At a crossroads: time for a new direction for workplace harassment laws

Samantha Mangwana and Beth Hale analyse proposals to tighten up sexual harassment legislation and consider how to bring about a culture change in UK workplaces

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'The report concludes with recommendations aimed at achieving greater transparency and strengthening legal protections for victims.'

Since the Weinstein scandal broke in October 2017, the issue of sexual harassment in the workplace has rarely been out of the headlines. In March 2018, the Equality and Human Rights Commission (EHRC) issued a report entitled *Turning the tables: Ending sexual harassment at work*. It is clear from the report, and the myriad stories which have emerged more informally via the #MeToo and #TimesUp movements, that we are at a crossroads. Employers must get better at dealing with the issues – but the often shocking stories which have emerged have also placed a serious question mark over the adequacy and effectiveness of the protections and remedies currently provided by the law in England and Wales.

EHRC's recommendations

In its report, the EHRC publishes the findings of its online survey of individuals who have experienced sexual harassment at work and the findings of its survey of employers. The report concludes with a number of recommendations aimed at changing workplace culture, achieving greater transparency and strengthening legal protections for victims. One of its key conclusions is that many of those who experience or witness harassment in the workplace do not report it and, if they do, the actions taken by employers are often inadequate or even damaging to their career. Individuals not only reported employers seeking to minimise complaints but even described being disciplined or otherwise penalised as a result of reporting harassment. In the employer survey, the EHRC found that:

> ... only a small minority of employers [used] effective approaches to prevent and address sexual harassment at work.

The key recommendations made by the EHRC are to:

Introduce a mandatory duty on employers to take reasonable steps to protect workers from harassment and victimisation

Employers can currently defend a claim by showing that they took reasonable steps to prevent harassment occurring. However, this defence is not frequently relied upon (and is rarely successful when it is used). This proposed mandatory duty would expressly extend the existing duty of care owed by employers to their workers. Breach of the duty would be an unlawful act for the purposes of the Equality Act 2010, enforceable by the EHRC. A positive duty to ensure a workplace is free from sexual harassment already exists in some other jurisdictions, such as the Netherlands.

Introduce a statutory code of practice on harassment
The proposed code would have a similar status to the existing Acas code on disciplinary and grievance procedures. It would set out the steps that employers must take to prevent harassment (including having a policy in place) and would include guidance on compulsory training for staff. Tribunals would have the power to uplift compensation by up to 25% in harassment claims for failure to follow the code.

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Develop an online reporting tool
This would be developed by the government and would allow employees to make confidential reports and employers to improve their practice by identifying persistent issues.

Extend the limitation period in harassment claims to six months
The EHRC is not alone in identifying the short time limit for bringing a tribunal claim (currently three months) as a significant barrier to bringing claims. Three months is often not enough time for someone to process what has happened and recover sufficiently to seek advice and commence the legal process.

However, it is not clear that an additional three months would make much difference and, in any event, tribunals already have discretion under s123 of the Equality Act to extend time where 'just and equitable'. Unfortunately, they do not apply this discretion entirely consistently. The EAT has held that the s123 discretion is as wide as that of the civil courts under s33 of the Limitation Act 1998 (in *British Coal Corporation v Keeble* [1997] and *Mills v Marshall* [1998]). However, there is no legal obligation on tribunals under s123 to consider particular factors (which is the case under s33). Clearer guidance for employment tribunals on the extent of their discretion may be more useful than an extension of the limitation period (and would limit the need for statutory change).

Introduce interim relief for harassment and victimisation claims where the worker has been dismissed
This would give employees who have been dismissed the opportunity for faster relief by way of seeking reinstatement or continuation of their contract pending the outcome of a harassment claim, which will inevitably take longer to be heard. The employee would have to apply for the relief within one month of the act of harassment (or the last in a series of acts of harassment). The option of applying for interim relief already exists for some other forms of dismissal (such as whistleblowing), although the short time limits mean that it is not frequently used.

Restore tribunal powers to make recommendations for the wider workforce
Under s124 of the Equality Act, employment tribunals have the power to make recommendations about the employer's treatment of the individual claimant. Prior to 1 October 2015, that power extended to making recommendations for the benefit of people other than the claimant – for example, by recommending that an employer provides training or implements its harassment policy more effectively. Given that one of the priorities for many victims of sexual harassment is to ensure that what they have experienced does not happen again, this would be a welcome re-addition to the powers of the employment tribunal.

Reintroduce a statutory questionnaire procedure in discrimination and harassment claims
The statutory questionnaire procedure, previously set out in s138 of the Equality Act, was controversially repealed in April 2014 following a very narrow vote in Parliament. The procedure allowed someone who believed they had been harassed to obtain information relevant to their potential claim before starting proceedings. It provided a useful (and low-cost) way of gathering information before litigation to help complainants establish the strength of their case – and often encouraged early resolution. If an employer failed to respond to the questionnaire, or provided unclear or evasive answers, this could result in a tribunal drawing adverse inferences.

The statutory procedure was replaced by a voluntary process that does not have the same statutory recognition or impact and is therefore less frequently used. Reintroducing a statutory procedure (albeit potentially amended to make it less burdensome for employers) should be welcomed.

Reinstate the third-party harassment protections
To achieve this, s40 of the Equality Act would be reintroduced but amended to remove the requirement for an employer to know about two or more prior incidents of harassment by third parties before they become liable. While there is an argument that the existing law protects against harassment by third parties such as customers or contractors, that position relies on a rather contorted interpretation of the legislation. The controversial removal of the s40 protection in 2013 made the position less clear for both workers and employers and its reintroduction would be a positive step towards clarifying the position and improving protection against harassment.

Non-disclosure agreements

The use of non-disclosure agreements (NDAs) in sexual harassment cases has received close scrutiny recently. The unusually onerous wording in the NDA signed by Zelda Perkins (a former assistant to Harvey Weinstein) and the agreements provided to

British Coal Corporation v Keeble & ors [1997] UKEAT/496/96
Mills & anor v Marshall [1998] UKEAT/528/97

those working at the Presidents Club dinner ahead of the event have come in for particular criticism. On NDAs, the EHRC made some specific recommendations:

The government should introduce legislation on NDAs
The proposal is for a new law which would render void any contractual clause which prevents disclosure of acts of discrimination, harassment or victimisation which have not yet happened (for example, those used at the Presidents Club event). In practice, many such clauses would already be void insofar as they seek to prevent workers from disclosing criminal or unlawful behaviour or from 'blowing the whistle' under the Public Interest Disclosure Act 1998.

A clear legislative provision which rendered such provisions void without having to satisfy complex public interest tests would help to clarify this area. However, it would need to be carefully drafted so that it did not prevent employers from using confidentiality provisions appropriately to protect their proprietary and sensitive information.

The code of practice on harassment should include provisions on NDAs
The EHRC suggests the proposed statutory code should clearly set out the circumstances in which NDAs are void and describe best practice for the use of confidentiality clauses in settlement agreements. Best practice would include:

Only using NDAs at the employee's request
It is unclear precisely how this would work in practice. Settlement agreements are usually prepared by the employer (or its advisers) – would it suffice for an employee to 'agree' to an NDA included in an employer's first draft of the settlement?

The employer paying for independent advice
While there is already a requirement for individuals to take independent advice on the terms and effect of settlement agreements, there is no obligation on the employer to pay for such advice (although it is common practice for it to make a contribution). Introducing an obligation to pay for specific advice on confidentiality provisions would give rise to a number of complications – such as the appropriate level of the contribution.

Giving the employee adequate time to consider an agreement
In some states in the US, agreements settling discrimination claims are subject to a mandatory seven-day cooling-off period. During that period, the employee can withdraw agreement to the terms of the contract. While this requirement may limit intimidating negotiating tactics such as those allegedly used in the case of Zelda Perkins, there is an issue where settlements are agreed 'on the steps of the tribunal', which is common in tribunal litigation. If settlements were subject to a cooling-off period, parties would be less likely to settle at all: it would be simpler (and cheaper) to proceed with a hearing for which they had already prepared than to have to re-open the case.

In addition, whether deliberately or not, there does appear to have been some sort of cooling-off period in the Zelda Perkins case. Her evidence to the House of Commons Women and

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What other changes could the government consider?

In addition to the EHRC proposals, there are several other legislative changes which the government could consider, including:

Introduction of punitive damages as a deterrent
Currently, unless a complainant leaves their job and has significant financial losses as a result, they might only be able to secure compensation for injury to feelings, where the award is anywhere between only £800 and £42,900. In addition, the costs regime in the employment tribunal means that there is no certainty that a complainant will recover their legal costs even if they win. Indeed, they may even be exposed to employer costs if they lose.

There is therefore little incentive for victims of sexual harassment to bring claims unless they lose their job (when their priority may well be to secure alternative employment and move on). Moreover, because sexual harassment claims are brought under the sex discrimination banner, there are no accurate statistics about how many claims are brought (or, indeed, how many succeed). This makes it difficult for employees to assess whether it is worthwhile bringing a claim. The introduction of punitive damages could offer both a deterrent to employers and an incentive to prospective claimants.

Removal of the word 'unwanted' from the statutory definition of harassment
In the Netherlands, the wording taken from the European directive has been adapted so that behaviour does not have to be unwanted to constitute harassment. This small change could have a significant impact on the types of behaviour which are included in the definition – and would remove an element of subjectivity from claims.

Positive duty to investigate harassment complaints
Many complaints are not adequately investigated by employers keen to close down an issue rapidly. A positive duty to investigate, backed up by a penalty for failure to comply (as already exists in certain circumstances under the French Labour Code), could encourage employers to investigate matters even when an employee has left the organisation. In turn, this could help the employer understand the issues it is facing.

Equalities Committee inquiry into workplace sexual harassment was that signature took place a week after the negotiations – yet she still signed the agreement. It is hard to imagine that many people would withdraw from an agreement, particularly one which has been heavily negotiated, in the knowledge that all the effort in reaching that stage would then be for nothing.

Granting an employee the right to be accompanied

The EHRC proposes that the employee should be entitled to be accompanied by a trade union representative or colleague when discussing the terms of a settlement agreement, as is already the case during disciplinary and grievance hearings.

Annexing an explanatory statement to a settlement agreement

This statement would explain why confidentiality clauses have been included and what their effect is.

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It is certainly true that the current law on the circumstances in which an individual can lawfully breach an NDA is in need of clarification. A clear explanation of those circumstances is therefore likely to benefit both parties to an agreement.

The role of regulators

There is also a potentially key role to be played by regulators in this area.

The Solicitors Regulation Authority (SRA) has published a warning notice on the use of NDAs, which makes it clear that law firms should not brush sexual harassment allegations under the carpet. The notice also highlights solicitors' duty to report serious misconduct by other solicitors to the SRA. In addition, the Law Society is working on guidelines for law firms on how to deal with harassment in the workplace.

In relation to financial services employers, the Financial Conduct Authority (FCA) has not issued any specific guidance on the point. There is, for example, no explicit reference in its handbook to the impact sexual misconduct may have on an individual's fitness and propriety to carry out a regulated function. In addition, the FCA's recent discussion paper on transforming the culture in financial services (published in March 2018) did not refer to sexual harassment when identifying cultural issues in the sector.

However, it is likely that a finding of sexual misconduct would go to an

individual's honesty, integrity and reputation when assessing fitness and propriety. The FCA has made a recent high-profile example of Paul Flowers, former chairman of Co-operative Bank. Mr Flowers was held to have 'demonstrated a lack of fitness and propriety required to work in financial services' and banned from the industry after he used his work email for sexually explicit messages and to discuss illegal drugs. However, this was an extreme and high-profile case and more guidance from the FCA and other regulators about the link between sexual misconduct (particularly where it is not a criminal matter) and fitness and propriety would be welcomed.

What changes are likely?

Parliament currently has a great deal on its plate with the Brexit negotiations, so immediate legislative intervention is unlikely. However, the House of Commons Women and Equalities Select Committee is undertaking an inquiry into sexual harassment in the workplace and there have been informal indications from Downing Street that this is an area the government is considering. Given the intense public interest and growing pressure for change, it would not be surprising to see at least a consultation on legislative change being launched.

There are a number of key proposals which have been repeated in several papers and submissions in this area and which, therefore, may be most likely to be taken forward. These include reinstatement of the statutory questionnaire procedure and s40 of the Equality Act on harassment by third parties, as well as extension of the limitation period for harassment claims in the employment tribunal. However, even these proposals would involve significant Parliamentary time (and reinstatement of rights which this government repealed).

Tipping point

We may have reached a tipping point in relation to attitudes to sexual harassment – behaviour that was once accepted (if not acceptable) is now called out as inappropriate. Although change is not imminent, legislators have an obligation to ensure that the law offers adequate protection to victims. Likewise, employers have a responsibility – in the interests of both victims and alleged perpetrators – to move with the times and ensure their approach to sexual harassment is adequate and appropriate. ■

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Actions for employers

In the absence of imminent legislative change, there are various steps which employers can take to help prevent sexual harassment and to deal with it when it occurs.

Investigation process

Getting the right person to carry out the investigation is key – the investigator should be appropriately senior, but not involved, even indirectly, in the allegations. An external investigator might be appropriate, particularly in smaller organisations where impartiality may be harder to achieve.

Risk assessments

Employers should identify areas of low, medium and high risk in their organisation. For example, businesses where employees work long hours and attend networking events where alcohol is consumed are likely to be at higher risk. They should repeat risk assessments regularly to ensure policies and procedures remain current.

Review and target policies and procedures

Employers should tailor their policies to address the issues identified in the risk assessment. They should remind managers and staff of what is (and is not) appropriate in the workplace. It is crucial to take into account the interests of those accused of harassment, so unproven allegations do not damage an individual's reputation.

Appoint a sexual harassment reporting officer

A major issue is that victims are reluctant to come forward. Clear and effective reporting procedures could help resolve this. A sexual harassment reporting officer would provide a single point of accountability to ensure that all matters are effectively handled. This should be a member of senior management who is trained in the relevant issues.

Improve knowledge and understanding

Employers should provide information to staff, via training and information on intranets or noticeboards, about what harassment is and how to report it. Colleagues who are witness to or otherwise aware of allegations should be encouraged to come forward to ensure that the onus to report does not simply fall on the alleged victim. Other specific methods to encourage disclosure may work in some organisations, such as the use of a particular 'safe word' or phrase.

Consider recruitment policies

Employers could consider requiring new recruits, especially at a senior level, to confirm whether they have been the subject of formal or informal harassment complaints in prior roles –and what the outcome was of any investigation. Many employers (and candidates) would baulk at such a suggestion, but in light of the recent introduction of the regulatory references regime to prevent 'rolling bad apples' moving around the financial services sector unchecked, it is not unimaginable that disclosure of sexual misconduct could become a commonplace requirement. After all, it is in the employer's interests to minimise the risk of litigation.