1. This note has been prepared by CM Murray LLP (the “Firm”\(^1\)) for the House of Commons Women and Equalities Committee (the “Committee”), following the oral evidence given by Clare Murray of the Firm on 31 January 2018. It is provided by way of written evidence to the Committee.

2. The Firm is a leading specialist employment & partnership law firm advising multi-national companies, professional partnerships, senior executives and partners. Clare Murray is Managing Partner of the Firm, and an employment and partnership law specialist.

3. The Firm frequently acts in sexual harassment matters in the workplace, and has experience of representing complainants, employers, and alleged harassers alike. We therefore see what happens in practice, the impact it has on all involved, and the range of potential outcomes.

**Summary of proposals**

4. In this note, the Firm suggests the Committee should consider the following key points and proposals:

   4.1. Reinstatement of similar, but improved, provisions to the third-party harassment provisions as were set out in section 40 Equality Act 2010 (the “Act”).

   4.2. Reinstatement of the statutory questionnaire procedure.

   4.3. Employers should be required to:

       4.3.1. undertake mandatory sexual harassment risk assessments in their own organisation - to identify risks specific to their business, and actions to be taken to minimise those risks in advance;

       4.3.2. adapt their policies and training to respond to those specific risks; and

       4.3.3. appoint a sexual harassment reporting officer within senior management with direct responsibility for ensuring compliance and effective complaints handling within the business.

   4.4. Sexual harassment at work should be given the same level of priority as the new General Data Protection Regulation\(^2\) (“GDPR”) and Anti-Money Laundering\(^3\) (“AML”) regimes, which impose stringent requirements and civil and criminal sanctions for breaches.

   4.5. The use of non-disclosure agreements (“NDAs”) or settlement agreements with confidentiality provisions should be regulated but not prohibited - see further below.

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\(^1\) The note has been prepared by Clare Murray, Managing Partner of the Firm; Beth Hale, Technical Director, Nick Hawkins, Associate, and Naomi Latham, Paralegal.

\(^2\) General Data Protection Regulation (EU) 2016/679

\(^3\) The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017
4.6. Awareness should be improved so that employees and employers alike have a better understanding of what constitutes sexual harassment.

4.7. Effective anti-harassment policies are heavily reliant on leadership from the top - senior management must set an example.

**Background**

5. The Equality Act 2010 protects people in the workplace from harassment in respect of:

5.1. unwanted conduct related to a relevant protected characteristic (age, disability, gender reassignment, race, religion or belief, sex and sexual orientation);

5.2. unwanted conduct of a sexual nature; and

5.3. less favourable treatment for rejecting or submitting to unwanted conduct of a sexual nature or related to gender reassignment or sex.

6. Section 26 of the Act defines sexual harassment as unwanted conduct of a sexual nature which has the purpose or effect of violating someone’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. Sexual harassment also covers unwanted conduct of a sexual nature relating to gender reassignment or sex.

7. In deciding whether conduct violates someone’s dignity, or creates an intimidating, hostile, degrading, humiliating or offensive environment for them, the following are considered:

7.1. the perception of the harassed;

7.2. other circumstances in the case;

7.3. whether it is reasonable for the conduct to have the effect of violating someone’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

8. *Employer liability for harassment*: an employer will normally be liable for acts of sexual harassment committed by one of its employees or agents, where the harassment took place during the harasser’s employment (even without the employer’s knowledge or approval).

9. *Employee liability for harassment*: the Act makes employees personally liable for acts of unlawful discrimination/harassment committed by them in the course of their employment.

10. *Employer defence*: it is a defence for the employer to show that it took all reasonable steps to prevent the harasser from doing the act complained of, or anything of that description.

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4 The Equality Act 2010 s.26(2)
5 The Equality Act 2010 s.26(3)
6 The Equality Act 2010 s.26(4)
7 The Equality Act 2010 s.109
8 The Equality Act 2010 s.110
9 The Equality Act 2010 s.109(4)
11. All reasonable steps of the employer to prevent harassment can include:

11.1 an anti-harassment policy that it is communicated to workers and effectively implemented, monitored and reviewed

11.2 the provision of relevant training; and

11.3 an appropriate procedure for reporting harassment, protecting victims and taking action if harassment occurs.

The legal threshold for a reasonable steps defence are set high and the defence is not often successfully relied upon.

12. Factors that, in the Firm’s experience, could be behind some of the recent findings in the research done by the TUC on workers’ experiences with sexual harassment include:

12.1. inequality of power in the workplace;

12.2. job insecurity;

12.3. lack of women in senior management;

12.4. alcohol, which has a major disinhibiting factor, and is repeatedly an issue in workplace sexual harassment incidents;

12.5. workplace stress – we have, comparatively, a long work hours culture in the UK, which can detract from or prevent employees enjoying normal home and family lives.

13. It is suggested that sexual harassment tends to arise between colleagues at the same level: what are the common triggers to it happening and what steps can employers take to prevent sexual harassment taking place?

13.1. The harasser does not have to be a supervisor – it could be anyone, including a peer, another member of staff, a client or customer, a pupil or patient, or a visitor to the workplace. Men can also be victims and both men and women can be harassers.

13.2. Our professional experience suggests it is predominantly a senior male in a position of direct influence over a junior female; or a client with influence and potential control over a junior employee working for one of their advisors. Common triggers include:

13.2.1. stressful, long hour work environments;

13.2.2. effect of alcohol on behaviour of senior employees at team social events;

13.2.3. laissez faire approach and lack of effective oversight and control of the team by senior management, leaving some senior employees believing they can act with impunity;
13.2.4. other situations where some senior men feel able to wield power over more junior females for whom they have responsibility.

14. What are the barriers to reporting sexual harassment and what can employers do to encourage reporting?

14.1. Embarrassment, shame, powerlessness and it may be difficult personally, socially, or culturally to speak up;

14.2. victims may “freeze” in shock and feel unable to react;

14.3. victims may have a sense of job vulnerability, and a fear of the effects reporting harassment may have on promotion prospects, as well as a fear of retaliation;

14.4. expectation of not being taken seriously (especially if there is a power imbalance with the alleged harasser);

14.5. not trusting anyone in a senior position to report it, and not knowing how to report it.

15. What might be done to encourage reporting?

15.1. Leadership from the top – senior management must support and live the anti-harassment policy themselves;

15.2. ask women to come forward – telling them they do not have to tolerate it and it is not their fault;

15.3. ask colleagues to come forward to report incidents they have witnessed;

15.4. raise awareness – information posters in the workplace and on intranets should be considered;

15.5. introduce a sexual harassment reporting officer within senior management;

15.6. training should be provided to all and tailored for the business and its specific areas of risk;

15.7. establish a well communicated complaints process, and a clear statement that there will be no retaliation for making a complaint;

15.8. advertise a counselling service for victims with an external provider;

15.9. adopt a visible zero-tolerance to sexual harassment in the workplace.

16. Has the abolition of the third-party harassment rule reduced protection of workers?

16.1. The abolition was a significant psychological step backwards. It created a sense that it was acceptable to remove protections from employees, even if that protection was not as robust as it could have been.
16.2. It was not an especially effective protection because it was only if the employer was aware of two previous incidents of harassment of the employee by any third party, that they would be liable (assuming they failed to take reasonably practicable steps to prevent any further harassment).

16.3. Without the s.40\textsuperscript{10} protections, workers now must show that the failure by the employer to act on third party harassment amounts to unwanted conduct “related to” a protected characteristic such as sex (i.e. that the employer’s failure to deal with it was related to the employee’s sex). It is a rather contorted interpretation and there are differing tribunal decisions on this point.

16.4. Workers should not have to rely on whims of interpretation to get protection – it should be clear to them when they do have rights. You cannot expect an employee to bring complaints if they cannot be sure of their rights.

16.5. We agree with the TUC and Fawcett Society proposals for the reintroduction of third party harassment, and the proposal to strengthen it so that the duty to take action should apply if the employer is aware of one previous incident of harassment.

16.6. Further there should not need to have been a prior incident against the person subsequently complaining – if any third party is known to have harassed one employee, that employer should be under a duty to protect all employees dealing with that third party.

17. \textbf{How effective are the legal protections against sexual harassment in the workplace?}

17.1. The current framework is not adequate in providing protection because:

17.2. unless the complainant leaves their job and has significant losses, then they might only secure compensation for injury to feelings, where the award is anywhere between only £800 and £42,000;

17.3. the costs regime in the employment tribunal means there is no certainty that a complainant will recover legal costs even if they win, and may be exposed to employer costs if they lose;

17.4. following the repeal of the statutory questionnaire process there is a lack of access to supporting evidence relating to one’s own claim and other affected employees.

18. \textbf{What figures are available on sexual harassment cases in the employment tribunal and how useful would it be to have those figures?}

18.1. There are limited figures available – none specifically on sexual harassment. We refer you to Annex 1 which shows the statistics provided by the Ministry of Justice relating to sex discrimination claims. The statistics show how sharply the number of claims fell when tribunal fees were introduced in 2013 having been fairly constant for a number of years. Recent statistics for the number of claims brought since the abolition of fees (not broken down by type of claim) suggests a significant increase, although not yet back to the levels we saw before fees were

\textsuperscript{10} The Equality Act 2010
introduced. Fees had a significant impact on access to justice for claimants and their reintroduction, even at lower levels, would be a step backwards in this regard.  

18.2. Statistics are of limited use because of the reluctance to bring sexual harassment claims in first place and the frequency with which claims are settled before they reach full blown litigation. Settled claims will not form part of the statistics.

18.3. Requiring employers to provide anonymised sexual harassment data such as complaints received could be an option, though we suspect it would be hard to police in unregulated sectors and may discourage employers from encouraging employee complaints.

**19. The TUC recommend reintroduction of the questionnaire procedure; do you agree?**

19.1. Yes. It allowed someone who believed they had been harassed to obtain information relevant to their potential claim before starting proceedings. It was an important way of gathering information before litigation to help complainants establish the strength of their case. Failure by an employer to comply with the questionnaire or evasive responses could result in an adverse inference being drawn against the employer.

19.2. It was replaced by a voluntary non-statutory questions process that does not have the statutory recognition or impact of a statutory questionnaire, and as a result is far less frequently used.

**20. What are the advantages and disadvantages of using non-disclosure agreements in sexual harassment cases, including how inappropriate use of such agreements might be tackled?**

20.1. The Firm has considered this issue in some depth. Please see Annex 2 (NDAs – Options for Change) for more detail of our suggestions on this issue.

20.2. If confidentiality provisions in settlement agreements are made unlawful, employers will lose some of the incentive to resolve claims early. This may result in complainants having to go all the way to a hearing to seek compensation (with the associated stress, uncertain outcomes and cost risks). Most complainants do not wish to go through a hearing and instead are seeking an early settlement with their employer. Confidentiality provisions do have benefits:

20.2.1. they provide the complainant with the option of obtaining financial redress without having to go to court to prove their case;

20.2.2. they provide confidentiality for the complainant, the employer, and the alleged harasser (against whom allegations may or may not have been established);

20.3. By way of disadvantage, confidentiality clauses can be perceived as protecting alleged harassers and employers. They may allow the alleged harasser to remain in the business with their behaviours unchecked so that they can continue to harass others.

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11 Annex 1: table of statistics relating to sex discrimination cases in the employment tribunal.
20.4. Rather than making confidentiality provisions unlawful, we suggest that Parliament consider the following potential statutory requirements in respect of confidentiality clauses in workers' contracts and settlement agreements, including, but not limited to, where such agreements deal with issues of sexual harassment:

20.4.1. a ban on provisions which purport to prevent whistleblowing;

20.4.2. s43J of the Employment Rights Act 1996 ("ERA") provides that a confidentiality provision is not effective (and is void) to prevent a protected disclosure under the whistleblowing regime. This provision could be extended to render void any provision which purports to prohibit a disclosure of serious wrongdoing to appropriate bodies in the public interest or a disclosure which is required by law;

20.4.3. an obligation on advisers to expressly flag the presence of confidentiality provisions and to advise on their effect and limitations;

20.4.4. requiring inclusion of a clear statement in the agreement as to the extent to which under existing law, a complainant who signs a confidentiality provision can still make disclosures;

20.4.5. making the inclusion of a confidentiality provision permissible only if subject to a cooling off period;

20.4.6. extension of definition of “prescribed persons” under the Public Interest Disclosure Act 1998 to include other bodies such as the Solicitors Regulation Authority, the police, the Institute of Chartered Accountants in England and Wales, Public Concern at Work, ACAS or the Equality and Human Rights Commission.

21. How else might the law be changed to provide greater protection for women and better access to justice?

21.1. Extend sexual harassment protections to volunteers – there is no reason why they should be left without protection just because they are not being paid.

21.2. Reinstate the employment tribunal’s power to make recommendations for the benefit of the wider workforce, not just the claimant, to encourage employers to properly address institutional issues; with an effective sanction if they do not comply.

21.3. Consider punitive damages as a deterrent. Those which operate in the US are based not on financial loss, but on punishing the employer for engaging in discriminatory practices with malice or reckless indifference to employee protections. We refer you to Annex 3 which provides further information on punitive damages in the US, as well as some information on how sexual harassment is dealt with in several jurisdictions.12

21.4. Give sexual harassment equal importance to GDPR13 and AML14: bring mandatory requirements and sanctions for sexual harassment closer in line with those for

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12 Please see Annex 3 for how sexual harassment is dealt with elsewhere. The information in this Annex has been provided by members of the Innangard International Employment Law Alliance.
13 General Data Protection Regulation (EU) 2016/679
14 The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer)
breaches under GDPR and AML to reflect the equivalent importance and impact on society.

21.5. Place more proactive statutory obligations on employers in order to satisfy the all reasonable steps defence:

21.5.1. mandatory employer risk assessments of sexual harassment occurring which are specific to their organisation and identifying specific actions to prevent;

21.5.2. policies, actions and training which are specifically tailored to those risks, and approved by senior management;

21.5.3. appoint a sexual harassment reporting officer, who is a member of senior management and trained in these issues and with overall accountability for ensuring they are effectively handled;

21.5.4. review of all hiring and promotion policies to ensure they minimise harassment risk – could include an obligation to ask candidates whether they have ever been subject of sexual harassment allegations and the outcome;

21.5.5. sexual harassment information publicly displayed in the workplace - what it is, what you can do if you are harassed, who you can report to and related protections;

21.6. Improve the costs regime in employment tribunal for successful complainant in harassment and other discrimination proceedings.

21.7. Increase the time limit for bringing proceedings from 3 months to 12 months to allow victims more time to consider their options.

21.8. Where harassment amounts to a criminal offence (e.g. sexual assault, indecent exposure, stalking or offensive communications) and is in the course of employment, consider whether there should be corporate vicarious liability where the organisation had managed its operations in a way which has facilitated the sexual harassment and amounts to gross breach of duty of care to the employee, unless an employer can show it met requirements to reduce risks.

21.9. Both victim and alleged harasser be granted anonymity (in the case of harasser unless and until allegations are established following reasonable investigation and in good faith/reasonable belief and resulting in dismissal); to protect both parties and inadvertent disclosure of one by identification of the other and also, to protect family of the harasser and victim.

21.10. Consider female quotas in senior management to help drive change and influence at the top to effect change throughout the organisation.

21.11. Wider look at long hours culture (which can affect home and family lives), workload stresses and drinking/substance abuse at work (which can be a key component in uninhibited behaviours at work and related sexual harassment).

Concluding remarks

Regulations 2017
22. We have a great deal of experience in dealing with sexual harassment in the workplace. We see first-hand the adverse impact that harassment sufferers face and the difficulties they have in addressing their complaints. There is unquestionably a need for a cultural change in the workplace, which will need to be driven by government intervention. As such, we welcome warmly the Committee’s inquiry into this important issue.

23. We would be happy to provide further assistance to the Committee as may be required.
## Annex 1
### Sex discrimination statistics\(^{15}\)

#### Table E.7

**Compensation awarded in Tribunals – claims with Sex Discrimination jurisdictions, 2007/08 to 2016/17**

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**Source:**
ET Database

**Notes:**
1. Compensation awarded is that of which the tribunal is aware. For awards in cases of Discrimination there is no statutory cap.
2. Awards validated by the data owners, Performance and Reporting team in HMCTS.

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\(^{15}\) Statistics taken from Ministry of Justice
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* figures not yet available for Q4 of 2017/18
Annex 2
Part 1

Non-Disclosure Provisions and Agreements in Sexual Harassment Cases

Suggested Options for Legislative Change

Introduction

1. It is currently standard practice to include confidentiality clauses in settlement agreements, entered into on or after the termination of an individual’s employment to settle a dispute between the employer and employee.

2. These clauses may repeat or strengthen existing provisions in the employment contract relating to technical and client information acquired during employment but will usually also limit the individual’s ability to disclose the existence and/or terms of the settlement agreement as well as the circumstances surrounding the termination of their employment.

3. Confidentiality provisions are included as standard even (or perhaps particularly) where there has been an allegation of sexual harassment as an employer will be keen to limit disclosure of such allegations because of concerns about reputational damage. The existence and terms of such provisions are often key in an employer’s decision to settle a dispute.

4. In light of recent high-profile scandals, the use of confidentiality provisions in sexual harassment cases has been put under the spotlight. Some commentators have suggested that their use in such cases is entirely inappropriate.

5. The parliamentary Women and Equalities Committee has launched an inquiry into sexual harassment in the workplace and one of the issues to be looked at include the pros and cons of using non-disclosure agreements in sexual harassment cases and including how inappropriate use of such agreements might be tackled.

6. A total ban on the use of NDAs in sexual harassment cases would interfere with parties’ contractual freedom and would also be likely to make employers less inclined to reach settlement with employees, driving more cases to the Employment Tribunal and court system.

7. We would suggest that a more balanced approach would be preferable to (and more workable than) a total ban. This note sets out a range of potential options that might be considered for protecting employees, whilst still preserving the potential to enter into a confidentiality agreement in appropriate circumstances.

8. The options set out below are not mutually exclusive – a number of them could be used in conjunction with one another. We have provided outline drafting suggestions in Annex 2 Part 2 – these are not intended to be detailed drafting but merely starting points for consideration.
Option 1 – statutory ban on provisions which purport to prevent whistleblowing

9. Section 43J of the Employment Rights Act 1996 (“ERA”) provides that any provision in a settlement agreement is void insofar as it purports to prevent a worker from making a protected disclosure under the whistleblowing legislation.

10. This does not amount to an actual ban on such clauses – they can still be included in settlement agreements but will not be enforceable. This leaves it open to employers to include such clauses simply for their deterrent effect.

11. ERA could be amended to include a ban on such clauses (see (1) in attached draft) – and this could even be extended to include a sanction (financial or otherwise) on employers who seek to include such provisions.

Option 2 – extension of s43J ERA to include disclosure beyond statutory whistleblowing

12. As set out above, s43J ERA already provides that a confidentiality provision in a settlement agreement is void insofar as it purports to prevent a worker from making a protected disclosure under the whistleblowing legislation.

13. S43J could be extended to also render any provision of a settlement agreement void insofar as it purports to prevent a worker from making a disclosure of serious wrongdoing to the police, a regulatory authority, a court or tribunal, the Equality and Human Rights Commission, ACAS or Public Concern at Work – see (2) in the attached draft. As set out below, it is already the case under common law that such a disclosure would not be in breach of a confidentiality agreement.

14. Such an extension would need to be limited in the same way as the existing whistleblowing legislation (and to reflect the common law) so that it only applies where (a) the disclosure is made in the public interest; (b) the worker reasonably believes the facts disclosed are true and (c) the worker is not making the disclosure for personal gain. In addition, the amendment would inevitably give rise to some discussion about what constitutes “serious” wrongdoing and some thought would need to be given about the parameters of the extension – for example, it could be limited to situations in which the disclosure involves the commission of a criminal offence.

Option 3 - obligation on advisers to expressly flag presence and to advise on effect and limitations

15. Other than for agreements negotiated via ACAS, a settlement agreement between an employer and employee will not be binding unless the individual has taken independent advice on its terms and effect, including any confidentiality provision. Most commonly, this advice is given by a solicitor, but independent advice from a trade union official or a certified worker in a legal advice centre (e.g. Citizens Advice Bureau) will also satisfy the statutory requirements. The adviser in these circumstances will be acting for the individual and, where the adviser is a solicitor, will have an obligation to act in the best interests of that individual.

16. The statutory provisions in relation to the provision of advice on settlement agreements could be amended to explicitly require advisers to flag up the presence
of a confidentiality provision in a settlement agreement and provide advice on its terms and effect (see (3) in the attached suggested drafting).

17. As part of this obligation, advisers perhaps could be required to provide a pro forma explanation of the impact of such a clause and, more importantly, the limitations on it, which are broadly as follows:

a. a confidentiality agreement cannot prevent an individual from making a protected disclosure for the purposes of the Public Interest Disclosure Act 1998 – and any confidentiality agreement or provision which purports to do so would be void;

b. where an individual is obliged by law to disclose information (for example, because she is required to give evidence in a court case), that disclosure will not be in breach of an NDA (although evidence given in regulatory proceedings and in the absence of an order from a court or tribunal will not always be covered by this exception); and

c. there are circumstances in which public interest overrides the contractual provisions – for example, where an NDA seeks to prevent the disclosure of a crime or the disclosure of other serious misconduct where there is a genuine public interest in the information (rather than simply a public curiosity).

18. It is explanation of this last limitation which would likely cause most consternation with some employers and advisers – they may be keen to ensure that it does not appear to be a green flag to go to the press about allegations. However, an explanation of the impact of a confidentiality clause would not be complete if this were excluded.

19. The pro forma explanation would need to be carefully drafted to ensure that it is comprehensible to lay people and, particularly in relation to c. above, some practical examples could be given to illustrate the relatively high bar of “public interest” in these circumstances.

20. In order to be effective, the obligations would need to be mirrored for non-legal advisers on settlement agreements and also for ACAS conciliators who negotiate terms of COT3 agreements in relation to which formal independent advice is not required.

Option 4 - mandatory wording for inclusion in any worker contract which contains confidentiality provisions

21. Another option would be to amend the relevant legislation to provide that confidentiality provisions in any settlement agreement or ACAS-conciliated agreement (regardless of whether a lawyer is involved) will not be binding upon employees unless it includes specific mandatory language which sets out the limitations of such clauses, including specific examples of when disclosure would be permitted (see option 4 in the attached).

22. This option goes further than Option 3 as there could be no later dispute about whether advice was given, whether at all or adequately.
23. Again, the wording of the mandatory language would have to be user friendly and, ideally, "non-legal" in order to serve the desired purpose. It would also need to be succinct to avoid agreements becoming unwieldy in length.

24. A lesser version of this obligation has been in place in relation to some settlement agreements in the Financial Services sector since September 2016. PRA and FCA Policy Statements (PS24/15 and PS15/24) apply to banks, building societies, credit unions and PRA designated investment firms and insurers. The statements provide that wording in employment and settlement agreements must not deter staff from blowing the whistle on wrongdoing. Settlement agreements with these organisations (a) must include a term that makes it clear that nothing in the agreement prevents the worker from making a protected disclosure; and (b) must not include any warranties in which workers are asked to confirm that they have not made a protected disclosure or that they do not know of any information which could lead to them making a protected disclosure. There is no obligation to provide any further explanation of what constitutes a "protected disclosure" nor to describe other situations in which disclosure will be permissible. However, this does provide some limited precedent for this option.

25. Employers (and their advisers) may find this option unattractive as detailed explanatory language may undermine the perceived deterrent effect of including robust confidentiality provisions in settlement agreements.

26. However, all of the above options preserve the use of confidentiality agreements where appropriate while providing some additional protection to employees.

**Option 5 – Cooling off period in settlement agreement containing confidentiality clause**

27. In addition to the above or alternatively, a “cooling off” period for any settlement agreement which includes a confidentiality provision could also be considered (see option 5 in the attached suggested drafting).

28. In some states in America, agreements settling discrimination claims are mandatorily subject to a 7-day cooling off period after signing. During the 7-day period the employee can withdraw his or her agreement to the terms of the contract. It is not possible to contract out of the cooling off period and it is only available to the employee – employers are not permitted to withdraw.

29. There is also precedent for cooling off periods in relation to insurance contracts in the UK.

30. A cooling off period would allow employees, who may feel that they have been worn down by the negotiation process or have otherwise entered into a settlement agreement reluctantly, the opportunity to reflect for a further period before the terms of the agreement become binding on either party.

**Option 6 – ACAS/Government/SRA Guidance on use of confidentiality provisions in settlement agreements**

31. In relation to public sector employees, in 2015 the Cabinet Office published non-binding guidance which provides that confidentiality clauses should not be included in settlement agreements as a matter of course, that where they are used they should not "seek to stifle or discourage staff from raising concerns with a regulatory or other
statutory body about wrongdoing or poor practice” and that any such clauses must “expressly remind the individual of their rights” under the Public Interest Disclosure Act 1998. There is currently no equivalent guidance in relation to private sector employees.

32. Also, in 2015, the Solicitors Regulation Authority (“SRA”) published a report called “Walking the Line – Balancing duties in litigation”, which set out guidance for solicitors on how to balance obligations to the court and their clients when running litigation. That document does not deal with confidentiality clauses but addresses ethical and conduct issues for solicitors and guidance on how to avoid “taking unfair advantage of a third party” and “predatory litigation”. There is no equivalent guidance for solicitors advising on confidentiality clauses in settlement agreements although similar issues arise – in particular in relation to inequality of bargaining power and advice on the limitations and enforceability of confidentiality clauses.

33. On 12 March 2018 the SRA published a Warning Notice setting out ethical and conduct issues for solicitors to consider when using confidentiality provisions, with specific reference to the use of such clauses in settlement agreements with employees. This communication from the SRA is welcome and provides valuable guidance for solicitors when advising clients on confidentiality agreements.

34. In addition, guidance could be published for settlement agreements entered into with employees in the private sector – either by ACAS or by an appropriate Government department (the Department for Business, Energy and Industrial Strategy or the Government Equalities Office).

Option 7 – Extension of definition of “prescribed persons” under PIDA

35. Whistleblowing protection is only available where the statutory tests set out under the Employment Rights Act 1996 (as amended by the Public Interest Disclosure Act 1998) are met. One way in which protection can be obtained is by making the disclosure, in appropriate circumstances, to a “prescribed person”, as defined in the legislation.

36. The list of prescribed persons includes the Independent Police Complaints Commission, police and crime panels, the National Crime Agency, elected local policing bodies, the FCA, Secretary of State for Business, Energy and Industrial Strategy, the Prudential Regulation Authority and a number of other regulatory bodies.

37. However, it is notable that the list does not include the Solicitors Regulation Authority, the police, the Institute of Chartered Accountants in England and Wales, Public Concern at Work, ACAS or the Equality and Human Rights Commission.

38. These omissions limit the scope of the legislation and we believe that the list should be extended to ensure the maximum protection for workers.

Conclusion

39. We recognise that including confidentiality clauses in settlement agreements can allow, or can be perceived to allow, employers to cover up allegations of sexual harassment and, potentially, to avoid having properly to investigate and deal with such allegations.
40. However, there are many circumstances in which confidentiality agreements work for both parties – not least where they allow conclusion of a dispute without resorting to litigation which can be expensive for both parties and stressful for individuals.

41. In those circumstances, we would suggest that a total ban on the use of confidentiality agreements in settlement agreements – or even a ban on their use in sexual harassment cases - would interfere with parties' contractual freedom and is excessive in the circumstances.

42. The above provides a number of alternatives to a total ban which we believe are commercially workable while providing protection to employees.
Annex 2

Part 2

Suggested Outline Suggested Drafting Options for Legislative Change

Current wording under s43K Employment Rights Act 1996 (ERA) relating to NDAs and confidentiality provisions

S 43J ERA Contractual duties of confidentiality.

(1) Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure.

(2) This section applies to any agreement between a worker and his employer (whether a worker’s contract or not), including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract.

Proposed outline amendments to s 43J ERA as follows:

These are alternative individual suggested changes (in outline drafting only), which could be considered individually or collectively.

Option 1 – statutory ban on provisions which purport to prevent or restrict whistleblowing

(1) An employer shall not include in any agreement between a worker and his employer (whether of a worker’s contract or not and including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract) any confidentiality or other provision in an agreement which purports to preclude limit restrict or delay the worker from making a disclosure of the type referred to in section 43J(2) below. [A standalone civil sanction should then be considered for breach of this provision by an employer]

Option 2 – extension of s43J ERA to include disclosure beyond statutory whistleblowing

(2) Any confidentiality or other provision in an agreement to which this section applies is void in so far as it purports to preclude limit restrict or delay the worker from making:

   a) a protected disclosure or
   b) any other disclosure of serious wrongdoing where such disclosure is made by the worker in the public interest to the police, any regulatory authority, any court or tribunal of competent authority [or to the Equality and Human Rights Commission [or ACAS] [or Public Concern at Work], where the worker reasonably believes the facts being disclosed are true and where such disclosure is not made by the worker for any personal gain.

Option 3 - obligation on advisers to expressly flag presence and advice on effect and limitations

(3) Any confidentiality or other provision in an agreement to which this section applies and which purports to preclude limit restrict or delay the worker from making a
disclosure of information of any kind shall be void in its entirety except where the worker has received advice from an independent adviser or [ACAS conciliation officer] as to the terms and effect of such provision and the limitations on the effect of such provisions to preclude limit restrict or delay a disclosure by the worker of the kind referred to in this section.

Option 4 - mandatory wording for inclusion in worker contract which contains confidentiality provisions

(4) Any confidentiality or other provision in an agreement to which this section applies and which purports to preclude limit restrict or delay the worker from making a disclosure of information of any kind shall be void in its entirety unless it specifies that that provision shall not prevent:

1. any protected disclosure under this Act;
2. any disclosure of information to a court or tribunal; and
3. any other disclosure of any criminal or other serious misconduct where [in the reasonable belief of the worker] there is a genuine public interest in the disclosure of such information.

OR alternatively

(5) Any confidentiality or other provision in an agreement to which this section applies and which purports to preclude limit restrict or delay the worker from making a disclosure of information of any kind shall be void in its entirety except where such agreement includes or appends a written statement which states the circumstances under section 43J in which any such provision will not apply to the worker to prevent limit restrict or delay any disclosure of serious wrongdoing in the public interest [and the Secretary of State shall have the power to prescribe the form of such statement from time to time].

Option 5 – Cooling off period

(6) Any confidentiality or other provision in an agreement to which this section applies and which purports to preclude limit restrict or delay the worker from making a disclosure of information of any kind shall be void in its entirety except where such agreement provides for a cooling off period of 7 days from the date of such agreement being signed during which time the worker shall be entitled by written notice to the employer to cancel such agreement and not to be bound by its terms as if the worker had never entered into that agreement; [and the Secretary of State shall have the power to prescribe the form of such cooling off provision and the length of the cooling off period from time to time].

Proposed amendment to Public Interest Disclosure (Prescribed Persons) Order 2014

We also recommend the extension of the prescribed persons list under section 43F Employment Rights Act 2996 and The Public Interest Disclosure (Prescribed Persons) Order 2014 to include some or all of those bodies referred to below:

- The Police
- Solicitors Regulation Authority, ICAEW and other recognised regulatory bodies
- Equality and Human Rights Commission
- [ACAS]
- [Public Concern at Work]
Harassment is a form of employment discrimination that violates Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, (ADEA), and the Americans with Disabilities Act of 1990, (ADA).

Harassment is defined as unwelcome conduct that is based on race, colour, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.

Harassment can include “sexual harassment” or unwelcome sexual advances, requests for sexual favours, and other verbal or physical harassment of a sexual nature. Harassment does not have to be of a sexual nature and can include offensive remarks about a person’s sex.

Both victim and the harasser can be either a woman or a man, and the victim and harasser can be of the same sex.

Although the law doesn’t prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

The employer is automatically liable for harassment by a supervisor that results in a negative employment action such as termination, failure to promote or hire, and loss of wages. If the supervisor’s harassment results in a hostile work environment, the employer can avoid liability only if it can prove that:

1. it reasonably tried to prevent and promptly correct the harassing behaviour; and
2. the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

The employer will be liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors or customers on the premises), if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.

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16 Information contained in this Annex has been supplied by members of the Innangard International Employment Law Alliance (except in relation to US Law), although has not been verified by CM Murray LLP.

17 https://www.eeoc.gov/laws/types/harassment.cfm
When investigating allegations of harassment, the Equal Opportunity Commission (EEOC), to whom a sexual harassment complaint must be made, looks at the entire record: including the nature of the conduct, and the context in which the alleged incidents occurred. A determination of whether harassment is severe or pervasive enough to be illegal is made on a case-by-case basis. The limitation in US for filing such a complaint is 6 months.

The US EEOC details the limits on compensation and punitive damages that a person can recover for sexual harassment, the details of which are in the in section 102 of the Civil Rights Act 1991:

DETERMINATION OF PUNITIVE DAMAGES. - A complaining party may recover punitive damages against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

EXCLUSIONS FROM COMPENSATORY DAMAGES. - Compensatory damages awarded under this section do not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.

LIMITATIONS. - The sum of the amount of compensatory damages awarded for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded do not exceed, for each complaining party:

1. in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;
2. in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and
3. in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and
4. in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.\(^{18}\)

**New York Law**

Punitive damages are available by way of compensation. These are designed to punish the harasser for the violation rather than reimburse the victim. Under Title VII, the federal law, compensatory and punitive damages are capped based on the size of the employer. The New York State Court Human Rights law does not provide for punitive damages, but under the New York City Human Rights law (“NYCHRL”), both punitive and compensatory damages are available with no cap\(^ {19}\).

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It was recently held that the standard for determining punitive damages under the NYCHRL should be whether the employer engaged in discrimination with wilful or wanton negligence, or recklessness, or a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard. Under this clarified standard it is suggested that trial courts may now issue punitive damages more frequently20.

Ireland - Colleen Cleary Solicitors21

The Employment Equality Acts 1998-2015 describes sexual harassment as any form of “unwanted verbal, non-verbal or physical conduct of a sexual nature”. It is defined as conduct which “has the purpose or effect of violating a person’s dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person” and it is prohibited under the Acts.

The “unwanted conduct” includes spoken words, gestures or the production and display of written words, pictures and other material. This includes offensive gestures or facial expressions, unwelcome and offensive calendars, screen-savers, e-mails and any other offensive material.

The harassment can be by a fellow worker, employer or someone in a superior position, a client, a customer or any other business contact. It can take place at work or on a training course, on a work trip, at a work social event or any other occasion in respect of which the employer ought reasonably to have taken steps to prevent it.

While general harassment is a criminal offence, as is sexual assault (including at very low levels where “in circumstances of indecency”), sexual harassment itself is not a specific criminal offence.

Companies are heavily encouraged to implement internal policies to address harassment on any of the protected grounds of discrimination. They are also heavily encouraged to put in place an equality/dignity at work policy, which puts employees on notice of their own obligations.


Employers can be held vicariously liable when an employee sexually harasses a co-worker. A defence for an employer is if it has taken steps that are reasonably practicable to prevent sexual harassment. Compensation is up to two years of the employee’s remuneration, although this is limited to actual losses (i.e. loss of earnings) in the case of constructive dismissal. Gender discrimination claims, which can arise from sexual harassment, may also be issued in the Circuit Court, where compensation is unlimited. These claims must be brought within 6 months of the cause of action. Employers can also face High Court proceedings for personal injury, where the recipient of harassment can establish that he/she has sustained a psychiatric injury as a result of the harassment. If the claim is successful, compensation for injury, loss of earnings and loss of future earnings may be awarded, with general damages being awarded for injury.

21 Information provided by Innangard International Employment Law Alliance, http://www.ccsolicitors.ie/
Sexual harassment can result in the dismissal of the harasser, whether with or without notice, provided the employer has used a fair and thorough procedure, including an investigation of whether the harassment, on the balance of probabilities, occurred.

Cases of physical harassment could also be reported to the Garda Síochana (the Irish police force) and may be prosecuted accordingly. The recipient can pursue the harasser for damages in a civil claim but, in practice, the employer is the more frequent target for such claims.

Spain – Fornesa Abogados

From a criminal perspective, Organic Law 10/1995, of November 23, of the Penal Code defines sexual harassment as “whoever requests favours of a sexual nature, for him/herself or for a third party, within the scope of employment, teaching or service provision, in a continued or habitual manner, and with such behaviour provokes in the victim an objective and seriously intimidating, hostile or humiliating situation”.

From an employment viewpoint, Organic Law 3/2007 regarding the effective equality between men and women defines sexual harassment as “any behaviour, verbal or physical, of a sexual nature that has the purpose or produces the effect of impairing the dignity of a person, particularly when creating an intimidating, degrading or offensive environment”.

Organic Law 3/2007 states that “Companies must promote working conditions that prevent sexual harassment conducts and arbitrate specific procedures for its prevention, channelling complaints and claims that may be made by those who have been subject to it”.

Additionally, Collective Bargaining Agreement’s usually include specific regulations regarding the internal policies that must be adopted against sexual harassment conducts. In practice, these policies are commonly known as “company ethical codes” of “protocols against harassment”. These policies must include a specific complaint procedure which guarantees the confidentiality of both the claimant and the victim (which may not always be the same person).

Case law studies suggests that there are three substantive elements that comprise sexual harassment: the request, the refusal and the persistence. However, it is possible to determine the aggressor’s behaviour as sexual harassment upon one sole incident, depending on the seriousness of the incident.

Risk Prevention Law states there must be preventative measures in place, such as the identification or evaluation of psychological risks; training activities for management positions; health surveillance regarding the mental health of the employees. These obligatory measures state that sexual harassment is considered a risk in the workplace from a Health and Safety point of view.

For the employer, the liabilities depend on whether the employer has acted to prevent harassment at work. If such measures are not effectively carried out and the employer does not evaluate the psychosocial risks in the workplace or does not carry out an internal investigation when having received a sexual harassment complaint, Article 50 of the Workers Statute could apply. Under Article 50, the victim has the right to terminate his/her contract based on a severe contractual breach of the employer. If a victim claims this right against the Employment Court, and the Company is proven liable, the following compensations would be due to the employee:

22 www.fornesaabogados.com
1. The same compensation as an unfair dismissal, i.e. 33 days of salary per year of service with a limit of 24 months.

2. Compensation for damages, including the “moral” damages ones, usually quantified using LISOS Law and the scale of compensation in traffic accidents.

3. If the sexual harassment conduct leads the victim to a temporary disability, the employer could be liable, in certain cases, to the payment of a surcharge between 30%-50% over the public subsidy the employee receives from the Social Security National Institute.

4. An administrative sanction could be imposed, amounting between €6,251 to €187,515.

For the harasser, if it is considered a criminal offence, they may face imprisonment of 1 year or a fine of 14 months, calculated over a daily amount which will be determined by the judge. The range of the fine is 2 – 400 daily euros (therefore, €850 – €170,000).

If the victim wants to claim for damages (including moral ones) against the Company (solely or jointly against the harasser) or if the victim wants to terminate the contract with right to a severance payment, the general limitation period of 1 year to bring a claim in Article 59 of the Spanish Workers Statute applies.

The acts committed by the harasser may constitute a just cause for dismissal. If the Company, after a complaint, decides to disciplinary dismiss the harasser, the term to take such action is 60 calendar days. For top management employees (General Managers or similar) the term is 12 months. This time-limit runs from the moment in which the Company acquires knowledge of the sexual harassment behaviour. Please note that sexual harassment conducts are usually continuous conducts, repeated over time, and hidden behaviours, that requires a prior complaint and a subsequent investigation for the Company to take knowledge of it.

Portugal - PLMJ

Article 29 of the Portuguese Labour Code defines sexual harassment as those "An unwanted, verbal, non-verbal or physical, behaviour with a sexual connotation that is unwanted by the worker against whom it is directed with the purpose of disturbing or violating dignity of a worker or to create an intimidating, hostile, degrading, humiliating or offensive climate".

The Portuguese Labour Code which was recently amended now provides:

1. An express provision of (i) the right to compensation for financial and non-financial loss and damage whenever there is a situation of harassment (ii) a special set of rules to protect the complainant and the witnesses in proceedings relating to assault situations.

2. A requirement to adopt a code of good conduct to prevent and combat assault at work, whenever the company has at least seven employees.

3. A requirement to begin disciplinary proceedings whenever the employer becomes aware of alleged situations of assault at work.

4. An assumption that any dismissal or other sanction applied allegedly to punish a breach of the rules is abusive, up to one year after the complaint or other form of exercising rights relating to equality, non-discrimination and assault.

The employer could be considered responsible, jointly with the harasser, for the payment compensation for financial and non-financial loss and damage of the victim under Article 29 of the Portuguese Labour Code. In addition, the employer will also be liable for committing a
very serious administrative offence punishable with a fine ranging between EUR 2,040.00 and EUR 61,200.00, depending on the annual turnover and degree of severity. In addition, the following ancillary sanctions may apply: (i) publicity of the decision; (ii) prohibition of applying to public tenders; (iii) temporary closure of the facilities where the non-compliances were detected.

The victim could be considered a just cause for termination of employment. In this case, the victim is entitled to receive the payment of the indemnity between 15 and 45 days of remuneration per year of service and compensation for financial and non-financial loss and damages.

The misconduct carried out by the harasser may constitute a just cause for dismissal. Contrary to moral harassment, sexual harassment does not require an ongoing continued harassment behaviour. One single case of sexual harassment or a serious attempt could be considered a reason for a disciplinary sanction or a disciplinary dismissal (depending on the seriousness of the sexual harassment).

The disciplinary action is conditioned by two types of time limitation:

1. Expiry: the employer must start disciplinary proceedings within 60 days as of the knowledge by the person with disciplinary powers of the harassment situation;
2. Statute of limitation: the right to disciplinary action is considered extinct once 1 year passes since the misconduct (except if it constitutes a crime, in which case the criminal statute of limitation supersedes this deadline).

The harasser is responsible for all the damages suffered by the victim as consequence of the sexual harassment, and in respect of criminal charges may be face imprisonment of up to 3 years.

**Australia – People + Culture Strategies**

A person is taken to have sexually harassed another person if that person behaves in a way that fulfils the core elements of what constitutes sexual harassment. Under the *Sex Discrimination Act 1984* (Cth) ("SD Act") the three elements that define sexual harassment are as follows:

- the behaviour must be unwelcome;
- it must be of a sexual nature; and
- the conduct took place in circumstances where a reasonable person would have anticipated the possibility that the person who was harassed would be offended, humiliated and/or intimidated.

Whether the behaviour is unwelcome is a **subjective test**: i.e. the issue is how the conduct in question was perceived and experienced by the recipient rather than the intention behind it.

Whether the behaviour was offensive, humiliating or intimidating is an **objective test**: whether a reasonable person would have anticipated the possibility that the behaviour would have this effect.

Most Australian workplaces have policies and procedures around discriminatory behaviour and sexual harassment in order to show that they have taken all reasonable steps to prevent 

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or eliminate the conduct, and thereby avoid vicarious liability for the harassment by a workplace participant or another worker. However, many policies have been found by the courts to be inadequate because they do not exhibit sufficient commitment and proactive engagement with the issue.

It is far less common for employers to have policies and procedures that address situations and potential liability where a customer or client acts in a discriminatory or harassing manner towards an organisation’s employees. Some Australian employers in the retail sector have taken action to protect their employees from inappropriate conduct engaged in by customers in order to avoid accessorial liability for “permitting” unlawful conduct where they are aware that it is happening, and do not intervene.

Sexual harassment can occur in any work based-relationship. It does not have to involve a person in a position of greater authority and applies irrespective of gender. It is also subject to regulation where it occurs away for the work premises, such as a conference or off-site event, where there is a connection between the two parties that is work related. It is not necessary for the behaviour to be repeated to constitute sexual harassment.

Liability for sexual harassment in Australia amounts to a civil breach that gives rise to a claim for damages. There is no criminal liability or penalty regime that applies under anti-discrimination legislation. However, employers have obligations under work health and safety legislation to ensure the health and safety of workers, and can be liable under this legislation if the harassment causes risks to the health and safety and the employer has not taken any steps to eliminate the risks.

Sexual harassment may be considered an offence under criminal law if it takes the form of an actual or threatened assault, indecent exposure, stalking or intimidation or an obscene communication.

Australian courts set a new benchmark regarding the amount of compensation that should be awarded for sexual harassment (Richardson v Oracle Corporation Australia Pty Ltd [2014] FCAFC 82). This changed the long-standing approach of awarding minimal damages for the pain and suffering caused to victims of workplace sexual harassment in order to mirror community attitudes about the harm of sexual harassment.

Netherlands – Van Hall Arbeidsrecht

Dutch legislation was amended towards the end of 2006 in order to implement the European Directive 2002/73/EC. The definition of sexual harassment in the Netherlands is included in the equality legislation: ‘any form of verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of affecting the dignity of the person, and in particular, if an intimidating, hostile, degrading, humiliating or offensive environment is created.’ The word ‘unwanted’ is absent from the definition, with the view of offering better legal protection to the victim.

Sexual harassment can include making ambiguous remarks, unnecessary touching, peeping and pornographic images in the workplace, however, it can also include assault, rape and sexual blackmail; such as making decisions or the chance of promotion dependent on performing sexual services.

http://www.vanhallarbeidsrecht.nl/
The feelings and motives of parties must be regarded as objectively as possible. The subjective perception of those involved must not be the decisive factor in a dispute about sexual harassment.

Employers have a duty of care towards employees under the Working Conditions Act to ensure that the workplace is free from sexual harassment. Therefore, it is irrelevant whether the sexual harassment is from a manager or a colleague. If, however, the misconduct is performed by a manager, it will be an aggravating factor when the employer imposes disciplinary measures.

In order to comply with the statutory duty of care, the employer must take responsibility for:

1. Preventative policy
2. A complaints procedure
3. Sanctions policy
4. Measures aimed at restoring working relationships.

The employer is then obliged to apply a policy that aims to create a safe working environment. He or she must also expressly publicise this policy within the company, including any disciplinary measures for a transgression.

Sexual harassment is not a criminal offence, because in criminal law, the term covers every approach or sexual behaviour that the victim deems unwanted. This is a subjective concept and therefore difficult to criminalise. A perpetrator can only be punished in the Netherlands if the sexual intimidation is accompanied by unwanted indecent acts. The criminality is mostly found in the indecency and/or actual assault, punishable by a maximum prison sentence of eight years or a fine of up to €82,000.

If the employer fails to fulfil his or her duty of care, then he or she is acting contrary to the equality legislation and the obligation to act as a responsible employer (Article 7:611 of the Dutch Civil Code). The employer is also failing to fulfil his or her obligation to prevent the employee from suffering any injury as a consequence of carrying out his or her work (Article 7:658(1) of the Dutch Civil Code). The employee may then make a claim against the employer for damages. The amount of compensation is difficult to set and depends on the facts and circumstances of the case.

It is also possible to initiate a complaint procedure at the Netherlands Institute for Human Rights because sexual harassment is a form of gender-based discrimination. It first tests whether there has been conduct that can be regarded as of a sexual nature by objective standards in the given context. The Institute also states, like other bodies, that it is not the intention to argue about the personal perception of those involved. It must be about behaviour that any reasonable person would consider as sexual. The Institute then tests whether the sexual behaviour had the purpose or effect of affecting the dignity of the victim. It also looks at the context in which the behaviour took place. The balance of authority, the tone and intensity are important, as is the location, any difference in age, and whether there was repeated misconduct.

*Italy - Daverio & Florio*

The only definition of sexual harassment is given by Article 26 of the Italian Legislative Decree 198/2006 which defines sexual harassment as those "unwanted behaviors with a sexual connotation expressed in physical, verbal or non-verbal form, with the purpose or
effect of violating the dignity of a worker or worker and to create an intimidating, hostile, degrading, humiliating or offensive climate".

Pursuant to Article 2087 of the Italian Civil Code, the employer has a general duty of protection of the employee’s health. In case of sexual harassment, committed by an employee against a colleague, the behaviour carried out by the harasser could be considered as a violation of the victim’s health. In case of lack of control by the employer, he could be considered responsible for the damages suffered by the victim of sexual harassment in the workplace.

It is not compulsory for employers to implement an internal policy (or code of conduct) against sexual harassment in the workplace, but they have to establish and announce a complaints office.

Form a criminal perspective, liability can be only charged on the subject who committed the crime. This means that the victim of the sexual harassment in the workplace can sue the sole harasser (and not the employer) for damages. Sexual harassment can be included, from a criminal law stand point, into the general hypothesis of “harassment”, regulated by Article 660 of the Italian Criminal Code. Pursuant to such Article, the harasser can be condemned to 6 months imprisonment or the payment of a fine up to 516,00 Euro.

In addition to that:

- the Italian Criminal Code also punishes the cases of “sexual assault” (article 609-bis), which consists of coercing any person to take part in sexual acts through violence, threats or abuse of authority, or through abuse of the inferior mental or physical state of the victim at the moment of the act or by deception, where the offender claims to be someone else in some way in order to induce any person to commit sexual acts. The punishment is imprisonment ranging from five to ten years.

- the crime of “persecutory acts” (i.e. stalking) has been recently introduced by Law Decree No. 11 of 23 February 2009, converted into Law No. 38 of 23 April 2009. Such new regulations provides for imprisonment ranging from six months up to five years for any person who repeatedly threatens or harasses any other person in such a way as to cause in that other a lasting and grave state of anxiety or fear, or to generate a well-founded fear for one’s own safety or that of a close relative or a person related to the same through a relationship of affection, or to force that person to alter his or her habitual lifestyle.

From a civil and Labour law perspective, the misbehavior carried out by the harasser may constitute a just cause or a justified reason of dismissal. A repeated harassment is not always necessary: even a single case of sexual harassment or a serious attempt could be considered a reason for a disciplinary sanction or a disciplinary dismissal (depending on the seriousness of the sexual harassment). The harasser is responsible for all the damages suffered by the victim as consequence of the sexual harassment.

In the light of Article 2087 of the Italian Civil Code, the employer could be considered responsible, jointly with the harasser, for the damages suffered by the victim.

In addition, the sexual harassment could be considered a just cause of resignation from the employment relationship. In this case, the victim is entitled to receive the payment of the indemnity in lieu of notice provided by the National Collective Bargaining Agreement (NCBA) applied by the Company and the reimbursement for the damages (if proved) suffered as a result of the sexual harassment.
In Germany, there are in essence two legal definitions of sexual harassment; civil and criminal. The civil law concept is broader than the criminal law one. Before the introduction of sec. 184i StGB was introduced into the Criminal Code in November 2016, prosecution could only be based on sec. 177 StGB (“sexual assault by use of force or threats; rape”) and insult (sec. 185 StGB). Sec. 177 StGB requires a breaking of the physical resistance of a woman. By contrast, sec. 184i StGB merely requires a physical (not only verbal) “contact” that is sexually determined.

Sexual harassment in the workplace is defined in sec. 3 (4) AGG as a discrimination, when an unwanted conduct of a sexual nature, including unwanted sexual acts and requests to carry out sexual acts, physical contact of a sexual nature, comments of a sexual nature, as well as the unwanted showing or public exhibition of pornographic images, takes place with the purpose or effect of violation the dignity of the person concerned, in particular where it creates an intimidating, hostile, degrading, humiliating or offensive environment.

While it is not compulsory for employers to implement an internal policy (or code of conduct) against sexual harassment in the workplace, they have to establish and announce a complaints office, sec. 13 AGG. Consequently, if an employee calls the complaints office because of sexual harassment, the employer has to safeguard that the allegations are reviewed, and that the complainant is informed about the outcome. Should the complaint be found to be correct, there are several options: admonition, written warning, relocation and termination of the offender. Where the employer takes no or obviously unsuitable measures, pursuant to sec. 14 AGG the affected employee has the right to refuse work without loss of pay insofar as this is necessary for her/his protection.

Potential liabilities for the employer include: Unlawful discrimination amounts to a breach of contract and an employee may be able to bring a claim for damages against the employer under sec. 15 AGG.

1. Such a claim for damages will cover any material loss incurred by the employee.
2. An employee can also claim reasonable compensation for any non-financial damage suffered. Such claims may arise irrespective of whether the employer is at fault.
3. Sec. 15 (4) AGG requires the victim to assert the claim in writing within a period of two months (from learning of the discrimination), unless different provisions in a collective bargaining agreement apply.
4. If the harasser is the employer himself the only remedy for the person concerned may be to claim compensation.

In severe cases the employer’s management may also be subject to criminal prosecution for insult and/or defamation (sec. 185 ff. StGB), if the situation has been grossly mishandled.

Potential liabilities for the harasser include:

1. Sexual harassment can justify the dismissal of the perpetrator, including extraordinary i.e. immediate termination (depending on the severity of harassment and consideration of the whole situation).

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27 www.seitzpartner.de
2. The victim can claim damages against the harasser in a civil law procedure.
3. In the case of physical harassment, the harasser also has to expect criminal prosecutions (fines or up to five years imprisonment).

China – River Delta Law Firm

According to the Law of the People’s Republic of China on the Protection of Women’s Rights and Interests, sexual harassment against women is banned. The victims shall be entitled to complain to the employer.

The legal definition of sexual harassment is contained in provisions of some local regulations. For example, according to the Measures of Beijing Municipality for Implementing the Law of the People’s Republic of China on the Protection of Rights and Interests of Women (2009 Revision), any sexual harassment of a woman against her will in forms of language, text, image, electronic information or physical act that contain Sexual content or relate with sex is prohibited.

It is worth mentioning that there is no protection of men from sexual harassment.

There is no legal definition of sexual harassment in the workplace. According to the local regulation in Shenzhen, it is prohibited to annoy, insult or have indecent behaviours towards women with the advantages of position, employment and other conditions.

A woman who suffered from sexual harassment may file a complaint with the employer, the employer of the perpetrator, the women's federations at various levels of the municipality and the department concerned, or directly file a lawsuit to the people's court. After receiving the complaint, the women's employer, the women's federations at various levels of this municipality and the department concerned shall take measures to criticize and educate the person being accused, to mediate the two sides or to support the complainant to file a lawsuit.

According to the No 619 Order of the State Council the Special Rules on the Labour Protection of Female Employees, adopted in 2012, employers shall prevent and prohibit the sexual harassment of female employees in their workplaces. Based on the local regulations, it is compulsory for companies to take measures such as constructing appropriate environment or establishing necessary investigation and complaint mechanism to prevent and stop sexual harassment against women.

The employer is liable to undertake the civil compensation responsibility in case of the employer’s fault, if the employee suffers physical, and/or mental and reputation damage.

The harasser’s employment can be terminated unilaterally on the grounds of serious violations of labour discipline or the employer's rules and regulations. According to the Public Security Administration Punishments Law, if the harasser has sent obscene or insulting information or offensive data several times, the harasser shall be detained for not more than 5 days or shall be fined not more than 500 yuan. If the circumstances are relatively serious, he shall be detained for not less than 5 days but not more than 10 days and may be concurrently fined not more than 500 yuan.

March 2018

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