



House of Commons
Women and Equalities
Committee

**Sexual harassment
in the workplace:
Government Response
to the Committee's
Fifth Report of Session
2017–19**

**Seventh Special Report of Session
2017–19**

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Women and Equalities Committee

The Women and Equalities Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Government Equalities Office (GEO).

Current membership

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Powers

The Committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No. 152. These are available on the internet via www.parliament.uk.

Publication

Committee reports are published on the Committee's website at www.parliament.uk/womenandequalities and in print by Order of the House.

Evidence relating to this report is published on the [inquiry publications page](#) of the Committee's website.

Committee staff

The current staff of the Committee are Jyoti Chandola (Clerk), Luanne Middleton (Second Clerk), Holly Dustin, Tansy Hutchinson, and Shai Jacobs (Committee Specialists), Renuka Rawlins (Inquiry Manager), Alexandra Hunter-Wainwright (Senior Committee Assistant), Mandy Sullivan (Committee Assistant), and Liz Parratt and Simon Horswell (Media Officers).

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Special Report

The Women and Equalities Committee published its Fifth Report of Session 2017–19, *Sexual harassment in the workplace*, as HC 725 on 25 July 2018. The Government response was received on 28 November 2018 and is appended to this report.

Appendix: Government Response

Introduction

The Government strongly condemns sexual harassment – and harassment of any sort – in the workplace and outside it. The Equality Act 2010 (‘the Act’) sets out strong, clear protections against sexual harassment in the workplace. However, recent disclosures have produced worrying evidence that the law is not being respected. We therefore welcome the Women and Equalities Select Committee inquiry into this issue, and the thoughtful recommendations it has produced.

Sexual harassment is, in itself, abhorrent and cannot be accepted in the workplace. Moreover, workplace cultures that permit sexual harassment also link to the broader issue of equality in the workplace. An employer that allows sexual harassment of women to go undealt with is sending a message about how welcome they are and their value in that workplace. It is therefore essential not only that the Government acts on sexual harassment, but that employers take this issue seriously and recognise it as a symptom of wider factors that they need to address for the health and productivity of their workforce.

Sexual harassment is not an issue that only impacts one group. While women are most frequently the victims of sexual harassment, many men are also affected; and it is a problem that can be faced by LGBT people and heterosexual and/or cisgender people alike.

In light of this, and the broader principles on which equality protections are based, we have been careful to consider legal protections for sexual harassment in the context of the wider equality framework in which they sit, and to avoid the risk of creating a hierarchy of protected characteristics.

In both this report and its report on sexual harassment of women and girls in public places, the WESC rightly highlights the lack of data and research we have on this issue.¹ Without this information we cannot identify the most effective interventions that will address its root causes. Therefore our first focus must be on developing this evidence base. We set out below our plans to gather representative data to help us better understand this issue, as recommended by the WESC, and will continue to collate, document and review the existing evidence and research, using this to develop our programme of work on sexual harassment in light of emerging findings.

We set out below a number of interventions that we agree with the WESC can and should be taken forward straight away, and a number more that we propose to consult on. Through our consultation we will be looking to establish what the most effective interventions

¹ See paras 135–140 of https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72509.htm#_idTextAnchor083 and para 79 of https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/701/70106.htm#_idTextAnchor018

will be to deliver the critical changes we need to protect individuals. To deliver lasting, impactful change we recognise that employers are our allies, and so we will be looking to engage them through this process to help us find solutions that work for everyone. We will not shy away from legislation where it is the right answer, but above all our aim is to deliver real world results.

Beyond the domestic context, the UK Government is an active proponent of an ambitious and practical ILO Convention on ending violence and harassment in the world of work.

Our detailed responses to the Committee's recommendations are set out below.

WESC conclusions and recommendations

1. Providing a workplace where employees have safety and dignity is no less important than other corporate responsibilities such as preventing money-laundering and protecting personal data. We call on the Government to establish a regime that ensures that it will be just as important to employers. (Paragraph 27)
2. We agree with the Equality and Human Rights Commission (EHRC) that the burden of holding perpetrators and employers to account on workplace sexual harassment is too great to be shouldered by individuals alone. Employers must have greater and clearer responsibilities for protecting workers from sexual harassment. (Paragraph 31)
3. *We support the recommendation of the Equality and Human Rights Commission that the Government should place a mandatory duty on employers to protect workers from harassment and victimisation in the workplace. Breach of the duty should be an unlawful act enforceable by the Commission and carrying substantial financial penalties. The duty should be supported by a statutory code of practice on sexual harassment and harassment at work which sets out what employers need to do to meet the duty.* (Paragraph 32)

Government response

Employers already have a responsibility to protect their employees from harassment and victimisation in the workplace. The Act outlaws workplace harassment related to a protected characteristic; sexual harassment; and victimisation because a person has rejected or submitted to the harassment. Under section 109 of the Act, employers are liable for acts of harassment carried out by their employees in the course of their employment, unless the employer can show they have taken 'all reasonable steps' to prevent their employees from acting unlawfully.

The prevalence of workplace sexual harassment, as found by the Committee, suggests that there is more that employers could be doing to prevent it. The evidence noted that employers do not know what 'all reasonable steps' to prevent harassment are.

The Government agrees that employers should take their preventative responsibilities more seriously; under recommendation 16 below, we agree to the Committee's recommendation that a statutory Code of Practice should be introduced. This would help employers understand and demonstrate that they have taken 'all reasonable steps' to prevent harassment. We expect the statutory Code of Practice to significantly improve employers' ability to engage with their existing responsibility, and think that its introduction may, in effect, have the same impact as the proposed mandatory duty in placing more of an onus

on employer, rather than individual, action. However, we will consult on this proposal to gather evidence on whether it would be an effective and useful tool to ensure prevention is prioritised, and to understand its potential impact on business.

WESC conclusions and recommendations

4. The public sector should be leading the way on tackling and preventing sexual harassment, setting good practice examples that other employers can follow. We urge the Government to ensure that all public sector organisations take immediate action to protect workers from sexual harassment. (Paragraph 33)

5. *In the interim period before the mandatory duty is in place, the Government should direct public service employers to take immediate action to tackle and prevent sexual harassment in the workplace, including setting out unacceptable behaviours, how cases will be handled and the penalties for perpetrators.* (Paragraph 34)

6. *The Government should introduce a specific duty under the Public Sector Equality Duty requiring relevant public employers to conduct risk assessments for sexual harassment in the workplace and to put in place an action plan to mitigate those risks. Action plans should set out how cases will be investigated and include guidance on penalties for perpetrators* (Paragraph 35)

Government response

The Civil Service is committed to promoting positive workplace behaviours and being a leading employer for the inclusion and overall well-being of its workforce. It is committed to preventing and tackling bullying, harassment and discrimination in all its forms, and creating an inclusive culture which is intolerant of poor behaviours, this includes incidents relating to sexual harassment.

To support this commitment the Civil Service has undertaken an extensive review since December 2017 to help identify employees' experiences and what improvements are required to strengthen our existing support. Work to respond to the review is now well underway, and a report was published on 24 September² outlining its findings and conclusions. Primary actions have a strong focus on culture change and the creation of environments where behaviours such as bullying, harassment and discrimination, including those which are sexually motivated, are clearly defined and recognised, and where they will not be tolerated.

Additionally, alongside current policies for discipline and resolving disputes, specific policy and guidance is now being developed for sexual harassment and this will become available to all Civil Service organisations by the end of 2018. This guidance will explicitly reiterate that the Civil Service will not tolerate sexual harassment of any kind or from any source, and that it will act decisively where it does happen. Guidance will therefore ensure that individuals have clear and supportive information about their options for reporting sexual harassment and where they can access and receive help and advice. It will also ensure that managers and leaders are clear about their role and responsibilities and what is expected of them when incidents of sexual harassment are reported. The Civil Service is consulting the Advisory, Conciliation and Arbitration Service (Acas) and other experts

2 <https://www.gov.uk/government/publications/bullying-harassment-and-misconduct-review>

in sexually related misconduct to ensure that guidance is fit for purpose. They have also committed to ensuring any guidance aligns with and reflects the Code of Practice for sexual harassment when that becomes available (see recommendation 16).

Alongside this, the Civil Service is working hard to improve data capture about the types and prevalence of bullying, harassment and/or discrimination occurring. This will help drive understanding about where positive change is happening as well as where more needs to be done.

In addition to plans targeting the Civil Service, we will undertake work to identify how the wider public sector can best tackle sexual harassment and what support is required to deliver this.

Under the Public Sector Equality Duty (PSED)³ public sector organisations (with some exceptions)⁴ are already required to have ‘due regard’ to the need to eliminate harassment in their role as an employer. Additionally, under existing PSED specific duties, public sector organisations are required to set themselves equality objectives at least every four years. Both the PSED and its specific duties are intentionally non-prescriptive in their approaches to ensure that they provoke meaningful thought and engagement, rather than becoming a ‘tick box’ exercise. Therefore, while we agree that the public sector should be leading the way among employers, the Government does not agree with the proposal for a new specific duty, and will not be taking this forward in England (Scottish and Welsh Ministers are able to impose PSED specific duties in Scotland and Wales). The PSED should already lead public sector organisations to focus on and address this issue, if necessary as an objective under the specific duties. Furthermore, if we take forward a specific duty for employers, as discussed under the above recommendation, this would apply to the public sector as well as all other employers. Likewise, the new statutory Code of Practice that is to be developed (see recommendation 16) will advise public sector employers, as it will others, on what they should be doing to prevent sexual harassment and address it when it does occur. As the Code of Practice is developed we will work with the EHRC to assess whether additional guidance is required for the public sector, and incorporate that into this work if needed.

WESC conclusions and recommendations

7. Everyone in the workplace should be protected from sexual harassment, regardless of whether they have a contract of employment or similar contract for services or who the harasser is. (Paragraph 43)

8. *If the judgment in *Unite the Union v Nailard* stands, the Government should bring forward legislation to place a positive duty on employers expressly to protect workers from harassment by third parties and to ensure that employers can be held liable for failure to take reasonable steps to protect staff from third party harassment. This must not be restricted to cases where there were previous occurrences of third party harassment.* (Paragraph 44)

3 Section 149 of the Equality Act 2010

4 Exceptions are set out in Schedule 18 of the Equality Act 2010

Government response

The Government agrees that employers should have a responsibility to take reasonable steps to protect their staff from third party harassment where they know that their staff are at risk. However, as the Committee notes, recent case law has challenged the potential avenues of legal redress. The Government proposes to consult on how best to strengthen and clarify the laws in relation to third party harassment.

WESC conclusions and recommendations

9. *The Government should extend the protections relating to harassment in the Equality Act 2010 to interns and volunteers so that they are entitled to the same protections as the wide range of individuals in the workplace who are already protected. (Paragraph 45)*

Government response

The Government agrees that all volunteers and interns should be safe from sexual harassment in the course of their volunteering and internship activities. Government would expect organisations taking in volunteers and interns to ensure a safe working environment for them, as they would for their staff. Safeguarding provisions exist in the charity sector to support a safe environment, and the Charity Commission has been working with Government and the sector over the last year to further strengthen the protections in place. This includes reviewing guidance on the Reporting Serious Incidents (RSI) regime, ensuring effective co-ordination with other statutory agencies, improving whistleblowing processes, and collating and strengthening guidance on safeguarding.

As the Committee notes, where sexual harassment does occur, volunteers and many interns may not satisfy the tests for employment status that would afford them explicit protections under the work provisions of the Act. However, some legal protections for volunteers and interns are available elsewhere for harassment. For example, in certain cases volunteers and interns may have legal recourse against an organisation under common law (duty of care or personal injury), or the Health and Safety at Work etc. Act 1974. As service users - for example if they are placed by a volunteering agency - volunteers and interns who experience harassment may come within the scope of the services provisions of the Act. Pursuing a course of conduct which amounts to harassment, and which the offender knows or ought to know amounts to harassment, is a criminal offence under the Protection from Harassment Act 1997. This could include sexual harassment. The 1997 Act also includes a civil remedy for a person who is or may be the victim of a course of conduct amounting to harassment. Finally, behaviour at the more serious end of the spectrum, such as sexual assault, may constitute a criminal offence under the Sexual Offences Act 2003.

Legal avenues therefore already exist to provide volunteers and interns legal recourse in relation to sexual harassment that occurs in the course of their engagement with an organisation, and we will take steps to ensure that these are better understood.

However, the safety of volunteers and interns is a priority so the Government will also consult to gather evidence on whether additional protections are needed. In addressing this question, we are conscious of the benefits of volunteering and internships to individuals and wider society, and our consultation will therefore be mindful of the need to avoid

unintended consequences that could result in a reduction in these types of opportunities. Ultimately we will be looking to ensure that these opportunities are maintained in a safe, sustainable way that benefits both parties, and we are confident that this can be achieved.

WESC conclusions and recommendations

10. All workers are entitled to a safe working environment, free from sexual harassment. It is incumbent on the Government, the Equality and Human Rights Commission and employers to make clear to all those in the workplace, including clients, customers and volunteers that all workers are entitled to be treated with respect. Employers must take responsibility for setting out within their organisation the kind of behaviours that are unacceptable and what might constitute sexual harassment or a sexual offence. However, there is also a need for wider, large-scale awareness-raising work to change the culture that enables sexual harassment to go on unchallenged. (Paragraph 49)

11. *The Government should work with Acas, the Equality and Human Rights Commission and employers on an awareness-raising campaign. This should include information on: the behaviours that might constitute sexual harassment; employers' responsibility to protect workers from sexual harassment and victimisation; actions that workers can take if they are sexually harassed; how employers should help workers to challenge inappropriate behaviours; enforcement processes including tribunals; whistleblowing laws; and legal and ethical use of confidentiality clauses in settlement agreements.* (Paragraph 50)

Government response

The Government agrees that everyone should have a safe working environment, and we will work with Acas, the EHRC and employers to raise awareness of appropriate workplace behaviours, and individual rights.

As this response sets out, this is a changing landscape; it is therefore important that communications are clear and well timed. We will plan engagement activities around developing policy, in particular to take account of the new statutory Code of Practice (see recommendation 16) and potential changes to legislation.

We have a strong existing legal framework in place, but need to ensure that people know their rights and how to take action when the law is not respected. Therefore, in addition to our work with employers, we will scope and consider options for public information and campaign activity in this area.

As set out in our LGBT action plan, Acas and the Government Equalities Office (GEO) will ensure that LGBT harassment is included in any sexual harassment policies and guidance they issue.

WESC conclusions and recommendations

12. Regulators are uniquely placed to oversee employer action to protect workers from sexual harassment. This is a health and safety issue, and several regulators have responsibility for overseeing this aspect of employers' activities. The Health and Safety Executive in particular must take up its share of the burden of holding employers to account if they fail to take reasonable steps to protect workers from sexual harassment. This could include issuing guidance on the actions that employers could take, including undertaking specific risk assessments, and investigating reports of particularly poor practice. (Paragraph 60)

13. *Regulators who do not take steps to address sexual harassment in their sectors are failing in their Public Sector Equality Duty. The Government should require all regulators to put in place an action plan setting out what they will do to ensure that the employers they regulate take action to protect workers from sexual harassment in the workplace.* (Paragraph 61)

14. Regulators must make it clear that sexual harassment by regulated persons is a breach of regulatory requirements by the individual and their organisation, that such breaches must be reported to the appropriate regulator, and that such breaches must be taken into account when considering the fitness and propriety (or equivalent) of regulated individuals and their employers. Perpetration of or failure to address sexual harassment in the workplace must be recognised as grounds for failing a 'fit and proper person' test or having professional credentials removed. Regulators should also set out the sanctions for perpetrators of sexual harassment in their sectors. The victim themselves, however, should not be under any obligation to report, nor should they face sanctions for failing to report to their regulator. (Paragraph 62)

Government response

The Government agrees that many regulators are well placed to tackle sexual harassment within their sectors, and encourages them to do so. In line with this, we agree that regulators should make it clear that workplace sexual harassment is unacceptable, and that sexual harassment should be taken into account when considering the fitness and propriety (or equivalent) of the individuals and employers they regulate. Given the range of regulators' remits, and the purely technical focus of some, we do not believe that a blanket approach should be taken. Therefore, rather than mandating that all regulators put in place a sexual harassment action plan, the Government will engage directly with regulators for whom this is of key relevance to ensure that they are taking appropriate action to address sexual harassment in their sectors. We believe this is the best way to deliver action which is well targeted and effective.

The EHRC, which is the lead regulator in this area, has a strong programme of work planned to tackle sexual harassment. In its written evidence to the Committee, the EHRC referenced its work with inspectorates, ombudsmen and regulatory bodies, including a roundtable meeting with regulators from a wide range of sectors on sexual harassment in July 2018, which was repeated in November and is intended to continue. These roundtables have provided an opportunity for relevant bodies to share knowledge and identify areas of potential collaboration, with a specific focus on experience of embedding steps to address

sexual harassment at work into regulatory activity and any plans for new work in this area. The Government strongly supports this collaboration and encourages regulators to share, and learn from, best practice as part of this group.

As the Committee notes, under the PSED regulators must have due regard to the need to eliminate harassment in the exercise of their functions, and should therefore already be taking steps to consider what role they should play in tackling sexual harassment.

In addition to the PSED, most regulators are expected to comply with the Regulators' Code⁵ which came into effect on 6 April 2014. It provides a clear, flexible and principles-based framework for how regulators should engage with those they regulate. The code makes clear that regulators should take an evidence based approach to determining the priority risks in their area of responsibility. Regulators should therefore consider to what extent sexual harassment in the workplace is a priority risk in the areas they cover, and take action accordingly.

The Health and Safety Executive (HSE) fully acknowledges the negative impact of sexual harassment in the workplace. HSE currently operates a longstanding policy that it will not seek to apply the Health and Safety at Work etc. Act 1974 where another regulator or agency has specific responsibility or where there is more directly applicable legislation. While, for this reason, HSE is not the lead regulator for issues in relation to sexual harassment in the workplace, HSE is able to contribute to the measures to move forward on this issue. HSE will include better advice and signposting on its website for employers and for workers. As an experienced workplace regulator, HSE has knowledge, networks and expertise it can share with EHRC. This may include contributing to any new guidance, access to relevant stakeholder networks and identifying appropriate events and workshops for EHRC to further promote good practice. More formal liaison arrangements will be set up between the two organisations to achieve this. The HSE already works closely with other regulators to promote co-operation, share intelligence and where appropriate, co-ordinate on joint activities. HSE will work with EHRC to consider whether there are any other potential opportunities in this respect.

5 <https://www.gov.uk/government/publications/regulators-code>

WESC conclusions and recommendations

15. We support the EHRC's recommendation that the Government should introduce a statutory code of practice on sexual harassment in support of the mandatory duty. This code would specify the steps that employers should take to prevent and respond to sexual harassment, and which can be considered in evidence when determining whether the duty has been breached. Tribunals should have the discretion to apply an uplift to compensation of up to 25 per cent in harassment claims where there has been a breach of mandatory elements of the statutory code. (Paragraph 68)

16. *The code of practice to support the mandatory duty should set out good practice guidance on matters including:*

- *reporting systems and procedures and what employers should provide as a minimum, including guidance on anonymous reporting and any relevant data protection issues that arise;*
- *support for victims, including access to specialist support and steps that should be taken to prevent victimisation of complainants;*
- *how to investigate and record complaints, including a presumption that all complaints should be investigated unless there is a compelling reason not to;*
- *how to identify when sexual harassment allegations may include criminal offences and how to conduct any investigation in a manner which does not prejudice any potential police investigation and criminal prosecution;*
- *training, induction, risk assessments and other policies and practices; and*
- *alternative dispute resolution including mediation, and risk assessments.* (Paragraph 77)

Government response

The Government shares the Committee's concerns that evidence suggests many employers are currently failing their employees in their responsibility to prevent sexual harassment, and in the systems they have in place for dealing with it when it does occur.

We therefore agree the proposal for the development of a new statutory Code of Practice on sexual harassment and will work with the EHRC to develop a code that make it clear what actions an employer must take to fulfil their legal responsibilities. This statutory Code of Practice will be developed by the EHRC, with support from Government, under the powers conferred on it by the Equality Act 2006.

In developing the statutory Code of Practice with the EHRC we will be looking to provide clarity and outline specific measures wherever possible, but this will be balanced with the need to allow employers to adapt proposals to their own circumstances.

We agree that for the Code of Practice to have sufficient weight, failure to comply must have consequences. However, at this stage it is not clear that any changes are required to the options already available to Employment Tribunals in cases relating to the Act. Some of these options are set out in response to recommendation 18.

In light of the above, we think it is premature to introduce a compensation uplift linked to breach of the statutory Code of Practice. Once the statutory Code of Practice has been introduced we will monitor how Employment Tribunals take account of it in the remedies they apply in sexual harassment cases, and assess whether an uplift option is required. In considering this question we would need to take account of the inconsistency this would create between treatment of the proposed statutory Code of Practice on sexual harassment as compared to existing statutory Codes of Practice under the Act, and the rationale for making this distinction.

WESC conclusion and recommendations

17. If the cost risks of going to tribunal outweigh the likely benefit for the majority of potential claimants then the system cannot be working properly. Moreover, the lowest-paid workers are least likely to be able to take forward a case even though high levels of sexual harassment occur in low pay sectors such as retail, hospitality and services, and among workers in temporary or casual work. Employees who have a strong case against their employer must not be priced out of justice. There must be a threat of strong sanctions to encourage employers to take appropriate action. (Paragraph 84)

18. *The Government should improve the remedies that can be awarded by employment tribunals and the costs regime to reduce disincentives to taking a case forward. Tribunals should be able to award punitive damages and there should be a presumption that tribunals will normally require employers to pay employees' costs if the employer loses a discrimination case in which sexual harassment has been alleged.* (Paragraph 85)

Government response

Prevention will always be better than cure and, as such, much of the work set out in this response focusses on how we can prevent sexual harassment before it occurs. However, the Government agrees that when it does occur victims must have access to appropriate remedies.

The Government believes that the current range of remedies available to Employment Tribunals to compensate in cases involving discrimination, harassment and victimisation offers significant deterrent to employers and compensation to workers.

The fundamental purpose of a tribunal award is to compensate a party for the detriment suffered and to restore them to the state they would have been in had that treatment not occurred. It is not intended to be punitive and awards are proportionate.

Tribunals do have the power to award more than the financial harm suffered in the form of injury to feelings and aggravated damages. Where employment law has been breached in a way that is deliberate or malicious, the Employment Tribunal is able to apply penalties, and can impose aggravated breach penalties, cost orders and uplifts in compensation.

We will bring forward legislation to raise the maximum limit of an aggravated breach penalty from £5,000 to £20,000 as soon as Parliamentary time allows. As part of the Government response to the Taylor Review recommendations on tackling repeated breaches of employment law we have also consulted on placing an obligation on employment judges to consider the use of these sanctions, where there are repeated employment law breaches, and will respond shortly.

The system of costs in the Employment Tribunal are part of its original intent as a less formal forum for resolving employment disputes than the Civil Courts, where the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. Case law around costs orders is well established and is related to the conduct before and during proceedings.

The proposed change would raise questions of whether the reverse should apply: that people accused of sexual harassment and against whom the case was not proved should be automatically awarded costs from the complainant.

However, Government recognises the concern that the risk of not receiving compensation for legal costs of litigation may be dissuading people experiencing sexual harassment in the workplace from enforcing their rights. We have also heard that the fear of being responsible for their employer's legal costs may also be a factor in deciding not to pursue a claim. These fears are echoed in the evidence submitted to the Committee.

Legal aid is available for civil legal services provided in relation to contravention of the Equality Act 2010, subject to the statutory means and merits tests; this is available both for initial advice and representation. Publicly funded advice also continues to be available for Employment Tribunal discrimination claims, and publicly funded advice and representation is available in the Employment Appeal Tribunal.

WESC conclusion and recommendations

19. We agree with the Equality and Human Rights Commission, employment law experts and business representatives that the three-month time limit for harassment claims is not long enough to allow employers and employees to pursue alternative means of resolving cases. This places an unnecessary pressure on potential claimants to submit a claim before they know whether they want to go to tribunal. It also hinders alternative approaches to resolution by requiring parties to consider early conciliation and to prepare for a tribunal hearing while internal grievance procedures may be ongoing. Requiring victims of sexual harassment to gamble on judicial discretion is unfair and constitutes another barrier to making a claim. (Paragraph 91)

20. *The Government should extend the time limit for lodging a tribunal claim in cases of sexual harassment to six months and pause the countdown until employers' internal complaint and grievance procedures are completed. This should be done as part of a wider review of the time limit in all discrimination cases.* (Paragraph 92)

Government response

As noted in the Committee's Report, three months is the current time limit for lodging a tribunal claim for most Employment Tribunal cases, whether based on provisions in the Act or wider employment law. For complaints under the Act these three months begin from the date on which the event under dispute occurred and, if it relates to a course of conduct, the date of the final act of this conduct. The Employment Tribunal has discretion to extend this period if it considers that it would be "just and equitable" to do so in the circumstances of the case. As Minister Lucy Frazer reported to the Committee, recent data suggests that tribunals frequently grant extensions when requested: from April-June this year, of 54 requests for out of time claims made to the Employment Tribunal across

England and Scotland, only one was rejected.⁶ The Government will take steps to ensure that Tribunals' power to extend time limits is more widely known and the process better understood.

The Government notes the suggestion that we should 'pause the countdown' on tribunal time limits, to allow for the conclusion of internal grievance procedures. However, we are aware of a number of difficulties with this proposal, in particular the problem of defining when an internal grievance process starts and ends given that there is not a single consistent process across employers. There is also a risk that this approach could create a significant lag between the event under dispute and legal action, which could disadvantage the claimant in a case in which fresh recollection of recent events is likely to be key. We therefore do not propose to take this suggestion forward.

On the wider question of Employment Tribunal time limits, the Law Commission has recently issued a consultation on Employment Law Hearing Structures that raises this question and invites views on whether Employment Tribunal time limits should be extended for all cases, or specific types of case. We encourage interested parties to contribute to the Law Commission's consultation. In parallel we propose to consult specifically on extending Employment Tribunal time limits in the Act from three to six months, to explore the evidence for doing this.

WESC conclusions and recommendations

21. Employment tribunal claimants alleging sexual harassment that could constitute a sexual offence should have access to similar protections to those available to complainants in sexual offence cases in the criminal justice system. *The Government should take immediate steps to close the gap in protection for complainants of sexual harassment and sexual violence in an employment context compared with complainants of sexual offences in a criminal justice context, regardless of whether they make a complaint to the police. This includes: lifelong anonymity; access to special measures in an employment tribunal, including not being cross-examined by the alleged perpetrator; and regular specialist training on sexual harassment for tribunal judges hearing these cases.* (Paragraph 97)

Government response

The Government places great importance on providing protections to those who may be vulnerable within the courts and tribunals system. It is already possible for special measures similar to those in the criminal courts to be put in place in the Employment Tribunal and the tribunal has the technology and knowledge to facilitate this. These measures are applied at the discretion of the judiciary. Protection is always available for those who need it.

In terms of current practice, the equal treatment benchbook gives extensive guidance to panels. Judges can allow claimants in the Employment Tribunal to provide written evidence to the tribunal panel rather than in person at the hearing. They can allow evidence from a claimant to be given via video links and make arrangements for screens to be placed in the hearing room so that the claimant does not have to see the respondent and their representatives when being cross examined. Parties involved in tribunal claims are

6 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/740317/Statistical_notice_ET_Out_of_Time_Claims.pdf

also able to seek specialist advice on matters from Independent Sexual Violence Advisors if they choose to, in the same way that they are in criminal proceedings. However, the tribunal would not be required to use specialist trained police and prosecutors as it would not be within their jurisdiction to do so, unless they are to be called as witnesses to the claim. The Employment Tribunal Rules of procedure also allows for parties to request anonymity for any length of time, including lifelong anonymity should they require this.

Therefore a range of protections are already in place in the Employment Tribunal. However, in response to the Committee's report, we will consider what further lessons might be learnt from the measures in place in the criminal courts, taking into account that these are matters subject to judicial discretion.

Under the Constitutional Reform Act 2005, the Lord Chief Justice is responsible for maintaining appropriate arrangements for the training and guidance of the courts' judiciary. Under the Tribunals, Courts and Enforcement Act 2007 the Senior President of Tribunals is responsible for maintaining appropriate arrangements for the training and guidance of judges and other members of the tribunals. These judicial training responsibilities are exercised through the Judicial College under judicial direction. Ticketing – the authorisation of judicial office-holders to deal with different types of cases – is a judicial responsibility. Judges are ticketed at the discretion of the Lord Chief Justice and the Senior President of Tribunals and may need to complete specialist training if necessary.

The Employment Tribunal in both England & Wales, and in Scotland, has an established training programme. It covers points of law, procedure and good practice. The content of training is chosen in a way that responds to legislative developments and the needs of the judges as identified by the jurisdictional President[s] in consultation with a training committee. There is also extensive training on what are sometimes called 'judgecraft' skills: awareness of difference, empathy, communication challenges and other matters that ensure that the parties are provided with a fair hearing. If legislative changes are proposed to the legal tests by which sexual harassment is demonstrated, or to the procedural rules that determine the way such cases are heard, appropriate training will be provided through the existing programme of national and regional events.

WESC conclusions and recommendations

22. Access to information is an important tool for employees, and transparency is vital in ensuring that employers are held to account. Any procedure must, however, be proportionate, and there should be safeguards for employers against pernicious or careless use that elicits too much irrelevant information. A more tailored version of the statutory questionnaire, which previously enabled employees to request information about a potential discrimination claim, could achieve this. *The Government should introduce a statutory questionnaire, consulting on whether standardised questions specifically for claims in which sexual harassment is alleged could be developed.* (Paragraph 101)

Government response

Statutory questionnaires were introduced with the Sex Discrimination Act 1975. The intention was that they would act as a method by which employees or former employees who felt they had been discriminated against could ask simple questions of their employer or former employer to help them decide whether they should bring a case. The questionnaires, and the ability of tribunals to draw inferences from a late, non-existent or evasive response, had no parallel elsewhere in employment law and were, in part, meant to address a general lack of awareness in the 1970s of what constituted unlawful discrimination.

As the Committee notes from the evidence it received, the questionnaires, as a form of pre-hearing disclosure, became a legal battle between potential claimants and employers, with both parties often using lawyers to prepare the questions and answers. To some extent this process is inevitable where the questionnaires have statutory force and direct legal implications. We do not see the reintroduction of statutory questionnaires as appropriate to present day conditions, and do not see it as viable to try to tailor the questionnaires in such a way as to prevent them being used as pre-hearing legal exchanges.

A non-statutory process continues to exist, with Acas guidance available for employers and workers to aid the asking and answering of questions in advance of issuing a formal claim where unlawful discrimination, harassment or victimisation is suspected. This guidance is available at: www.acas.org.uk/media/pdf/m/p/Asking-and-responding-to-questions-of-discrimination-in-the-workplace.pdf. The guidance makes it clear that an employer should treat any such questions seriously and promptly, and the information gathered as a result can form part of the evidence in a case brought under the Act. Additionally, tribunals can take account of employers' behaviour and cooperativeness when reaching a judgement.

WESC conclusion and recommendations

23. A toxic organisational culture or poor management practices have the potential to make sexual harassment, along with other types of workplace discrimination, more prevalent. The ability of tribunals to make wider recommendations that draw on the lessons of individual cases to encourage a joined-up organisational response could have an important part to play in tackling these factors as part of a scheme of wider changes. *The Government should consider reintroducing tribunals' powers to make wider recommendations to employers in discrimination cases.* (Paragraph 105)

Government response

As referenced by the Committee, Employment Tribunals previously had the ability to make wider recommendations in cases relating to the Act. With the introduction of a statutory Code of Practice on sexual harassment (as set out under recommendation 16) there will be far greater clarity on what is expected of employers and this will have a statutory basis. Reintroducing these powers – which were not, at the time, considered to be particularly effective – should not therefore be necessary.

WESC conclusion and recommendations

24. The use of non-disclosure agreements (NDAs) must be better controlled and regulated to ensure that they are not used unethically in cases where sexual harassment is alleged. It is vital that employees have access to information about the responsible and legal use of confidentiality clauses and that lawyers are held to account for using or attempting to use such clauses in an unethical way. We are encouraged that the SRA has issued guidance on reporting sexual harassment and the use of NDAs in sexual harassment cases and hope that the Bar Standards Board and the Bar Council also issue guidance. However, the regulators must also demonstrate that members of the legal profession will face serious sanctions if they sexually harass clients or colleagues or if they misuse NDAs to silence victims of sexual harassment. (Paragraph 130)

25. *The Government should legislate to require the use of standard, approved confidentiality clauses. These should include clear, plain English wording setting out the meaning, effect and limits of confidentiality clauses, including a clear explanation of what disclosures are protected under whistleblowing laws and cannot be prohibited or restricted.* (Paragraph 131)

[See 26 below.]

27. *The Government should make it an offence for an employer or their professional adviser to propose a confidentiality clause designed or intended to prevent or limit the making of a protected disclosure or disclosure of a criminal offence.* (Paragraph 133)

28. *Use of provisions in confidentiality agreements that can reasonably be regarded as potentially unenforceable should be clearly understood to be a professional disciplinary offence for lawyers advising on such agreements.* (Paragraph 134)

Government response

The Government recognises the Committee's concern over the unethical use of non-disclosure agreements (NDAs). In its evidence to the Committee, the Government highlighted the existing statutory rights that workers retain, even when they have signed an NDA. However, we agree that individual workers may not be aware of these rights, and so can be intimidated in pursuing claims of sexual harassment even where the NDA is unenforceable.

The Government therefore agrees with the Committee that NDAs require better regulation and a clearer explanation of the rights that a worker cannot abrogate by signing one. Particularly that workers have the right to make a public interest disclosure and to take a matter to an Employment Tribunal (unless this has been specifically waived by a valid settlement agreement). The Government also agrees that any explanation to workers must be clear. We will consult on the best way to achieve this, including the Committee's recommendation of a standard approved confidentiality clause.

As part of this consultation, the Government will consider how best to enforce such a requirement. The Government believes that making it a criminal offence to propose an NDA that is unenforceable, as the Committee recommends, could be difficult to enforce. However, the Government will likewise consider and consult on enforcement approaches.

Regarding the proposal to make advising on the use of potentially unenforceable provisions in confidentiality agreements a disciplinary offence, the legal profession in the UK is independent of government. Under the framework set out in the Legal Services Act 2007, lawyers in England and Wales are regulated by one of the ten approved regulators, which are in turn overseen by an independent oversight regulator, the Legal Services Board. In practice, most solicitors and solicitors firms are regulated by the Solicitors Regulation Authority (SRA), the regulatory arm of the Law Society of England and Wales, and similarly, most barristers are regulated by the Bar Standards Board (BSB), the regulatory arm of the General Council of the Bar (the Bar Council). The regulatory arrangements in both Scotland and Northern Ireland are different, as legal services are a devolved matter.

We are aware that the legal services regulators in England and Wales are already taking this matter seriously, and strongly encourage them to do so.

As noted in the committee's report, in March this year the SRA published a Warning Notice, reminding solicitors and law firms that potential professional misconduct by a person or firm should be reported to the regulator, and that NDAs should not be used to prevent people reporting wrongdoing to the relevant authorities, such as the police or a regulator.

In the light of apparent inconsistency in the understanding of when to report a concern to the SRA, it has recently consulted on changes to its Codes of Practice to ensure reporting obligations are clear. The consultation closed in September. The SRA is also planning to issue further guidance and warnings to the regulated community, making it clear that potentially unenforceable provisions are a breach of regulatory requirements. In this work the SRA is working closely with the representative body, the Law Society of England and Wales, to make sure that any guidance issued by the Law Society is fully lined up with the regulator's position.

In July, the SRA published its annual Risk Outlook, which included a reminder over the inappropriate use of NDAs. This made clear that it was important that NDAs should not be drafted in such a way as to suggest that a person may not report misconduct to a regulator or a law enforcement agency, or may not make a protected disclosure. This also contained a warning that the SRA will take action against any firm that uses NDAs to cover up criminal activity or serious professional misconduct.

Law firms that include unenforceable terms in contracts they draft may also face allegations of misleading, or taking unfair advantage of, the other party.

While we understand that barristers are less likely to be drafting NDAs than solicitors, the BSB is planning to issue new guidance on NDAs and to review the relevant sections of its handbook. The BSB is already working in partnership with the Bar Council and the profession on this issue.

The legal services regulators have a joint information website for the public, 'Legal Choices.' In early September, this website was updated to include new help and advice on reporting sexual harassment. The regulators are also involved in wider discussions about tackling these issues through their joint regulators forum, and through participation in events such as a recent Equality and Human Rights Commission roundtable.

26. *The definition of protected disclosures and prescribed persons under whistleblowing legislation should be widened to include disclosures of sexual harassment to the police and all regulators including the Equality and Human Rights Commission and Health and Safety Executive and to any court or tribunal. (Paragraph 132)*

Government response

The Government routinely considers whether additional bodies should be added to the list of ‘prescribed persons’ for the purposes of employment protections for whistleblowers. The Government believes that the right body to investigate the concerns of a whistleblower is generally the body that regulates the issue about which concerns are raised. That body is in the best position to see the disclosure in context; for example, to judge the seriousness of the allegations, to make connections with any related investigations underway and to consider whether some regulatory action is appropriate to prevent reoccurrence. We are not persuaded that there is a need to prescribe every court or tribunal. However, we agree with the Committee that there is clear value in having the EHRC prescribed and we will make this change at the next regular update. We can see the potential advantages in adding the police to the prescribed persons list, but we need to think through the wider implications that this could have for the police so will consider this further in detail. We will consider the need to add other regulators as prescribed persons for sexual harassment disclosures in the light of wider engagement with regulators on this issue. HSE is already a prescribed person.

We believe that the employment protections for whistleblowers can already cover disclosure of workplace sexual harassment. Under section 43B of the Employment Rights Act 1996 (as amended), qualifying disclosures include disclosures showing that a person has failed to comply with any legal obligation. That includes employers’ legal responsibilities under the Equality Act 2010

WESC conclusions and recommendations

29. It is crucial, if we are to gauge the effect of actions being taken now to stamp out sexual harassment in the workplace, that robust and comparable data is collected at regular intervals (Paragraph 139)

30. *The Government should collect data on the number of tribunal claims submitted involving allegations of harassment of a sexual nature and the outcome of such claims. As tribunal data alone tells only a small part of the story, the Government should commission large-scale surveys at least every three years to determine the prevalence and nature of sexual harassment in the workplace. The findings of each edition of the survey should be accompanied by an evaluation of measures taken in the preceding period to tackle sexual harassment, and an action plan responding to the findings.(Paragraph 140)*

Government response

Data is vital to understanding the challenge we are facing and identifying the best ways to address it. The Government therefore agrees with the recommendation to gather regular data on the prevalence and nature of workplace sexual harassment, and we will commence work to scope and commission a survey to deliver this which will run at least every three years. We expect to be able to launch our survey questions in 2019.

In addition, the Ministry of Justice is currently exploring what data it might be possible to collect in the future through the planned replacement of the Employment Tribunals' computer system.

The design team for the replacement IT system is considering the recommendation of the Select Committee, and design and testing of the system is currently underway. This investigative period – which will last a number of months – will enable us to have a more concrete understanding of the level of data that can be collected, and allow us to consider ways we can better capture data from the Employment Tribunals, including discrimination on all grounds, so we are better equipped to develop appropriate policy.

In considering this, however, we are conscious that the process for capturing allegations of sexual harassment is likely to be complicated. These cases do not have a separate code and are currently recorded as part of the wider sexual discrimination code. This code includes indirect and direct discrimination, harassment and victimisation on ground of sex, marriage and civil partnership or gender reassignment. We will look at how data might be captured beyond the current jurisdictional codes, however, manual collation would rely on tribunal staff, who are not legally qualified, making a decision as to whether a case involved sexual harassment or not when originally inputting it into the system. We will, however, consider ways in which this might be overcome.