Introduction

1. The Law Society (‘the Society’) is the professional body for solicitors in England and Wales, representing over 170,000 registered legal practitioners. The Society represents the profession to parliament, government and regulatory bodies and has a public interest in the reform of the law. Members of the Society have to abide by a Code of Conduct - the main principles are attached in Annex A. They are regulated by the Solicitors Regulatory Authority.

2. Recent high-profile cases, such as the accusations against Harvey Weinstein and the behaviour reported at the Presidents’ Club dinner have rightly caused concern. They have also started a debate on how to ensure all work environments are safe for all. We are pleased to assist the Committee in their inquiry on this matter.

3. For many employers preventing and ending sexual harassment is a high priority. Our employment law members report that over the last year there has been an increase in enquiries about sexual harassment and request for training in this area. This is likely due to the fact that more people are aware of the issues around sexual harassment and wish to ensure that their workplace is a safe one.

4. In our evidence we will discuss how the law relating to harassment functions and make suggestions on possible improvements. We are aware that the law can only go so far in creating safe workplaces and that workplace culture, colleague and management behaviour can be the most important factor.

Main recommendations

To the Committee, the Law Society makes the following recommendations:

- Reintroduce section 40 of the Equality Act 2010, which would bring back specific protection against third-party harassment.
- Employment tribunal reporting measurements should capture the volume and outcome of sexual harassment claims.
- The impact of making public the names of all parties involved in sexual harassment employment tribunal cases should be investigated.
- Organisations should encourage early internal reporting of sexual harassment and explain how the reporting process will work.
- Mediation should be considered as a first-step to resolve unintentional sexual harassment.

To support members and their clients the Law Society will be producing:

1 The Solicitors Regulation Authority is the independent regulatory arm of the Law Society.
A Practice Note to assist solicitors on providing advice to their clients on best practice is using and interpreting non-disclosure agreements and confidentiality clauses.

Plain-English guidance so those who are presented with non-disclosure agreements and confidentiality clauses have a clear understanding of how they function.

Understanding sexual harassment in the workplace

5. There is significant understanding of the definition of intentional sexual harassment and what it looks like and most people are confident that they know what harassment is when they experience or see it. However people need to be equally aware of unintentional harassment and it needs to be taken as seriously. Issues can arise when there is perceived ambiguity around the intentions of the harasser or if someone confident as to how to respond to the harassment. This awareness raising needs to also include a greater understanding of how to treat allegations of historical harassment by current or former colleagues.

6. Unintentional sexual harassment presents challenges to the law as the circumstances are often less certain than in intentional harassment. It may also be felt by those who experience unintentional harassment that searching for legal redress would escalate the matter to a point beyond where they feel comfortable. An example of unintentional harassment could be a male member of staff believing it is humorous to give a female member of staff a secret Santa gift that has sexual undertones.

7. The female member of staff may not be comfortable with the gift, but feels that to bring a formal complaint would mark her as being apart from the group. Organisations should ensure staff feel such matters can be handled sensitively. If this is not the case, there is a danger that not challenging unintentional harassment will create a strong discriminatory culture within the business. This would lead to an unhealthy work environment, expose the organisation to being at risk of litigation and create the conditions where more serious forms of direct harassment are tolerated.

8. To avoid such a culture from developing regular training is needed so that managers and staff better understand all the different types of harassment, how to put in place appropriate policies so everyone is clear as to what is acceptable, what to do if they are concerned about unacceptable behaviour, and the reporting systems are trusted. Organisations should encourage early internal reporting and have in place a reporting policy that clearly states:
   - reporting is welcomed,
   - how the organisation will investigate reports, and
   - those making reports will suffer no detriment.

9. Unintentional harassment is best resolved at an early stage. For this to happen the perpetrators and company need to understand how certain behaviour could be construed as harassment and ensure that similar situations do not reoccur.
Mediation at an early stage can work well. This is especially true when the issue relates to perception. Mediation can get the different parties to understand the others perspective. The perpetrators would understand the impact of their conduct, giving them a chance to apologise – if necessary – and better judge the appropriateness of future behaviour.

10. Sometimes there are relationship issues that spill into the workplace. Complications can arise when there is a power imbalance in the workplace relationships, for example when one of the former partners is a manager of the other. Organisations need to be sensitive to ensuring that harassment or discrimination does not occur in such situations.

**Reporting sexual harassment**

11. The most common type of harassment cases involve comments made to or about one employee that another finds distasteful. Organisations should have a system in place where such unintended discrimination can be reported sensitively and a proportionate outcome reached.

12. There are challenges around what details should be published. Currently employment tribunal (ET) judgments are published and the parties are named. The fear of reporting and naming maybe off-putting to people bringing cases – as it is has reported to be with rape. It is worth investigation if this is the case and how any problem could be remedied. For example, it may be worth considering whether to amend the current 'open access' reporting of ET claims where all parties are named and judgments put on line. If this were to be looked at possible exceptions for allegations of sexual harassment and other forms of harassment – such racial harassment would need to be considered. Recent evidence has shown that if people know that harassment has happened before they are more likely to report it. This shows that public reporting of matters can have the positive impact of emboldening others to come forward, who may have been previously unsure of doing so. This should also be taken into account when considering the potential positive and negative implications of publicising ET claims and judgments.

13. Some have called for the reintroduction of discrimination questionnaires. Such questionnaires can be useful in discovering how an organisation ensures they provide a safe workplace, though there is criticism that sometimes the questionnaire was used as a litigation tactic. If discrimination questionnaires where to be reintroduced, they should be accompanied by guidance to ensure that they are used and answered appropriately.

14. The statistics around the number of claims for sexual harassment made to ETs and the outcome of these claims is unavailable. ET reporting measurements should capture the volume and outcome of sexual harassment claims. This would give one measure as to the impact of Government policy in this area.

**Legal routes to redress**

15. The accessibility of employment tribunals has improved recently due to the removal of fees.
16. The Equality Act 2010 gives not just employees, but also job applicants and some other categories of workers protection from harassment by their employer or putative employer. At one time the Act also specifically protected employees from harassment by third parties: the relevant provision, set out in section 40, were repealed by the Government on 1st October 2013. We opposed the repeal at the time, and call for section 40 to be re-instated (see more below).

17. In addition to the Equality Act, the Protection from Harassment Act (POHA) 1997 allows victims of workplace harassment (including sexual harassment) to go to court rather than the ET, as well as giving the potential for criminal sanctions. The decision to go down a court route has an advantage in that a person has six years (although note that limitation periods are different in Scotland) from the incident to bring a claim rather than the three months limit that exists in the ET.

18. The person claiming does not need the employment relationship as a pre-condition for bringing a claim in the first place, so the actual employment status of those involved becomes moot. In addition, under the 1997 Act, there is no defence equivalent to that available under section 109(4) of the Equality Act – the defence available where an employer can show they took all reasonable steps to prevent the harassment occurring.

19. However, the Protection from Harassment Act 1997 does not cover one off incidents: liability is dependent on a course of conduct. The civil courts, unlike the employment tribunals, do not keep records of the causes of action invoked, so it is difficult to say how frequently redress is made through the 1997 Act. Anecdotally it would appear that the number of claims under the Act in the civil courts is insignificant. The high costs of seeking any form of remedy puts people off pursuing a civil claim and, in addition, cost shifting may act as a deterrent even to meritorious claims.

20. An act of sexual harassment may amount to the commission of an offence other than the offence of harassment under the 1997 Act. However, the difficulties occasioned by, for example, differing standards of proof and the even greater stresses that might be inflicted on a victim as part of the criminal process should not be underestimated. Neither should the possibility of criminal sanctions be used as an excuse to leave gaps in the civil law.

21. If the act of harassment is thought to be criminal it should be reported to the police, and the police have the responsibility to make prosecutions. Guidance could be produced to ensure potential claimants understand the police’s remit.

The use of non-disclosure agreements/confidentiality clauses

22. There are often legitimate reasons why parties will want to enter into confidentiality agreements. Confidentiality clauses are used to stop commercial secrets from being shared and to avoid reputational damage. In some situations, the victim, as well as the other party, will want confidentiality. It is not legal to block the reporting of criminal acts or anything that falls within the public interest disclosure test (aka Whistleblowing.) In addition, section 142(1) of the Equality Act 2010 renders void any term in a contract if it
“constitutes, promotes or provides for treatment …of a description prohibited by [the] Act”.

23. Although the provisions are not often invoked, arguably the section could render void a provision which purported to cloak acts of harassment with a confidentiality clause. Such a clause would be “promoting” actions prescribed by the Act.

24. A lot of times signing the confidentiality agreement will be tied to receiving compensation. People will often not want to risk having to pay that back or have to spend money defending themselves against the ex-employer wanting to claim the money back.

25. In many cases the different parties discussing a confidentiality agreement will each have legal advice. If this is the case each side should know what the legal limits are of such an agreement. They will also understand the choices they are making when signing the document. Abuses are a lot more likely to happen when one of the parties does not have independent legal advice.

26. It has been reported that non-disclosure agreements (NDA) have been used to imply that nothing can be disclosed, even behaviour that is unlawful. For example, a hostess may be given a lengthy document containing legal phrases on arrival for a job. They are not given much time to read the document or able to secure their own legal advice on the contents. If they do not sign the document the hostess will not work, thus not receive the wage they had expected. Once signed, the document is taken away and the hostesses are not given a copy. The hostesses are then advised by the employment agency that any disclosure would bring heavy penalties. The hostess is unable to refer to the NDA they had signed to understand what they had agreed not to disclose. We have real doubts over whether such an agreement would be legally enforceable, but as the main purpose of the NDA in such a situation would be intimidation it is unlikely that the legality of the NDA would be tested.

27. Iain Miller, Partner at Kingsley Napley, succinctly defines the three warning signs that a confidentiality agreement might not be being used appropriately as: “(1) the inequality of bargaining power; (2) lack of independent legal advice; (3) the use of terms that are unenforceable but seek to control the behaviour of someone who may not wish to take the risk of breaching the agreement.”

Whistleblowing

28. Using the Public Interest Disclosure Act 1998 to “whistleblow” on an organisation allowing inappropriate behaviour is not ideal. A common misconception about how whistleblowing legislation works in practice is that the law offers protection to whistleblowers. It does not. The legislation enables those who are treated badly as a consequence of whistleblowing to seek compensation, but a whistleblower seeking redress has to bear those consequences and the cost of legal action until proceedings have finished.

29. It is legally uncertain whether a person can talk about how they have been treated because they made the disclosure. Employers may argue that certain details about
behaviour and detriment are not applicable under whistleblowing legislation. This uncertainty can cause further stress to the victim and lead to differing legal outcomes. It would help if there was some detailed guidance which could be produced to help claimants navigate this issue.

Third party liability

30. The biggest need for reform is in the area of discrimination by a third-party. The way employment law is currently drafted it is more straightforward dealing with sexual harassment issue when they are concerned with what employers do to employees or what employees do to other employees. Bringing back specific protection against third-party harassment would mean that organisations would need to do what is necessary to prevent third-parties from harassing the workers they engage.

31. This is linked to fragmentation of the workforce and disconnection in responsibility between service provider and deliverer. The evolutionary nature of how to define in law who is an employee, worker or self-employed person has resulted in uncertainty for many as to what rights and status they enjoy. The broader issues associated with this and possible solutions were presented by Matthew Taylor in his Good Work report. The Department for Business, Enterprise and Industrial Strategy is currently consulting on how the Government should respond to Taylor’s recommendations. The way the law is currently structured those who are not employees – such as contractors – have fewer employment rights and those who contract their services less obligations. Companies are absolved from the application of some “employment rights” by the revocation of laws on responsibility for third party acts. This does not seem right to us as non-employees may not be in a position to protect themselves if placed in an unsafe environment.

32. All workplaces should be made safe, and this should not be diluted by uncertainty about the groups differing nature of ‘worker’ and ‘employee’ or contractor. There are strong arguments for a universally understood standard of protection against harassment in the workplace, whatever one’s precise legal status. The identity of the controller of the working environment is, after all, relatively fixed. In the consultation to whether the provision for third party harassment, previously contained in section 40 of the Equality Act 2010, should be repealed, the Law Society argued strongly against repeal. Our response in August 2012 concluded:-

33. “Harassment amongst employers and potentially reduced incidents of third party harassment at work, would be lost on any of the protected characteristics [under the Equality Act 2010] is deeply offensive and distressing to those who experience it. We are concerned that any deterrent effect of the legislation, which has supported and encouraged best practice amongst employers and potentially reduced incidents of third party harassment at work, would be lost.”

34. Those who feel that reinstating 3rd-party liability does not guarantee safe working environments might suggest further considering introducing a “failure to prevent” obligation. Such an obligation exists around the failure to stop tax evasion. If such an obligation was brought in, organisations would have to do more to analyse their working
environment, assess the risk and then put in appropriate measures to mitigate the risk, including training and contractor management.
Annex A - The principles

The principles are at the core of everything a lawyer does. If there is a clash between two or more principles, the course of action taken will be according to the principle that the Solicitors Regulation Authority deem to best serve the public interest.

The principles say that a solicitor must:

1. uphold the rule of law and the proper administration of justice,
2. act with integrity,
3. not allow your independence to be compromised,
4. act in the best interests of each client,
5. provide a proper standard of service to your clients,
6. behave in a way that maintains the trust the public places in you and in the provision of legal services,
7. comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner,
8. run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles,
9. run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity, and
10. protect client money and assets.

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