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Government Equalities Office ("GEO") Consultation on Sexual Harassment in the Workplace

Response from the Employment Lawyers Association ("ELA")

2 October 2019

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About ELA

The Employment Lawyers Association ('ELA') is an a-political group of approximately 6,000 UK employment law specialists, including in house employment lawyers, trade union lawyers and private practice lawyers who advise employers and employees, and represent clients in Courts and Employment Tribunals. ELA's volunteers do not lobby on behalf of third parties or comment on the political merits of proposed legislation. However, we are happy to offer legal and practical insight gained from our experience as employment lawyers. ELA has no role in regulating the conduct of employment lawyers. (These functions are carried out by the Law Society and Solicitors Regulation Authority.) ELA's Legislative & Policy Committee includes Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation.

A standing committee has been set up by ELA's Legislative and Policy Committee to respond to consultations on sexual harassment in the workplace. The members of the standing committee are listed at the end of this paper.

Introduction

Since the Me Too movement, which included women form around the world sharing their stories of workplace sexual harassment, there has been a focus on whether the law in Britain adequately protects workers from harassment and discrimination.

There have been a number of consultations and enquiries into the current legal protections, the use of settlement agreements in these types of claims and whether reform is needed in any area to ensure that workplace harassment (alongside other forms of discrimination) is addressed.

The responses below set out the views of a small number of employment practitioners who are part of a committee reviewing harassment and related discrimination reforms. The committee is made up of a cross-selection of legal advisers to reflect the broad constituency of ELA. The committee includes legal advisers from public and private sector, different geographical locations, advisers to individuals or companies as well as a blend of both. The responses below are to set questions posed by the Government Equalities Office and do not represent the totality of ELA's views on this subject. Our consultation responses on related matters are published on our website.

In summary, the ELA standing committee responding to this consultation are largely in favour of a mandatory duty to prevent harassment (and possibly also extended to discrimination) provided that the right to individual enforcement is limited to those with a related claim under the equality legislation. There is consensus that the current legal defence available to employers of taking all reasonable steps to prevent harassment/discrimination is not widely used or understood, and work is required to provide clear guidance which is easy to access by employers.

One of the more important shifts arising out of the Me Too movement is the recognition that there is little organisational oversight in many workplaces of complaints that have arisen in relation to harassment and discrimination. ELA's committee is largely supportive of a requirement that employers maintain an internal register of complaints and outcomes in order to analyse what steps they need to take to prevent future harassment or discrimination. There are clear concerns around accuracy of internal registers and data subject requests. However, ELA's committee does not support a requirement of external reporting at this time.

The ELA committee supports the re-introduction of legislation to protect workers against third party harassment, and to impose constructive knowledge of risk within certain sectors where concerns are widely reported. The committee accepts that a balanced approach is needed if the government were to legislate to protect volunteers against harassment and discrimination, but also considered that interns were likely to be captured within current definitions of workers already so protected.

Finally, the extension of legal time limits to bring a claim could be extended to 6 months but in practice this is unlikely to make a significant difference to claims except in relation to maternity/pregnancy cases.

GEO Consultation Questions

1. If a preventative duty were introduced, do you agree with our proposed approach? Please explain your answer.

1.1 The standing committee supports the renewed emphasis on requiring employers to focus on the prevention of sexual harassment. In a survey of ELA members (ie employment lawyers) conducted by ELA in July 2018, 81% of respondents supported the imposition of specific statutory duties on employers to take steps to combat sexual harassment.

1.2 In the view of the committee, unless the ambit of the duty is clear and the enforcement mechanisms are sufficiently robust (see responses to questions 2 and 3 below), any preventative duty is unlikely to achieve its aims. We have a number of concerns in relation to the proposed approach (as it currently stands). For example something akin to a duty of care for health and safety purposes could be considered which could then be enforced to achieve the required aim.

1.3 The proposal for a new duty which would mirror current concepts in the Equality Act 2010 that impose employer liability for harassment and require an employer to take all reasonable steps to prevent harassment of its employees, is not in line with existing obligations in the Equality Act 2010. The existing obligations require an employer seeking to raise a defence to show that it took all reasonable steps to prevent a particular employee alleged to have harassed another employee from "*from doing that thing or*… from doing anything of that description". This means that the employer can raise the defence by showing that it attempted to prevent the particular act of discrimination or that it attempted to prevent that kind of act in general. The proposed duty is wider, but what will amount to “all reasonable steps” remains unclear. Unless a prescriptive list of steps is published, what amounts to “reasonable steps” in any given circumstances will vary. One option would be to consider providing guidance by way of case studies setting out ‘best practice’ for employers of

varying sizes. This would demonstrate 'reasonable steps' that may be feasible for small to large organisations. However in practical terms this may be problematic and potentially cause opacity without clear guidance that is easy to access by employers.

1.4 Some are concerned that under the current proposals, if an employee complained that their employer had not complied with the statutory duty notwithstanding that harassment had not in fact occurred, an employer would be left seeking to demonstrate a negative.

1.5 Further, there remains a lack of certainty and clarity for employers of the current provisions under which "all reasonable steps" is a defence an employer is able to raise in sexual harassment allegations. As was demonstrated by the evidence to the Women and Equalities Committee 2018 enquiry, employers often feel unable to use the defence demonstrating that they took reasonable steps to prevent the harassment from occurring – such uncertainty is echoed by some legal professionals advising employers/clients. Therefore, to base the new proposed duty on the same principles is likely to perpetuate this uncertainty, unless more prescribed parameters are implemented. One such parameter may be an expectation that employers will retain an internal complaints register to ensure that there is a clear overview of discriminatory acts and outcomes to inform reasonable steps that may be needed, but with such internal reporting brings concerns relating to data subject access and accuracy of data. The concerns around data being collected in this way may well be unfounded given that currently the data may be collected but its location is not centralised (i.e. by being placed on HR files).

1.6 Notwithstanding the uncertainty of what constitutes "all reasonable steps" the EHRC's statutory Code of Practice sets out guidance on what may be considered to constitute "all reasonable steps". However, once again, the committee believes this is clearly lacking in the necessary certainty and clarity, thus preventing employers effectively raising the defence and in turn acting properly for the purposes of the proposed new duty.

1.7 By way of illustration in respect of the current test, it is worth contrasting the outcomes of different cases which each turned on their own facts:

1.7.1 In *Canniffe v East Riding of Yorkshire Council* ([2000] IRLR 555 EAT), the Employment Appeal Tribunal (EAT) held that where the employer/manager was not aware of any risk of inappropriate sexual behaviour or harassment by an employee (whether generally or towards another employee), it may be sufficient for the tribunal to simply ask whether there is an anti-harassment policy in place and whether it was disseminated. The EAT suggested that the analysis might be different where managers or other employees knew or suspected that there was a risk that a particular employee might act inappropriately. In such cases, it said that the tribunal should consider what else could reasonably have been done: e.g. an early warning of the alleged perpetrator or monitoring of his behaviour. However, the EAT also noted that a tribunal might conclude that in the circumstances there was nothing more that was reasonably practicable that the employer could have done.

1.7.2 By contrast, in *Quashie v Yorkshire Ambulance Service NHS Trust* (ET case number 1802401/15), an adequate policy had been disseminated but this was not enough to make out the defence. The Tribunal held that the Trust should have made it clear that the workbook (which included sections on dignity at work and equality and diversity) was very important and staff should have been given enough time during working hours to read and absorb it.

1.8 What continues to remain unclear is the 'high risk of enforcement' element and how this could be implemented in practice. From practical experience, the committee believes sanctions would have to be financial and reputational to have any substantial impact in reality. Even so, financial penalties would have to be substantial enough for employers to face genuine loss or hardship as a result of failing to comply with the duty. One can refer to the scale of financial penalties introduced by the GDPR to see the impact that the ability to impose meaningful fines can have. We do not believe the risk of reputational damage alone would be enough of an incentive.

1.9 Internal grievance procedures could be reviewed to deal with complaints in this area as a mechanism of addressing the issue. However it is not feasible to ensure that all allegations are actively pursued through the grievance procedure. An employer cannot compel individuals to formalise their complaints. The committee discussed

the centralised recording of allegations to build an organisational picture to allow 'reasonable steps' to be taken and reparative measures to put in place where necessary. From this record, patterns of behaviour can be reviewed and addressed taking appropriate steps. On the other side, some of our members express concern over the introduction of an internal register as there are data protection concerns as well as issues over the accuracy of the information recorded.

1.10 If implemented, a centralised record would form part of disclosure in employment tribunal proceedings and accordingly compile an element of establishing the 'reasonable steps' defence and this is a cause for concern for some of our members. The committee did not agree that employers should be required to self-report to the EHRC on an annual basis as this would place an undue administrative burden and adverse responsibility on employers. It was agreed that something akin to an internal 'risk register' would be more appropriate and could still provide an organisational picture of harassment complaints. Notwithstanding, external reporting to the EHRC may become a natural development once internal reporting is an established practice.

1.11 There may also be scope for using the Corporate Governance Code to compel the publication of an action plan to tackle harassment and discrimination, to be complied with or an explanation given if the action plan is not fully implemented.

2. Would a new duty to prevent harassment prompt employers to prioritise prevention? Please explain your answer, drawing on any evidence you have.

2.1 Potentially – this would be largely dependent on the consequences for failing to comply with the duty. The committee includes experienced employment lawyers who act for employer clients who are very aware of the fact that an employee is able to pursue tribunal proceedings – this in itself does not prevent employers taking action. In order to prevent harassment arising from the outset, the new duty must form part of a broader framework designed to focus on training and awareness, and form part of education and development for employers as a whole. It is to be hoped that, as with the introduction of the Gender Pay reporting requirements, imposing the duty will encourage dialogue on the issue of harassment/discrimination and place greater focus on it at board/management level.

3. Do you agree that dual-enforcement by the EHRC and individuals would be appropriate? If 'No' please explain your answer.

3.1 The standing committee does not agree – it remains cautious as to the feasibility of the proposal. Comments are as follows:

3.2 Paragraph 1.18 refers to the open question over whether an act of harassment would need to have taken place for an individual to bring a claim based on the duty or whether a claim could be raised on the grounds of the breach alone. If enforcement by individuals were permitted, it should be limited to those individuals who are bringing claims under the Equality Act. There were concerns within the committee that any broader enforcement rights could lead to speculative claims, with uncertainty as to remedy.

3.3 While enforcement by the EHRC will be important, there remains a broader question surrounding resourcing and the practicalities of enforcement. The standing committee recognises that it is difficult to find a balance regarding how wide to make the enforcement action open to individuals.

4. If individuals can bring a claim on the basis of breach of the duty should the compensatory model mirror the existing TUPE provisions and allow for up to 13 weeks' gross pay in compensation? If 'No', can you suggest any alternatives?

4.1 As discussed above, the standing committee does not support implementing proposals allowing individuals to bring a claim on the basis solely of a breach of the new duty where they do not have a related equality claim. Please see response to Q3 above.

4.2 The committee raises the possibility that individuals not subject to harassment but aware of a breach of the duty could potentially be compensated despite this being contrary to what is clearly intended by such proposals, given that 13 week's gross pay is much greater than what claimants could achieve pursuant to other heads of claims where they are directly affected. Furthermore, the compensation regime under the TUPE regulations works effectively because the affected employees are readily identifiable (in respect of the vast majority of employees) and because the steps

which the employer is required to take to comply with the TUPE regulations are well defined. The same would not be possible in respect of this proposed duty under which there is very little clarity on what would be expected of employers. In any event, we welcome clarification on the parameters of the duty.

5. Are there any alternative or supporting requirements that would be effective in incentivising employers to put measures in place to prevent sexual harassment? Please provide evidence to support your view.

5.1 Please see our response to question 15 below.

5.2 Further, as mentioned above, the standing committee is of the opinion that financial sanctions and reputational damage can be effective to prevent sexual harassment. Other measures could include:

5.2.1 The use of a central register, subject to GDPR issues being addressed and a consideration of the overarching impact of this on any individual. If a legal requirement to maintain such a register were introduced, this would ensure that there was a lawful basis for processing the personal data of individuals for the purposes of maintaining the register, bearing in mind that the data is likely to include special category data. In the absence of a legal requirement to maintain such a register, the committee considers that it could be difficult to identify a lawful basis for processing. This could possibly be circumvented by using pseudonyms, but this could render the information less useful for the purposes of discerning patterns and monitoring outcomes.) We consider that this should include allegations of harassment by colleagues and also by third parties such as customers;

5.2.2 Training and development in respect of sexual harassment awareness and/or prevention training;

5.2.3 Conducting internal impact assessments addressing quality control, audit trails and tender processes. Such assessments should form part of board member discussions and would ensure a top down approach is implemented across the business;

5.2.4 Educating employees to broaden understanding of what can be considered sexual harassment, including but not limited to the subtleties and the subjective nature of the framework;

5.2.5 Introducing regulatory sanctions;

5.2.6 Removing quality marks – e.g. Lexcel;

5.2.7 Encouraging employers and society (particularly those with a leadership role) to focus on the wider problem of bullying

5.2.8 EHRC to engage more actively, e.g. by strategically supporting action, investigation or claims;

5.2.9 Statutory duty imposed on directors to take steps to prevent discrimination and harassment in the workplace, to align with duties under health and safety legislation,

5.3 We support the proposal raised by the WEC in Sexual Harassment in the Workplace (published 25/07/2018), which suggests providing employment tribunals with the power to apply an uplift of up to 25% to compensation awarded in respect of harassment claims at its absolute discretion following breach of mandatory elements of the statutory Code of Practice on harassment in the workplace, with the Code to outline steps that an employer should take to prevent and respond to sexual harassment allegations. Such an approach mirrors the ACAS Code of Practice on disciplinary and grievance procedures, and as the EHRC notes, has helped to change employer practice.

6. Do you agree that employer liability for third party harassment should be triggered without the need for an incident? [Yes; No; Don't Know] Please explain your answer, drawing on any evidence you have.

6.1 Yes. A material amount of workplace harassment involves third parties. It would not offer adequate protection to workers if third party harassment was not prohibited and effective sanctions imposed on employers who did not take proper steps to protect staff from such treatment. The previous '3 strikes' provisions were rightly repealed because they were not effective and damaged confidence in our discrimination legislation.

6.2 There are higher risk industries and occupations, and also specific businesses can present a higher risk (for example because they have a higher incidence of complaints, or have previously been found liable for other third party harassment). It is apparent that retail and hospitality are likely to be high risk industries and constructive knowledge of risk should be presumed for such industries to take reasonable steps to prevent harassment and/or discrimination. We also recommend that all businesses are required to:

6.2.1 carry out a risk assessment and record their findings. We would expect that the GEO and / or EHRC could give helpful guidance on what this might comprise: for example, it could list some occupations which are presumed (in the absence of specific reasons rebutting that presumption) to be higher risk – such as catering, event management and bar work. It could also list factors which might lead a business to rank itself more at risk than typical businesses in its sector – such as higher rates of contact with third parties;

6.2.2 maintain an incident register, recording all allegations, findings, actions taken and any systemic changes made as a result of each incident. This register would assist employers to review their risk assessment over time, would be disclosable in any relevant litigation, and could be inspected by the EHRC if it wanted to audit employers or consider enforcement action. Litigants could undermine employers' credibility by, for example, getting evidence of historic complaints that were not recorded in the incident register. If this approach is adopted, careful consideration would need to be given to appropriate safeguards for alleged victims, accused and other linked parties.

6.2.3 appoint a named Board member (or equivalent, e.g. a partner in a partnership) with responsibility for equality and a requirement to provide an annual statement explaining the measures taken by the employer to prevent harassment/discrimination;

6.2.4 the EHRC should be empowered to publish a list of employers who are found to have failed to their statutory duty.

6.3 Recognising that an employer is less able to control the actions of third parties (or to take effective action against them), any difference in culpability could flow through

the assessment of reasonable steps, rather than when the potential liability is, in principle, capable of arising.

7. Do you agree that the defence of having taken 'all reasonable steps' to prevent harassment should apply to cases of third party harassment? [Yes; No; Don't Know] Please explain your answer, drawing on any evidence you have.

7.1 Yes. For the same reason as expressed in answer to question 6, there does not appear to be a clear basis for drawing a distinction between harassment from other members of the workforce and from third parties, where that harassment occurs in the course of someone's employment. The potential for liability to be owed by an employer, and for the employer to advance a reasonable steps defence, seems appropriate in both cases.

7.2 It seems likely that differences will emerge in what constitutes reasonable steps in respect of preventing third party harassment as compared to reasonable steps in respect of intra-workforce harassment. Given how rarely the reasonable steps defence is currently used in practice, further guidance on how it should be interpreted (and particularly whether there may be a difference in interpretation as between third party and non-third party harassment) would be helpful.

8. Do you agree that sexual harassment should be treated the same as other unlawful behaviours under the Equality Act, when considering protections for volunteers and interns? [Yes; No; Don't Know] If 'no', please explain your answer, drawing on any evidence you have

8.1 We agree with the Government's strong condemnation of not only sexual harassment but all forms of harassment in the workplace and outside of it.

8.2 To that extent, we agree that there is no basis to treat sexual harassment protections in a different manner to other forms of harassment protections related to other relevant protected characteristics (such as disability, sexual orientation, religion or belief or sex, for example, as per s 26 Equality Act 2010) when considering protections for volunteers and interns.

8.3 Similarly, and subject to our comments below, we also do not believe that there is a basis for treating protections for sexual harassment in a different manner to all of the protections as set out in Part V of the Equality Act 2010 when considering what protections should be in place for volunteers and interns.

9. Do you know of any interns that do not meet the statutory criteria for workplace protections of the Equality Act? [Yes; No; Don't know] If 'yes', how could this group be clearly captured in law?

9.1 Yes, but the scope under which the protection is offered remains unclear. As the Government recognises, there is no statutory legal definition of an "intern". Quite often they are people who obtain "work experience" from an organisation.

9.2 An internship will typically take place after an individual has completed their further education and before entering a particular profession.

9.3 We agree that many interns and those providing work experience, even if not considered employees or self-employed contractors, will have statutory protection not to suffer unlawful treatment under the Equality Act 2010 (including not to suffer sexual harassment) if they:

9.3.1 meet the criteria of providing personal services under a contract [s 83(3) Equality Act 2010];

9.3.2 or re seeking or undertaking vocational training (including by way of a work experience placement) [s 55 Equality Act 2010].

9.4 Those who will not be protected under the Equality Act 2010 include:

9.4.1 those in respect of whom there is found not to be a legally enforceable contract (either an oral contract or written one) between themselves and the entity for which they are interning/providing work experience; and

9.4.2 those exempt from being "workers" and the entitlement to be paid the National Minimum Wage (specifically, internships or work experience placements not exceeding one year undertaken by students as part of a UK-

based higher education or further education course [Regulation 53 of the National Minimum Wage Regulations 2015]).

9.5 Abuse of interns and work experience students has been a topic of concern that is wider than ensuring that such people are protected from unlawful harassment and discrimination. Principally, ensuring that those who meet the legal definition of "workers" for National Minimum Wage purposes has been a key concern of the relevant enforcing body for National Minimum Wage compliance, HMRC.

9.6 The Government has taken the view that in all but very exceptional circumstances an individual undertaking work in a trial lasting more than one day is likely to be entitled to be paid the National Minimum/Living Wage. Similarly, ACAS and HMRC has issued guidance to employers as to the criteria by which they would expect individuals to be treated as "workers".

9.7 The Government's recent appointment of Matthew Taylor, author of the 2018 Good Work Report, as Interim Director for Labour Enforcement from 1 August 2019 is a positive step in ensuring that all those who should be paid not only the National Minimum/Living Wage, but who also will therefore be entitled to protections under the Equality Act 2010 should minimise the risk that there are interns/those providing work experience who are not protected.

9.8 We consider focussing efforts on ensuring individuals providing any form of personal service that is outside of an experience in which they are gaining work experience is a more effective way to ensure that this category of individual is also not subjected to an abuse of power in the form of unlawful harassment or discrimination.

9.9 If the Government accepts the recommendation that employers have a statutory duty to prevent sexual harassment in the workplace, we consider that such duty should extend to all those attending an employer's workplace to provide work in accordance with s 83 Equality Act 2010 or to receive work experience/work shadowing.

10. Would you foresee any negative consequences to expanding the Equality Act's workplace protections to cover all volunteers, e.g. for charity employers, volunteer-led organisations, or businesses? [Yes; No; Don't Know] Please explain your answer, drawing on any evidence you have.

10.1 Yes. This could undermine the nature of volunteering, create practical barriers and additional costs for charities and other organisations in which volunteering occurs. We set out why we have these concerns further below.

10.2 As with interns, volunteers who are found in law to be "workers" gain protection not only to be paid the National Minimum Wage, but also to not be subjected to unlawful discrimination and harassment under the Equality Act 2010. This is subject to their not being a "voluntary worker", a specific category of volunteers who are exempt from being entitled to be paid the National Minimum Wage [s 44 National Minimum Wage Act 1998].

10.3 We would draw the Government's attention to the number of protections already available to volunteers and interns such as the:

a) protection from discrimination under Part 3 of the Act;
b) general harassment provisions in Section 26 of the Act
c) safeguarding legislation, e.g. Safeguarding Vulnerable Groups Act 2006;
d) vicarious liability of employers under tort law; and
e) protection under the Protection from Harassment Act 1997.

10.4 Despite these protections, the committee recognises that the current legal framework requires an undesirable and, at times, complicated analysis of what legal protections are afforded to individual volunteers and interns. This undesirable complexity detracts from what the committee believes the key focus on reform should be, which is preventing all those in a workplace or voluntary organisation being subjected to unlawful harassment and discrimination.

10.5 However, giving additional rights to volunteers clearly needs to be carefully balanced with the charitable sectors increased responsibilities, and the impact of those additional burdens.

10.6 We are concerned that if the protections under the Equality Act are offered to all volunteers, it may result in the reduction of services required by them in an attempt to reduce the potential liability associated with engaging volunteers. It could also undermine or deter many ad hoc volunteering initiatives due to fear of the potential consequences and the need for leaders of such initiatives or the organisations to take responsibility.

10.7 The standing committee is of the view that more effective means by which volunteers/interns not protected by the Equality Act 2010 could be appropriately protected is by employers, as well as organisations registered with the Charity Commission, to take steps as recommended in the responses to Questions 5 and 15 in this paper.

10.8 Specifically, the following:

- allowing a volunteer or intern not covered by the Equality Act 201 to raise concerns which will be placed on the internal register as evidence against the organisation's defence of reasonable steps;
- displaying signs of the organisation's zero-tolerance approach to unlawful harassment and discrimination; and
- trustees/directors of charities and voluntary organisations having a duty to prevent harassment in their organisations and to show the steps they have taken in compliance with those duties;

would, in the committee's view, provide more effective protection. It would provide protection that the committee hopes would avoid the need for the undesirable and complicated analysis referred to above in respect of what an individual's legal protections based on their individual circumstances may be.

11. If the Equality Act's workplace protections are expanded to cover volunteers, should all volunteers be included? [Yes; No; Don't Know] If 'no', which groups should be excluded and why?

11.1 We do not think that all volunteers should be included, particularly those who meet the definition of "voluntary worker" in the National Minimum Act 1998.

11.2 There is a wide range of volunteering opportunities available across the UK and as such the arrangements and the frequency of the volunteering depend on the organisations and their needs. We recognise that there are organisations which require regular volunteers' support (for example CAB) and those who only require assistance from time to time or once a year (e.g. around Christmas time). In our view, only organisations that require "regular" support should be subject to scrutiny offered under the Equality Act. It will be for the legislator to specify the definition of "regular volunteering". It may also be helpful to consider introducing additional protections within organisations who employ a certain number of people in addition to having volunteers as they may be better placed to take steps to ensure their entire workforce (including volunteers) are covered under equality practices.

12. Is a three-month time limit sufficient for bringing an Equality Act claim to an Employment Tribunal? [Yes; No] Please explain your answer, drawing on any evidence you have.

12.1 The Committee has a range of views in relation to this question.

12.2 The Committee recognises that there are some circumstances in which the three month time limit can be challenging. These can include, for example, where a discriminatory act arises in the course of an ongoing employment relationship (where an employee may be concerned about preserving that relationship and may therefore be reluctant to raise a claim promptly) or where the claim relates to pregnancy or maternity discrimination (as to which, see our response to question 13).

12.3 The three month time limit can also present a disadvantage when it pushes a claimant to bring a claim prematurely in order to protect their position – e.g. when a grievance process is ongoing, and where it is hoped that the grievance process might resolve

matters without recourse to legal action. In that scenario, filing a claim before the process is exhausted may negatively impact the dynamics between the employee and employer and undermine the efficacy of the grievance process.

12.4 Nevertheless, we see the merit in having consistency of time limits across a range of employment claims (with one limited exception, to which we refer in response to question 13) and we foresee difficulties in seeking to set time limits which differ by reference to employees' circumstances (e.g. a longer time limit in circumstances where employment is ongoing or a grievance process is underway, as compared to the time limit that would apply in circumstances where employment has ended). We also consider that it would be difficult to identify a longer time limit which would overcome the possible prejudice to claimants identified above, whilst balancing the desirability for certainty and for matters to be resolved within a reasonable period.

12.5 We note that, in practice, the three month time limit will usually exceed three months because of the ACAS early conciliation period.

12.6 Where a claim has not been presented within the time limit, our experience is that extensions are typically granted. However, we consider that it would be helpful if the Employment Tribunal were to issue further guidance on the factors that Tribunals commonly take into account when exercising their discretion to extend time (with a particular focus on harassment claims), in order to provide reassurance to claimants and their advisers. Greater awareness amongst claimants of their ability to file a claim and then request a stay to allow a grievance process to conclude would also be beneficial. Presidential Guidance may be a practical solution to both of these points.

12.7 Notwithstanding, other committee members consider that a time limit of 6 months in line with Equal Pay and Part 3 EA claims would be a practical solution. ELA's submission earlier this year to the Law Commission on its review of Employment Hearing Structures deals with our position as to increasing time limits; and it is understood that the Law Commission may recommend an increase in time limits for all ET claims to six months.

13. Are there grounds for establishing a different time limit for particular types of claim under the Equality Act, such as sexual harassment or pregnancy and maternity discrimination? [Yes; No] Please explain your answer, drawing on any evidence you have.

13.1 Committee members had differing views on the response to this question.

13.2 Although our general view is that there is merit in having consistency of time limits between claims and that a three or six month time limit should be sufficient, some felt that claims for pregnancy and maternity discrimination should benefit from different treatment. We note that an extension of the time limit for such claims has been in the pipeline for some time. There are obvious practical difficulties for an expectant or new mother in bringing a claim within a three month time limit, with some claimants being reluctant to raise a complaint if discrimination occurs in the late stages of pregnancy, or feeling unable to take legal advice and pursue their claim if they have a young baby).

13.3 We consider that any distinction in time limits between different types of harassment (or other types of discrimination) may be considered arbitrary. The mental and emotional impact of harassment and discrimination on claimants can be significant, whatever its nature or the protected characteristic on which it is based. We recognise that there may be instances where a claimant's mental health has been impacted to such an extent that they struggle to comply with a three month time limit, but some are of the view that this can be addressed by way of an application to bring a claim out of time, rather than a longer time limit applying on a blanket basis; although this lack of certainty could be a hindrance to access to justice as there is no certainty as to whether an extension may be given. Again, it would be helpful if further guidance could be issued (see above) which provide greater clarity and/or comfort to individual claimants in these circumstances.

13.4 We see a potential disadvantage in a longer time limit applying to all or some types of harassment or discrimination claim. In particular, in circumstances where a longer (e.g. six month) time limit applies, we consider it possible that an Employment Tribunal might enforce such time limit more robustly, and be more reluctant to exercise its discretion to allow a claim to be brought out of time.

14. If time limits are extended for Equality Act claims under the jurisdiction of the Employment Tribunal, what should the new limit be? [6 months; more than 6 months]

14.1 For any claim in respect of which the decision is taken to extend time limits, our view is that six months would be an appropriate period. There are important practical points to consider – for example, the fact that memories fade and there is merit in matters being resolved promptly. Some employers may also be wary of the risk of employees storing up "ammunition" to raise at a later date, rather than being encouraged to air any grievances promptly. Balanced against those considerations, six months would achieve consistency with other areas of the Equality Act and relieve some of the pressure on vulnerable claimants (e.g. those on maternity leave) to bring their claims before they feel able to do so.

15. Are there any further interventions the government should consider to address the problem of workplace harassment? Please provide evidence to support your proposal.

15.1 Many individuals and employers are still unsure about what can amount to harassment. Educating staff is crucial in tackling workplace harassment. Having mandatory training could address this. Such training should also include training on bystander intervention. This can help to train individuals to recognise and report problematic behaviour.

15.2 Employers could be required to have a reporting system in place. Something that is informal, anonymous and ensures confidentiality would encourage individuals to raise concerns. This would assist employers in identifying the scale of the problem at the early stage and take appropriate steps to address it. The possibility that these complaints could be disclosed as part of any discrimination/harassment claim could focus employers' minds on taking steps to address the concerns reported.

15.3 Making it mandatory to display and disseminate a statement of zero tolerance of harassment. We understand that posters by London Underground of non-tolerance of abuse of staff have been very effective in this regard.

15.4 Other steps that might be considered include the following:

- Requiring employers to publish (as part of the gender pay report) an action plan of steps they will take prior to the next report to address harassment and discrimination and to report progress against that plan.
- Requiring the CEO or another senior manager/board member named in the equality report as an equality "champion", to promote and take responsibility for the implementation of an action plan to reduce harassment and discrimination. This could be modelled on the similar concept of a "whistle blowing champion" under the current proposals for the Senior Managers Regime in the financial services industry. While there is a role for HR Directors here, it may also be useful to broaden this out to other board members or the Company's board more generally to ensure corporate accountability.
- Publicly recognising employers who show that they are taking effective action.
- Implementing a 'comply or explain" policy similar to the concept under the Corporate Governance Code which requires that, where there is a failure to comply with legal requirements or an employer's published action plan, an explanation should be provided which sets out the background, provides a clear rationale for the action or omission and describes any mitigating activities. Also, where deviation from a particular provision or action is intended to be limited in time, the explanation should indicate when the employer expects to conform with the provision or action.

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