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Sexual Harassment & Employment Law

Employment Lawyers Association ('ELA')

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SEXUAL HARASSMENT & EMPLOYMENT LAW

This paper is set out as follows:

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A ABOUT ELA

The Employment Lawyers Association ('ELA') is an a-political group of approximately 6,000 UK employment law specialists. Members include in house, trade union and private practice employment lawyers, who advise employers and employees, and represent clients in Courts and Employment Tribunals. ELA does not lobby on behalf of third parties or comment on the political merits of proposed legislation. However, ELA is happy to share legal and practical insight gained from our experience as employment lawyers.

B PURPOSE OF THIS PAPER

1. This paper is intended to provide information and insight to those considering potential change to employment laws and practices related to workplace sexual harassment. The paper offers some commentary on current laws and their impact, in practice, on victims, perpetrators and employers. It is further informed by a limited survey of our members completed on 20 July 2018, to which 464 ELA members responded (8% of those included in the survey). Please note that this paper is not intended to provide a comprehensive overview or review of sexual harassment law, but simply to contribute to current debate.
2. There are a number of reviews, initiatives and bodies currently focused on sexual harassment at work including, for example, the Parliamentary Women & Equalities

Committee inquiry into sexual harassment in the workplace, the Law Society, the Solicitors Regulatory Authority ('SRA'), the Equality and Human Rights Commission ('EHRC') and the Advisory Conciliation and Arbitration Service ('ACAS'). This paper is intended to complement and assist those bodies and reviews, and there is naturally some overlap between the content of various reports and contributions and this paper. In particular, the paper submitted by employment and partnership lawyers, CM Murray LLP, to the Women & Equalities Committee inquiry offers some helpful perspectives on employment law and sexual harassment. As discussion develops we anticipate that this ELA paper may need to be updated and/or replaced.

3. It should be noted that whilst ELA members have, in many respects, differing views, responses to ELA's Survey from claimant and respondent-focused lawyers were markedly consistent in many areas.

C CONTEXT

1. Responsibility for sexual harassment

Responsibility for sexual harassment in the workplace rests squarely with perpetrators. Attention given to the role of employers below reflects the significance of employers in preventing sexual harassment and in dealing with incidents and allegations as they arise. This focus should not give the impression that sexual harassment is typically perpetrated by, or actively supported by, employers. It is acknowledged that many employers work hard to eradicate harassment within their organisations. Similarly, lawyers advising employers typically work hard to encourage best practice.

2. Definition of sexual harassment at work

- 2.1 It is worth highlighting from the outset that 'harassment' has a different, broader, meaning in an employment law context to that understood by the general public.
- 2.2 The definition of harassment set out in s26 Equality Act 2010 is quite long and complex, and has been interpreted through case law. Essentially, the Equality Act confirms that a person harasses another person 'B' where they:

engage in 'unwanted conduct related to' sex or 'of a sexual nature' and 'the conduct has the purpose or effect of' 'violating B's dignity' or 'creating an intimidating, hostile, degrading, humiliating or offensive environment for B'. The definition also covers less favourable treatment for rejecting or submitting to unwanted conduct of this nature.

- 2.3 This employment law definition goes far beyond public understanding of 'harassment' as being behaviour such as unwanted touching, stalking, sexual threats or rape. The employment law definition clearly covers matters which would not ordinarily amount to a

crime. For example, making offensive jokes may create a humiliating or offensive workplace environment for an employee sufficient to amount to harassment for the purposes of the Equality Act. This set of facts may not meet criminal law criteria required for successful prosecution.

- 2.4 The legal standard for ‘proof’ of allegations is very different in an employment context from a criminal context. Essentially, it is much easier to ‘prove’ harassment for the purposes of employment legislation. The consequences of allegations being proven are also very different.
- 2.5 In an employment context, subjective impact on the victim is important (amongst other things). So, for example, it is possible to ‘harass’ for employment law purposes without intending to do so.
- 2.6 Through a common definition, employment law recognises harassment connected to a range of ‘protected characteristics’ (including for example race, age, disability, religion and belief and sexual orientation) in a consistent way. Consistency makes advising employers and employees, predicting outcomes, fair decisions, and settling claims easier. Any attempt to change sexual harassment laws out of line with laws relating to harassment on grounds of other recognised ‘protected characteristics’ would be unhelpful from a legal perspective. ELA anticipates that any attempt to give sexual harassment preference over other forms of harassment (eg on grounds of disability or race) would be challenged vigorously by interested parties in the Courts.
- 2.7 This current employment law definition is also consistent European law and any departure from this approach is likely to be challenged (assuming European law continues to apply).
- 2.8 In practice, the current employment law definition works reasonably well and is the cornerstone of a great deal of helpful case law. From a practical perspective, an amendment to this definition may be an unhelpful distraction from focusing on prevention and would introduce a period of uncertainty. It is hard to identify changes to the Equality Act definition that would either reduce harassment directly or encourage employers and others to take steps to do so.
- 2.9 Even disregarding European law constraints, harmonisation of criminal and employment law criteria and rules would not be practical, appropriate or helpful for victims or alleged perpetrators, and would inevitably lead to ‘less serious’ harassment falling out of scope of employment legislation.
- 2.10 Essentially, ELA would not recommend any substantial change to the current legal definition of harassment related to sex for employment law purposes.
- 2.11 It is imperative that those discussing or proposing changes to laws relating to sexual harassment are clear about the type of sexual harassment they are referring to (ie whether they are referring to criminal or employment law definitions/standards). For the purposes

of this paper, ELA is referring to harassment in the employment law sense, except where expressly confirmed otherwise.

3. Liability

Amongst others, individual employees, eg perpetrators, line managers, HR managers, and employers may be liable for sexual harassment under employment law. Employers may currently defend claims on the basis that they have taken ‘reasonable steps’ to prevent harassment, for example by offering training. Both potential liability and potential for defence are important in encouraging employers and senior managers to focus on prevention and attend to training. Essentially, this potential legal liability can help focus even unwilling employers on the need to combat sexual harassment. However, if the bar for avoiding responsibility is set too high there is a risk that employers and managers may be unnecessarily stigmatised. See further below in relation to a potential code of conduct for sexual harassment.

4. Role of employment lawyers

Employment lawyers typically engage with employers and employees over sexual harassment by:

- offering advice on compliance and prevention, eg by drafting equality policies, reviewing working practices and, providing training to HR practitioners, managers and employees;
- helping claimants, employers and respondents respond to specific allegations of harassment, eg advising on an investigation, grievance or disciplinary process;
- advising on settlement of claims (typically by means of a statutory settlement agreement); and/or
- assisting with litigation.

See further below.

D POLICIES AND TRAINING

1. Equality policies and training in practice

- 1.1 Employment lawyers have considerable experience of offering equality training to employers, both to human resource specialists and to staff directly. Similarly, equality policies will often be drafted by employment lawyers (or be based on documents that have been drafted by employment lawyers.) This work appears to have had some impact in helping to change workplace culture but the quality of the training itself is not the only factor. For example, securing appropriate internal ‘business sponsors’ can be important and the frequency of training, implementation of policies and relevance of policies to the particular workplace and group of employees can make a difference.

- 1.2 Rigorous academic research into the practical impact of various types of training and policy would be helpful to inform employer choices, and the advice of employment lawyers, although, in practice, this is difficult in the absence of accessible and reliable statistics relating to sexual harassment allegations, claims and outcomes.
- 1.3 In practice, employment lawyers often observe that employers are more open to suggestions after they have experienced the stress, wasted management time, expense etc of a claim.
- 1.4 Cultural change can take time and, to some extent, employers ‘inherit’ the attitudes of those they recruit. 283 respondents to ELA’s survey confirmed that they would be willing to help if a group of employment lawyers were to offer training to school children on workplace rights and responsibilities, including sexual harassment.
- 1.5 There appear to be marked differences in attitudes between different sectors, job types, professions, sexes, age-groups etc. Employment lawyers will typically adapt equality training to audience. For example, training related to recruitment practices might not be appropriate for junior administrators, whereas training on raising concerns might be appropriate for a broad audience.

2. Potential introduction of mandatory harassment policies

Requiring the application of rigid, mandatory harassment policies for employers is unlikely to be helpful. For example, because that would side step the educational benefits for employers of working on policies, and the thought and commitment that is required to adapt policies to a particular workplace. A new code of practice is likely to be more helpful than rigid policies, see further below. The reality is that employees do not always read policies, and employment lawyers observe that it is not so much having documents but doing something with them that makes the difference.

3. Specific workplace sexual harassment training

- 3.1 It is notable that equality training and policies do not always focus explicitly, or in detail, on sexual harassment. This is unfortunate as it is apparent that perpetrators and victims often have different ideas about the sort of behaviour that amounts to harassment. This is something that employment lawyers and employers could work together to improve.
- 3.2 Limitations should also be acknowledged: many perpetrators harass individuals deliberately and are either fully aware of what they are doing, or recklessly disregard the impact on the victim. Training may not directly impact on perpetrators’ behaviour but may still help empower colleagues, managers and victims to speak up and take action.

E RESPONSE TO INCIDENTS

1. Early reporting

Frequently concern is raised that reports of sexual harassment are not made (or dealt with) early or often enough, for example before harassment becomes more serious or whilst there is still an opportunity to deal with matters informally. By the time victims approach lawyers, it is often too late for them to 'save' their relationships and the attitudes of managers can become entrenched. Many victims end up leaving their employment. 46% of respondents to ELA's survey indicated that where a formal grievance or complaint about sexual harassment was raised employees 'rarely' remained in their role, whilst a further 51% indicated that complainants 'sometimes' remained in their role. (This may not give a clear picture of how this works in practice given that the formal complaints reaching lawyers may not be representative of all workplace complaints, and it seems likely that those reaching lawyers are at the more serious end. Nevertheless, survey and anecdotal evidence from employment lawyers is depressing.)

2. Retaliation

2.1 Raising a formal grievance brings with it a risk of retaliation (victimisation), and if that happens the impact on the victim can be severe. This is something that employment lawyers will naturally warn both claimants and employers about when incidents arise. Nevertheless, reaction is a common human response to complaints, and even well-supported and diligent HR practitioners may not be able to prevent it.

2.2 67% of respondents to ELA's survey indicated that where they advised employees or employers on sexual harassment the complaints typically related to a more senior or powerful individual, whilst only 3% indicated that this was not usually or never the case. Employees who make complaints are vulnerable. This is something that is, to some extent, unavoidable, but which employers and lawyers could work to improve. Senior sponsorship of policies, reporting and claimants is likely to be important but this is not something that can easily be developed simply by changing the law. (See below on a potential code of practice.)

2.3 In many cases victims will choose to endure harassment or seek alternative employment, rather than make internal reports or raise claims. This will be the case for many who seek legal advice as well as those who choose not to do so. Statistics and surveys cannot identify the extent to which this occurs but employment lawyers, naturally, know that it does occur to some extent through their own work.

2.4 Bringing any kind of discrimination claim or grievance is typically stressful for the individual (much more so than those who have not been involved might imagine), and stress-related

health issues are common. There appears to be a lack of awareness of the impact of conduct of employer investigations etc on individuals. It may be that practical improvements could be made, for example by referral of investigation to more neutral investigators, training on the health-related impact of stress, offering support lines etc. This context may also inform views on the importance of freedom to speak with friends, families and medical practitioners, see further below.

2.5 The role of colleagues in providing support and advocating change to workplace practices does not appear to have been sufficiently explored. 87% of respondents to ELA's survey who advised employees thought those they advised either 'occasionally' or 'never' felt they were supported by colleagues (including HR). Some of these things can be addressed by raising awareness, training etc but the cultural shift required to allow victims (and accused) to raise concerns with colleagues (and colleagues to support them) safely is not something that law can deliver in isolation.

3. **False and malicious claims and protection for alleged perpetrators**

3.1 Responses to ELA's survey suggest that false and malicious claims are not common. 64% of respondents to ELA's survey advising employers, and 87% of those advising employees indicated that less than 5% of claims they advised on where a settlement agreement was concluded were false or malicious. However, even if the figures are not so high as for genuine complaints, the potential impact of claims on alleged perpetrators is substantial. Damage to an individual's reputation (and relationships) cannot be undone, and there is no effective legal remedy for false accusations. Justice requires that the concerns of this relatively small but deeply affected group of victims should be considered carefully. It is also worth bearing in mind that, in practice, it is often the case that both complainant and alleged perpetrator speak their own 'truth' but that the conclusions to be drawn from conflicting perspectives may, nevertheless, be unclear. Third parties may also find it hard to distinguish between an individual who has been found 'guilty' in an employment context given the issues with standards of proof, broad definition etc highlighted above and an individual guilty of criminal sexual assault.

3.2 It should be reiterated that, in an employment context, allegations are not normally proven to a criminal standard. For example, in an employment context a manager conducting a grievance hearing may simply think one employee's oral evidence is more reliable than another's. This relatively low standard of proof should be taken into considering when debating the extent to which formally recording allegations and internal decisions is appropriate and should be made public.

4. **Potential professional sanctions**

4.1 The above should also be born in mind if proposals are made to facilitate more severe professional sanctions for perpetrators and their employers.

- 4.2 There is often a practical need for quick ‘rough justice’ in the workplace, in preference to ‘no justice’ or ‘slow justice’. Whilst raising the stakes would clearly encourage regulated employers to focus on addressing problems, this may also limit freedom to take practical steps to resolve things informally at an early stage.
- 4.3 The possibility of more severe potential professional sanctions for harassment that does not meet criminal standards could also have an impact on employees coming forward to raise relatively minor concerns. (Early raising of concerns is generally accepted to be helpful in allowing HR, managers and employees an opportunity to find informal resolutions before problems escalate.)
- 4.4 Processes for reporting and/or determining professional sanctions; standards of proof required for reporting and sanction; and opportunities for alleged perpetrators to participate, appeal etc will be important considerations. It is important to appreciate that professional sanction can have a devastating and potentially permanent effect on an individual’s career.
- 4.5 An additional consideration for the legal profession (by contrast, for example, with regulated financial services) is the need to give due consideration to the value of legal privilege to clients and the public. Imposition of reporting obligations on solicitors in relation to matters that concern clients’ conduct should be considered carefully, particularly if other approaches are available. (Privilege is not, of course, a special consideration in relation to harassment taking place in law firms or chambers and should not apply to the text of a settlement agreement that has been concluded).

F SETTLEMENT AGREEMENTS AND CONFIDENTIALITY

1. Current role of settlement agreements

- 1.1 Before considering whether legislation relating to settlement agreements should be amended, it is important to understand the pivotal role settlement agreements currently take in the context of a variety dispute types. Changes to legislation and required practices could affect large numbers of victims, employees, employers, witnesses and perpetrators.
- 1.2 It should be recognised at the outset that any form of redress for sexual harassment is likely to be unsatisfactory, in that sexual harassment that has taken place cannot be undone. Also, that the impact on victims (and accused and employers) can vary considerably. Many victims suffer serious health problems and potential future employment and income disadvantages as consequences of harassment. The impact on those (rightly or wrongly) accused of harassment can also be severe. It is important that the interests of the ‘wider public’ take into account the interests of individuals directly affected by harassment and by allegations of harassment. Those interests are not always aligned to those of the wider public. (See below on responses to ELA’s survey in respect of confidentiality particularly.)

- 1.3 In practice, victims of harassment may seek a range of outcomes including, for example, acknowledgement that the wrong has been done; an apology; to see significant change in workplace practices as a consequence of their complaint; for the perpetrator to be ‘punished’ in some way (eg to lose their job or supervisory role); for the harasser to stop doing what they are doing; or simply to move on with privacy or confidence that there will be no further negative action. These types of desired outcome cannot all be addressed by litigation or settlement agreements.
- 1.4 Most employment lawyers would agree that litigation is a last resort, rather than a desirable outcome, for victims. Victims find litigation stressful, and litigation can be disproportionately expensive. Litigation, even when successful, does not typically deliver the sense of resolution or ‘justice’ (or privacy) that litigants tend to look for at the outset. Settlement agreements help all parties to find an informal resolution without facing litigation. The primary remedy typically offered by a settlement agreement is money. Another key benefit for individuals is that the agreement can regulate the behaviour of the parties going forward. This does not typically fully meet the victim’s needs, but currently it is one of few options available to them to seek redress. At a practical level, victims who lose their jobs often find financial compensation helpful, if not sufficient to redress the wrong.
- 1.5 Examples of terms that might be agreed via a settlement agreement include:
- confidentiality, for example, that specified people will not talk about specified events, usually with caveats, eg, to allow the employee to make a ‘protected disclosure’ or discuss the events with a partner or lawyers;
 - the terms of a reference for the employee, again often subject to caveats, eg related to regulatory obligations.
 - terms restricting either, or both, parties from making derogatory, untrue or misleading statements about the other.

Further commentary on confidentiality restrictions is offered below.

- 1.6 It is important to reiterate that settlement agreements are also used in a wide range of situations which do not involve sexual harassment at all, eg redundancy, unfair dismissal, claims related to unpaid wages and for other types of equality-related claim. Careful consideration should be given to the potential impact of any proposed change focused on addressing sexual harassment on these other areas.

2. Settlement agreement – statutory requirements

For a settlement agreement to effectively settle statutory employment claims the agreement must satisfy specific requirements confirmed in various pieces of legislation and in case law. For example:

- the individual must be independently advised by a qualified person (in addition to solicitors and barristers, qualified trade union representatives may advise);

- the agreement must generally relate to the complaints made;
- the agreement must confirm in writing that the relevant settlement agreement legislation is satisfied.

It is worth bearing in mind that disputes can also be resolved via ACAS conciliation and settlement through an ACAS 'COT 3' agreement, to which different rules apply.

3. Confidentiality

- 3.1 Less than 1% of respondents to ELA's survey confirmed that they had ever advised (either an employer or employee) on a settlement agreement which included a requirement that the employee could not keep a copy of the agreement.
- 3.2 The overwhelming majority of respondents to ELA's survey confirmed that they thought freedom for the parties to agree terms related to confidentiality, references, reasons for termination etc in settlement agreements was helpful for employers (92%) and employees (82%), whilst a much lower proportion of respondents (40%) confirmed that they thought this freedom was helpful from a public policy perspective, disregarding the interests of those directly involved.
- 3.3 Only 5% of respondents to ELA's survey said that they would support a total ban on confidentiality restrictions in settlement agreements. An overwhelming majority of respondents to ELA's survey (95%) did not.
- 3.4 It is worth bearing in mind that confidentiality provisions in settlement agreements allow the parties to settle claims without admission of liability. Typically, a claimant will be much better off financially (with less risk) following receipt of compensation under a settlement agreement, than if the claim were pursued to Tribunal, where an award of compensation might be lower, the claim might be lost, legal costs are not generally awarded even to successful claimants, and the outcome will generally be public. It is also important to note that Tribunal outcomes are not accurately predictable. If freedom to settle without admission of liability were removed there would be less incentive for respondents to settle and to settle early, before substantial expense is incurred.

4. Advice to clients on the meaning of settlement agreements

Solicitors (and other qualified people) advising on a settlement agreement are already required by the legislation provided for settlement agreements to advise on the 'terms and effects' of the agreement and that advice should of course include advice on any confidentiality agreement contained in the settlement agreement. See, for example, section 203 of the Employment Rights Act 1996. For commercial reasons, the solicitor advising the claimant is almost invariably required to provide written confirmation that the solicitor has actually given that advice. More recently the Solicitors Regulatory Authority has issued a 'warning notice' to solicitors regarding their obligations in relation to confidentiality agreements.

5. Mandatory wording relating to confidentiality in settlement agreements

5.1 As highlighted above, current legislation already requires that settlement agreements include some specific information in writing (see, eg, s203 of the Employment Rights Act 1996). One option would be to amend settlement agreement legislation to require written confirmation of exemptions to any confidentiality obligation.

5.2 These might include for example the right to:

- report a crime to, or cooperate with, the police;
- give evidence to, or comply with an order by, a Court or Tribunal;
- make a 'protected disclosure' (ie those covered by whistleblowing legislation, s43A of the Public Interest Disclosure Act);
- report to, or cooperate, with a regulatory body;
- seek medical, legal and tax advice etc.

There are already some existing (limited) requirements in this regard, eg in a financial services context / related to protected disclosures. As highlighted by others, a clear list of bodies to which disclosures can clearly be made under the Public Interest Disclosures Act would be helpful.

5.3 Other exceptions commonly referred to in settlement agreements include exceptions to allow discussion with a defined partner or close family (this is normally made subject to a corresponding commitment to confidentiality) and for information that is already in the public domain (other than through the individual's breach) or order of a Court or Tribunal.

5.4 A majority of respondents to ELA's survey supported amendment to legislation to require mandatory wording relating to confidentiality in settlement agreements as a condition of enforceability. 58% thought mandatory wording should be included and 42% thought it should not be.

5.5 Respondents were more narrowly divided on whether similar mandatory wording should be required in other confidentiality agreements with employees or workers. (An example might be written confidentiality clauses in an employment contract). 53% thought mandatory wording should be included 47% thought it should not be. It is worth noting that a (limited) duty of confidentiality is normally implied into every employee's contract of employment under the common law.

5.6 Some potential pros and cons of including mandatory settlement wording related to confidentiality as a condition of an effective settlement agreement (ie an agreement that would effectively prevent the individual from making specified statutory employment claims) include the following:

- mandatory wording would be static and could not be easily adapted to suit the parties' preferences or developing case law;

- if specific wording were required less time (and expense) would be wasted on discussion between the parties (and their lawyers) over appropriate wording;
- lawyers could confidently advise on exemption wording, knowing they are recommending the 'right' wording;
- requirements could be imposed on unregulated individuals who may prepare settlement agreements for the employer (eg HR specialists) if the settlement agreement were not effective without it;

5.7 If any wording is to be imposed, consideration should be given to whether mandatory exceptions to confidentiality provisions (as above) should be imposed or whether mandatory confidentiality wording should be imposed. The latter would significantly reduce the flexibility of lawyers to help clients agree terms to fit the circumstances. For example, the parties to an employment dispute will often agree that responses to telephone enquiries to a former employer from a potential new employer must be consistent with an agreed written reference set out in the settlement agreement. This is often agreed at the request of the employee's lawyer to help the employee confidently seek new employment. For example, an employee dismissed for what the employer sees as 'poor performance', but the employee sees as 'character clash' or bullying, may seek some comfort that the employer will not destroy their chances of securing a new job by provide an unfairly critical reference.

6. Claw back clauses

6.1 A significant proportion of settlement agreements include 'claw back' clauses requiring repayment of money delivered under the terms of a settlement agreement in the event that the employee breaches any term of the settlement agreement, or breaches specified terms.

6.2 It can be argued that such clauses are void on grounds of public policy, eg because specific terms amount to an unenforceable 'penalty clause'. Interestingly, 47% of respondents to ELA's survey confirmed that they thought these clauses were not normally enforceable whilst 19% thought these clauses were usually enforceable. Clearly there is some uncertainty as to the precise effect of these clauses, and of course context, scope and drafting will be different for different settlement agreements so a clear answer may be hard to give through a survey.

6.3 It may also be that such clauses are included to 'discourage' breach rather than with a genuine expectation that they would be enforced in the event of breach.

6.4 The 'threat' of claw back, when coupled with uncertainty around the scope of confidentiality (and other) clauses has been criticised by some.

7. Other purposes of settlement agreements

When considering whether to amend or tighten settlement agreement legislation it is important to bear in mind that the majority of employment disputes do not involve sexual

harassment or 'criminal' sexual harassment. 85% of respondents to ELA's survey confirmed that they had either never advised on incidents of sexual harassment that might potentially be criminal (27%) or that less than 5% of the settlement agreements they advised on related to sexual harassment (58%). This is important because if, as most employment lawyers would assume, even without our limited survey data, settlement agreements generally relate to other things it is important that the impact on those other situations is taken into consideration when new legislation aimed at tackling sexual harassment is proposed.

8. Restricting who can sign settlement agreements for the employer

- 8.1 It has been suggested that restricting who can sign settlement agreements for the employer (eg to a statutory company director) could potentially assist victims by ensuring knowledge at a senior level of the settlement terms, perhaps making it more likely that action would be taken to prevent recurrence.
- 8.2 One potentially negative consequence is that such a formal process may make conclusion of settlement agreements less likely, and potentially lead to more litigation to be resolved by Courts and Tribunals. It would be sensible to review the practical impact of existing requirements of this type, for example in the public sector, before extending such requirements to others.
- 8.3 Respondents to ELA's survey did not support this suggestion (68%). There was very little support either for differentiating between different types of claim in this regard (eg by reference to size of employer or type of claim).

G OTHER SUGGESTIONS

1. Formal responsibilities and guidance for employers

- 1.1 81% of respondents to ELA's survey supported introduction of a non-binding statutory code of practice to guide employers, perpetrators and victims in their response to this issue.
- 1.2 The same proportion of respondents (81%) supported imposition of specific statutory duties on employers to take steps to combat sexual harassment.
- 1.3 These two approaches could stand alone or both be adopted separately. We assume that, if adopted, the scope and content of the proposals, and consequences of non-compliance, would be considered very carefully. Timing for introduction would also be important to maximise impact.

2. Reintroduction of statutory equality questionnaire procedure

- 2.1 A majority (but not a huge majority) of respondents to ELA's survey (61%) supported reintroduction of a statutory questionnaire process, either in the form adopted previously (29%) or with some modifications (32%). The questionnaire would give victims an opportunity to ask questions and a Tribunal could draw inferences from responses.

In practice, under the previous legislation allowing for this, most sensible employers would choose to respond to a statutory questionnaire. This could help, for example, by giving the victim an opportunity to request information that might assist at an early stage. For example, the employee might ask about the employer's previous claims record.

- 2.2 This could help address difficulties that claimants sometimes face in obtaining evidence from employers. Employers who anticipate being served with a questionnaire may also take steps to ensure that they can respond positively to the questions likely to be asked, eg by ensuring that they offer appropriate training to staff.
- 2.3 In practice, completion of questionnaires under the previous legislation was quite onerous for employers.
- 2.4 If questionnaires were to be reintroduced, consideration should be given as to whether they should be available for a full range of claims available under equality legislation.
- 2.5 If questionnaires are reintroduced careful consideration should also be given to the advantages and disadvantages of 'pro forma' questions. Pro forma questions would make response by the employer easier but would be less useful to employees seeking particular information needed to make a claim, or to decide whether to make a claim. Timing may also be important.

3. Time limits

- 3.1 There has been some discussion over the short time limits for making claims for sexual harassment under employment legislation to an Employment Tribunal. This can be challenging for claimants, particularly those whose health and strength have been affected by their experience. However, a narrow majority of respondent's to ELA's survey thought that the time limit should remain at 3 months (52%).
- 3.2 Examples of arguments for and against extension include the following:
 - claimants find making claims stressful and being pressed to take action quickly may have an adverse impact on health, outcome or ability to meet time limits;
 - short time limits force the parties to address matters while recollections are relatively fresh and evidence is more easily available;
 - short time limits may disrupt settlement negotiations, depending on context;
 - short time limits may sometimes prompt quicker resolution.
- 3.3 The availability of a discretion to extend time limits does not give the same comfort to a claimant as a longer certain time limit. Prudent lawyers will usually err on the side of caution and deliver by a reliable deadline when they can, rather than rely on a possible exercise of discretion.

4. Record keeping

4.1 A majority of respondents to ELA's survey (54%) did not support introduction of a mandatory register of sexual harassment allegations.

4.2 If such a requirement were introduced there are a variety of approaches that might be adopted. Careful consideration should/could be given, eg, to:

- the purpose(s) of such a register;
- who would be able to access such a register and how they would do so (Respondents to ELA's survey indicated that prescribed managers, Tribunals and possibly regulatory bodies could be given access, with differing degrees of support. There was no obvious support for differentiating between large and small employers. Very few (7%) supported public access to the information and it should be reiterated that the majority (54%) did not support introduction of such mandatory requirements at all);
- the interests of alleged perpetrators who may not have been found 'guilty' or been given an adequate opportunity to respond (see above), and of victims who may value their privacy;
- data protection laws;
- whether a mechanism for anonymous reporting of the subject matter of settlement agreements (eg by lawyers or employers, or both) might be appropriate;
- whether copies of settlement agreements concluded, rather than allegations, should be retained, and made available for inspection for specified purposes;
- whether data relating to Tribunal decisions on sexual harassment could be more effectively gathered.

4.3 This is a complex topic not well suited to analysis by survey and any proposals should be very carefully considered.

4.4 As indicated above, settlement agreement legislation typically requires that the agreement should relate to the particular complaints made. In practice, this is often done by including a long list of all the claims the employer can possibly think of, rather than by careful articulation of the claims that have actually been raised by the claimant. Requiring that employers stick to the wording of current legislation when setting out claims would help with the collation of statistics. (This would probably require some change to legislation as there is existing case law in this area).

5. Volunteers

The majority (88%) of respondents to ELA's survey supported clear extension of employment sexual harassment legislation to volunteers (in addition, eg, to paid employers, workers and those who provide personal services).

6. Professional conduct

Evidence given by Zelda Perkins to the Women & Equalities Select Committee has prompted some considerable re-focus on ethics, specifically the way that solicitors' conduct requirements interact with confidentiality provisions. At the time of writing, a 'warning notice' to solicitors has been issued by the SRA and guidance aimed at the public and lawyers is the subject of consideration by the Law Society, SRA, ELA and other interested parties.

Law firms, the SRA and the Law Society all help solicitors understand their ethical obligations. As a members' association, ELA is not required to provide ethics training to members but has voluntarily included or referred to ethics in its training programme, to some extent. 81% of ELA's survey respondents supported inclusion of ethics training focused specifically on employment lawyers in ELA's programme.

7. Personal injury

Further consideration might be given to the interaction of personal injury laws and employment laws where damage to health has been caused by sexual harassment (and in other circumstances), including the extent to which it is appropriate to settle personal injury claims via a settlement agreement.

8. Damages

It would be possible to provide for aggravated damages or other additional penalties in cases where there is evidence of previous complaints of sexual harassment made against the same individual and the employer has failed to take action.

9. Third party harassment

75% of respondents to ELA's survey supported reintroduction of specific statutory protection against harassment by third parties. (For example, sexual harassment of an employee by a customer.)

10. Access to legal advice for claimants

Access to legal advice at reasonable expense is a serious problem for claimants, and this is something that requires ongoing consideration along with other access to justice issues. Employers can also find legal costs difficult to bear but typically have greater resources. In practice, the parties do not typically have equal access to advice. Alternative ways of funding support for claimants include pro bono support (eg as currently offered in a limited way by ELIPs or FRU), contingency fees, legal aid, EHRC, insurance etc, none of which currently provides sufficient support for sexual harassment-related employment claimants. Legal costs are generally irrecoverable in the Tribunal even if the claimant wins and, where a

claimant is properly represented, may be disproportionate to sums awarded at Tribunal. Public policy considerations may warrant differential treatment for this type of claimant. For example, action by the EHRC could have considerable dissuasive impact beyond the particular case supported.

CONCLUSIONS

As highlighted at the outset, the purpose of this paper is to inform debate rather than to promote suggestions for legislative change, and particularly to highlight the way that employment laws relating to harassment currently operate in practice. ELA would like to highlight the following:

1. Whilst the law is important, the prevalence of sexual harassment to a large extent depends on workplace culture and the behaviour of individual perpetrators and employers. It can be tempting to assume that changing the law will 'make a difference'. Changing the law is often easier than addressing underlying problems – it is within legislator's control, whereas the behaviour of individuals is not. Whilst changing the law is not a 'quick fix' to this problem there are areas where improvement might be made. That is the area where ELA's members have particular expertise and this paper therefore naturally focuses on the narrower legal context.
2. Legislators may, eg, consider introducing the following and, if they do so, further work should be done to ensure that the decisions made are appropriate:
 - a. introducing mandatory wording for inclusion in settlement agreements (ie without which the agreement will not be enforceable) to make the restrictions on the scope of confidentiality agreements clearer, and possibly mandatory wording for inclusion in other types of confidentiality agreement intended to bind employees and workers;
 - b. introducing mandatory duties to take steps to combat sexual harassment;
 - c. introducing a code of conduct for employers regarding prevention and management of sexual harassment allegations;
 - d. re-introducing a statutory questionnaire procedure.
3. Legislators should be cautious in proposing changes to legislation that may potentially have far-reaching and unexpected consequences for claimants, employers and those accused of harassment. Eg the potential impact of new professional penalties or reporting requirements; and on the ability to individuals to secure new employment or reach a negotiated settlement without admission of liability or litigation should be considered carefully.

4. Settlement agreements and confidentiality agreements are used in a very wide range of situations, a small proportion of which relate to sexual harassment, and an even smaller proportion of which relate to matters that might be considered 'criminal'. It is important that changes focused on a small proportion of claims takes account of the wider impact on other types of employment dispute.

Employment Lawyers Association

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