual stated: 'I was told it was my own fault for wearing tight clothing. I was actually dressed in a black suit and white shirt.' Another woman told us that when she reported being harassed '[her] manager asked if [she] had flirted with the perpetrator'.

## Negative consequences of reporting

In many cases where employers did take action as a result of an individual reporting sexual harassment, the response was a negative one. Some respondents described being threatened that their career could be damaged if they pursued their complaint, or said they had been disciplined or lost their job as a direct consequence of reporting. In a number of responses, people said they were blamed for the harassment taking place or felt punished by being moved to another department or role when the alleged perpetrator was left in their existing role. Some respondents also described a significant negative impact on their physical and mental health as a result of the manner in which their complaint was handled.

## Negative responses

‘A partner who was close to the perpetrator said the firm would ensure my career was destroyed if I told anyone else about the incidents.’

‘I lost my job, my reputation and my health.’

‘The victim endured horrendous cross-examination and was never believed. The perpetrator remained on as a highly paid employee while the victim effectively had to leave an otherwise great career.’

### Helpfulness of response

When we asked individuals to rate how helpful the response to their report of sexual harassment had been, most people said that the response they had received from managers and HR staff had been unhelpful. The most popular rating was ‘very unhelpful’. Fewer respondents reported sexual harassment to trade union representatives. However, of those that did, most said they found the response helpful.

# Individuals' recommendations for change

We asked people, based on their experiences, what employers should be doing to help prevent sexual harassment occurring at work.

A number of individuals highlighted the impact of negative workplace cultures in normalising sexual harassment and inhibiting reporting. In these workplaces, sexual harassment was accepted as part of workplace culture and anyone complaining about it was viewed negatively and often ostracised. Many people highlighted the need to change these cultures as a precursor to making progress on preventing sexual harassment.

One respondent stated that her priority was 'changing the "laddish" workplace culture'. She gave an example from her workplace: 'A head chef and his colleagues would flirt and touch new waiting staff, and talk in a highly sexualised manner – they thought this was funny.'

Other popular suggestions included:

## Changing workplace culture:

- a mandatory anti-harassment policy
- improved training for line managers and staff
- anonymous reporting tools
- unbiased handling of complaints and protection for complainants, and • procedures to protect people reporting sexual harassment from victimisation.

## Promoting transparency:

- Clear policies and processes communicated through induction and training.
- Greater protection for individuals working with customers and clients.
- An end to settlements that require confidentiality or force victims of harassment to resign.

## Strengthening protection:

- Lengthening the time limit for tribunal claims.

These suggestions are all reflected in our recommendations for change.

## What employers told us

We wrote to Britain's largest employers to gather evidence on:

- the systems, processes and safeguards in place to prevent workplace sexual harassment
- any steps taken to ensure that all employees feel able to report instances of sexual harassment
- specific steps taken to ensure that people who report sexual harassment are not victimised
- plans to take further steps to prevent and respond to sexual harassment at work in the near future, and
- examples of good practice.

We also shared our guidance on sexual harassment and the law, asking employers to delegate responsibility for ensuring a shared understanding and effective implementation of this guidance to a senior HR representative.

We selected large employers across a wide range of sectors (for example, business, government, public and third sectors, and academia), while we also focused on sectors where evidence suggests sexual harassment is more likely to occur, such as those that use younger workers, agency staff, and imbalanced employment power structures such as internships. We received responses from 234 employers. They revealed a picture of inconsistent practice, elements of which highlighted why the experiences described by individuals continue to occur.

Under the Equality Act 2010, employers are liable for acts of sexual harassment by one employee towards another unless they have taken all reasonable steps to prevent it. There are currently no minimum requirements, but reasonable steps should include an anti-harassment policy and appropriate procedures for reporting harassment and taking action.

Despite these legal obligations, we found only a small minority of employers using effective approaches to prevent and address sexual harassment at work.

## Preventing workplace sexual harassment

Most employers told us that they had a policy which dealt with sexual harassment and some shared their documentation with us. Harassment was often covered by a wider policy – for example, a diversity and inclusion policy. Several of the documents we saw made minimal reference to sexual harassment.

## Turning the tables: Ending sexual harassment at work

Around two-thirds of the employers that responded trained line managers on harassment. This fell to around half in relation to training offered to staff other than line managers. Our guidance highlights that including information on sexual harassment in induction is an effective way of ensuring that all new staff are clear about the behaviours expected in the workplace and how to report instances where behaviour falls below this standard. However, only around two out of five employers included such information in their induction processes.

Fewer than a third of the employers who provided us with evidence evaluated the effectiveness of their harassment policy through methods such as regular staff surveys. Some employers recognised that this was an area they needed to improve on.

Given the number of individuals who reported being harassed by customers, clients or service users, and the severity of the issues raised, we were disappointed to learn that only around one-quarter of employers who responded provided information for customers or service users on appropriate behaviour towards staff.

Some employers, however, described positive practice in relation to policies and training. These included:

- Clear policies outlining the steps to follow if someone is being harassed.
- Codes of conduct stating expected standards of behaviour and the responsibilities of managers.
- Using harassment scenarios in induction and training.
- Ensuring policies are communicated on an ongoing basis, for example, through antiharassment weeks, training or posters.
- Regularly monitoring the effectiveness of policies through staff surveys.

One employer told us: 'We are keen to ensure that harassment is not dismissed as workplace banter. As a first step, we are providing training to our HR case management team on the definition of harassment and what it means in practice.'

**Our recommendations for change:** Our recommendations for a new mandatory duty for employers (recommendation 1.1) and a statutory code of practice (1.2) will require all employers to take effective steps to prevent and respond to sexual harassment. These measures will provide employers with clear guidance on what is required of them and ensure that there are consequences for failure to follow that guidance. We are also recommending that Acas should develop targeted sexual harassment training for managers, staff and workplace sexual harassment 'champions' (1.3) to support employers in achieving change.

## Support for employees to report harassment

We asked employers whether they had taken steps to ensure that all employees – including agency staff and younger workers – felt able to report sexual harassment. Most employers simply cited the fact that they had a general grievance policy, although some recognised the shortcomings of this approach. For example, one told us: ‘Our policy is all-encompassing in theory, but in practice we do not evaluate its reach and therefore cannot assess who feels able to report.’ These grievance procedures did not appear to address the significant barriers to reporting described by individuals who shared their experiences with us.

A small number of employers described examples of more proactive approaches. Most commonly, this was the use of anonymous tools for reporting harassment, such as telephone lines run by a third party or anonymous online reporting tools. However, only two responses included reference to supporting agency workers to report sexual harassment.

We were particularly encouraged to learn that the Ministry of Justice Digital and Technology team, informed by the results of internal staff surveys, is currently working with an outside organisation, Safely Spoken, to develop an innovative approach to supporting employees to report bullying and harassment. The online tool is based on the Callisto Project, a sexual assault reporting tool used in universities in the USA. This gives victims the options, information and support they need, by ‘allowing them to disclose in their own time and in their own way, and by safely connecting victims of the same perpetrator together to validate each other’s experience and take action’. Evaluation of this system has revealed that victims of sexual assault who used Callisto were five times more likely to report their assault than those who did not.

A few employers had trained staff to support people who had experienced harassment. One university, for example, has a network of dignity advisers to act as a confidential first port of call for concerns.

Others described the importance of clear and consistent messages from senior leaders. One employer told us it has issued ‘a statement from [its] chief officer specifically reminding staff of the importance of reporting any issues’.

**Our recommendations for change:** Our recommendations include a requirement for the Government to develop an online tool to make it easier to report sexual harassment (recommendation 1.4). We are also recommending that all employers should publish their sexual harassment policy on their website (2.2). We have made a number of recommendations designed to restrict the use of non-disclosure agreements and confidentiality clauses which prevent employees speaking out about sexual harassment (2.3). Making discussion of harassment more open will encourage reporting of incidents.

## Preventing victimisation

Around one in six of the employers who provided evidence had either not taken any steps to prevent victimisation or were unsure whether any such steps had been taken. Although most employers told us that they had taken action, in the majority of cases this appeared to be limited to having a policy or other form of documentation which made reference to victimisation. Only a small number of the employers who responded provided details of specific initiatives to prevent the victimisation of people who complain about harassment.

One employer outlined the three key ways it protects staff who report incidents: 'We have a clear message of zero tolerance for victimisation, communicated through various channels. We also have a designated whistleblowers' champion at board level. Finally, we provide ongoing monitoring and support during and after an investigation. This could include changes to roles or reporting lines, suspension of the alleged harasser, counselling, and tracking the reward outcomes of the aggrieved.'

**Our recommendations for change:** Our recommendations include a mandatory duty for employers to take reasonable steps to protect workers from victimisation (recommendation 1.1). The recommended statutory code of practice (1.2) will explain the steps employers should take to ensure nobody is victimised. We have recommended that interim relief should be available so that those dismissed by their employers for making a complaint can seek continuation of their employment and reduce their financial losses (3.2).

## Our recommendations in full

It is clear from our findings that existing obligations and guidance for employers are not enough to protect workers from sexual harassment or to protect victims. We are making the following recommendations to bring about:

- A **change in workplace culture**, with employers taking more responsibility for preventing harassment.
- **Greater transparency** about incidents of harassment and the policies in place to prevent them.
- New laws to **strengthen protection** for harassment victims.



# 1 Changing culture

## 1.1 Mandatory duty

### Our recommendation

The UK Government should:

- Introduce a mandatory duty on employers to take reasonable steps to protect workers from harassment and victimisation in the workplace.
- Breach of the mandatory duty should constitute an unlawful act for the purposes of the Equality Act 2006, which would be enforceable by the Commission.

Employers owe their workers a duty of care, but there is currently no statutory duty on employers to take steps to prevent harassment or victimisation in the workplace. If a person brings a legal claim in an employment tribunal, the employer can defend the claim by saying that it took steps to prevent the harassment from occurring. We do not think that this defence is an adequate means of protecting workers and it does not encourage best practice. Moreover, the Commission cannot currently take enforcement action for failure to take preventative steps. A breach of the mandatory duty would enable the Commission to take action. We believe that a mandatory statutory duty would create a clear and enforceable legal requirement on all employers to safeguard their workers and help bring about cultural change in the workplace.

## 1.2 Statutory code of practice

### Our recommendations

The UK Government should:

- Introduce a statutory code of practice on sexual harassment and harassment at work, specifying the steps that employers should take to prevent and respond to sexual harassment, and which can be considered in evidence when determining whether the mandatory duty has been breached.
- Give employment tribunals the power to apply an uplift to compensation in harassment claims of up to 25 per cent, at their discretion, for breach of mandatory elements of the statutory code.

We propose that a statutory code should address sexual harassment and other forms of harassment at work. It will set out the steps that employers must take to prevent harassment and comply with the mandatory duty. For example, a code would require all employers to have a harassment policy in place and would specify what a policy must contain. A code can also give guidance to employers about steps that they should take and highlight best practice. For example, a code could provide guidance on anonymous reporting mechanisms for larger employers. If an employer has not complied with the mandatory elements of the code, an employment tribunal should be able to increase the



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compensation for the claimant by up to 25 per cent. This mirrors the Acas Code of Practice on disciplinary and grievance procedures, which has helped to change employer practice.

### 1.3 Training

#### Our recommendation

- Acas should develop targeted sexual harassment training for managers, staff and workplace sexual harassment ‘champions’.

The code of practice will include guidance on training. Acas should therefore develop targeted sexual harassment training to support employers in achieving the requirements of the code and promote this to employers, particularly in sectors where previous research has shown sexual harassment is more likely to occur.

### 1.4 Reporting mechanisms

#### Our recommendation

- The UK Government should, drawing on learning from established online reporting mechanisms, develop an online tool which addresses the barriers identified in this report and facilitates the reporting of sexual harassment at work.

Culture change will not happen overnight and, even in those workplaces with the most effective approaches to preventing and responding to sexual harassment, there will remain circumstances in which employees feel unable to raise a complaint of sexual harassment. To encourage people to report, individuals need mechanisms that address the significant barriers to raising issues. In other areas, technology is being used effectively to support people to report in a way that feels safe to them. The UK Government should look to these examples and develop a tool which allows individuals to report confidentially and helps employers improve their practice by identifying persistent issues.

## 2 Promoting transparency

To achieve the necessary change in culture, greater transparency is required so that it is clear what the exact scale and nature of workplace sexual harassment is across Great Britain, and whether attempts to prevent and respond to it are succeeding.

### 2.1 Data collection

#### Our recommendations

The UK Government should:

- Collect data from individuals across England, Scotland and Wales every three years to determine the prevalence and nature of sexual harassment at work.

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- Report the findings from its data collection, broken down by protected characteristics, including an evaluation of measures taken to tackle the problem since previous reports.
- Publish an action plan following each report, stating how it will address enduring areas of discrimination and disadvantage.

We need to be able to track progress in areas such as the number of incidents that take place, that are reported to employers and that are taken to tribunal. We also need to be able to track trends such as where sexual harassment takes place (for example, in the workplace, at social events or online). To do this, we need large-scale reliable data which is collected at regular intervals. With the assistance of such data, we will be able to assess the success of measures taken and make improvements to policy and practice where necessary.

## 2.2 Publication of policy

### Our recommendations

Employers should:

- Publish their sexual harassment policy and the steps being taken to implement and evaluate it in an easily accessible part of their external website.
- Ensure that their sexual harassment policy explicitly addresses their obligations under the Equality Act 2010 in respect of workers supplied to them by third parties, ensure it is shared with organisations supplying staff and services and that workers supplied are aware of the policy and how to report instances of sexual harassment.

Employers can play an important role in ensuring that all current and potential employees are aware of their commitment to preventing sexual harassment at work. They can raise awareness of the steps they are taking to ensure their workplaces are free from sexual harassment and how everyone – whether directly employed, an agency worker or even an interviewee – can report any incidents that do occur. Making this information public will facilitate sharing of best practice and encourage employers who are falling behind to improve their practices. It will also help to ensure that atypical workers are not excluded from any available workplace protections through lack of information or any other means.

## 2.3 Non-disclosure agreements and confidentiality clauses

### Our recommendations

- The UK Government should introduce legislation making any contractual clause which prevents disclosure of future acts of discrimination, harassment or victimisation void.
- The statutory code of practice on sexual harassment and harassment at work should, subject to consultation on the code, set out:

## Turning the tables: Ending sexual harassment at work

- The circumstances in which confidentiality clauses preventing disclosure of past acts of harassment will be void.
- Best practice in relation to the use of confidentiality clauses in settlement agreements including that the employer should, for example:
  - Pay for the employee to receive independent legal advice on the terms of the agreement, including the reasonable costs of agreeing changes to the terms.
  - Give the employee a reasonable amount of time to consider the terms of a settlement agreement before it will become effective.
  - Allow the employee to be accompanied by a trade union representative or colleague when discussing the terms of a settlement agreement.
  - Only use confidentiality clauses at the employee's request, save in exceptional circumstances.
  - Annexe a statement to the settlement agreement explaining why confidentiality clauses have been included and what their effect is.
- In Scotland, the Law Society of Scotland and the Faculty of Advocates and, in England and Wales, the Solicitors Regulation Authority and Bar Standards Board should issue guidance regarding solicitors' advocates and barristers' professional obligations when drafting and advising on confidentiality clauses.
- The UK Government should ensure that all guidance on the use of settlement agreements in the public sector is updated to state that clauses should not be used to prevent disclosures of acts of sexual harassment.

The law on non-disclosure agreements (NDAs) and confidentiality clauses in settlement agreements is complex. NDAs and confidentiality clauses are often used to deter people from speaking out even if they are not legally enforceable and the employer would not take legal action against the person, but those subject to such agreements would often rather comply than face any risk that they may be sued.

There is no clear legislative or common law rule prohibiting clauses which seek to prevent a person from making a disclosure of sexual harassment. Currently, an NDA or confidentiality clause which seeks to prevent an individual making an allegation of sexual harassment will be void if the allegation amounts to a 'protected disclosure', as defined in section 43A of the Employment Rights Act 1996, or if it seeks to prevent the disclosure of criminal activity. Not all allegations of sexual harassment will constitute protected disclosures or criminal activity. Section 142 of the Equality Act 2010 prohibits a contractual clause if it 'constitutes, promotes or provides for' unlawful treatment under the Act. The scope of this provision is uncertain and has not had any effect on the use of confidentiality clauses.

Non-disclosure agreements used at the start of an employment relationship, or in advance of a particular event, may discourage people from reporting harassment which occurs during the course of their employment or the event. This type of agreement should not be

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used at all. Any clause which seeks to prevent disclosure of future acts of discrimination or harassment should be void.

Confidentiality clauses used in settlement agreements after the allegation of harassment has been made may also prevent people from speaking about their experiences and reduce the likelihood of systemic problems being tackled. These clauses should be more closely regulated.

Although Acas will act as an independent third party in the negotiation of settlement agreements, many settlement agreements are negotiated directly between employees and employers or their lawyers. These agreements often contain more extensive confidentiality provisions. Lawyers therefore have a role to play by ensuring that both employees

and employers are correctly and thoroughly advised on the effect and enforceability of confidentiality clauses, and that employees have a proper opportunity to consider such clauses and feel able to resist them where necessary. We would welcome guidance from the Law Society of Scotland, the Faculty of Advocates, the Solicitors Regulation Authority and Bar Standards Board to support lawyers in this regard.

The public sector has previously taken the lead in seeking to ensure that confidentiality clauses are not used to prevent employees 'blowing the whistle'. It should take the lead again in ensuring that confidentiality clauses and public money are not used to prevent employees from discussing harassment. Updating guidance for the public sector on the use of confidentiality clauses would be the first step towards achieving this.

## 3 Strengthening protection

Our findings have shown that existing protections are not sufficient and the nature of sexual harassment is such that additional protections, and time to take advantage of them, are required.

### 3.1 Limitation periods

#### Our recommendations

- The limitation period for harassment claims in an employment tribunal should be amended to six months from the latest of the date of:
  - the act of harassment
  - the last in a series of incidents of harassment, or
  - the exhaustion of any internal complaints procedure.
- In claims brought out of time, once the claimant has established the reason for delay, the burden of proof should shift to the respondent to establish why time should not be extended.

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The time limit to bring an Employment Tribunal claim of three months from the act of harassment is a significant barrier to people bringing such claims. For many people, three months will not give them sufficient time to recover, consider what has happened to them, make a decision to pursue the claim, seek legal advice and start the legal process. Employees are also often faced with a choice of allowing the limitation period to expire while they pursue an internal grievance, or issuing a claim before they have exhausted internal procedures.

### 3.2 Interim relief

#### Our recommendation

- Introduce interim relief provisions for harassment and victimisation claims, similar to section 128 to 132 of the Employment Rights Act 1996, but with a deadline of one month from the act of harassment, or the last in a series of acts of harassment, to make an application.

Individuals who wish to pursue a claim will often have been dismissed from their employment, which will exacerbate any economic disparity between them and their employer and make bringing a claim even harder. Employees who have been forced out of employment should be given the means to redress this balance by seeking reinstatement or continuation of their contract pending the outcome of their claim.

### 3.3 Restoring lost protections

#### Our recommendation

- Restore the power, under section 124 of the Equality Act 2010, of employment tribunals to make recommendations aimed at reducing the adverse effects of discrimination on the wider workforce.
- Make new regulations, reintroducing an amended statutory questionnaire procedure in employment-related discrimination and harassment claims, following consultation on how best to ensure that the procedure is effective and proportionate.
- Reinstate section 40 of the Equality Act 2010 and amend it to remove the requirement for the employer to know that the employee has been subjected to two or more instances of harassment before they become liable.

Employment tribunals frequently hear evidence about poor employment practice, but they are currently able to make recommendations only about the employer's treatment of the individual claimant. In order to achieve systemic change, it is critical that employment tribunals are able to make recommendations to improve employers' practices towards the workforce more broadly.

Statutory questionnaires enabled individuals to understand whether or not they had a viable discrimination or harassment case against their employer and supported early and cost-effective resolution of claims. We understand that the original questionnaire

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process sometimes led to extensive questions being asked of employers. We propose that statutory questionnaires are reintroduced after consultation to ensure that they are used proportionately.

Our evidence shows that people in customer-facing roles may be more vulnerable to harassment by third parties, such as customers or clients. While we appreciate that there may be an argument that the existing harassment provisions cover harassment by third parties, the law is not clear in this area and employers may not be liable even if they have failed to take steps to prevent such harassment from occurring. We recommend that the third party harassment provisions in section 40 of the Equality Act 2010 be reintroduced. They should also be amended to remove the requirement for two or more instances of harassment. It is possible for employers to be aware that harassment is likely to occur without a worker having demonstrated that it has happened before. The reintroduction and amendment of section 40 would make the law clearer for employers and employees and provide effective protection, in particular for employees in customer-facing roles.

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## Contacts

This publication and related equality and human rights resources are available from the Commission's website: **[www.equalityhumanrights.com](http://www.equalityhumanrights.com)**

For advice, information or guidance on equality, discrimination or human rights issues, please contact the Equality Advisory and Support Service, a free and independent service.

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