Introduction

1 The Government takes all forms of harassment extremely seriously. Unwelcome advances that intimidate, degrade or humiliate, are an abuse of power and are unlawful. Whether it is in the workplace or on the street, sexual harassment in any situation is unacceptable. Nobody should be subjected to unwanted conduct of a sexual nature or be put in a compromising situation – and the law on harassment is clear.

Legislation – The Equality Act 2010

2 Sexual harassment is expressly outlawed by the Equality Act 2010 (‘the Act’) and this applies to all fields covered by the Act, which include the workplace. A range of appropriate legal remedies already exists if an Employment Tribunal makes a finding of sexual harassment. The Government is satisfied that the civil law is already comprehensive in protecting against sexual harassment but continues to keep this area of law under review.

3 Harassment is defined quite extensively in the Act. Section 26 defines three types of harassment.

- The first type, which applies to most of the protected characteristics including sex, involves unwanted conduct which is related to the relevant characteristic and has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant or of violating the complainant’s dignity.

- The second type is sexual harassment which is unwanted conduct of a sexual nature where this has the same purpose or effect as the first type of harassment.

- The third type is treating someone less favourably because he or she has either submitted to or rejected sexual harassment, or harassment related to sex or gender reassignment.

- Sexual harassment is therefore specifically covered by the second and third types and applies in, among other areas, the employment field.

4 The Employment Statutory Code of Practice\(^1\) provides that conduct ‘of a sexual nature’ can be wide ranging and can cover verbal, non-verbal or physical conduct including unwelcome sexual advances, touching, forms of sexual assault, sexual jokes, displaying pornographic photographs or drawings or sending emails with material of a sexual nature.

\(^1\) prepared and issued by the Equality and Human Rights Commission under the Equality Act 2006, approved by the Secretary of State and laid before Parliament
Part 5 of the Act, which covers “Work”, prohibits all forms of harassment, including sexual harassment, of persons such as employees and job applicants at work. This prohibition applies to employers, agencies supplying workers and organisations using contract workers supplied by an agency. Employers are also potentially liable for any harassment of employees by other employees and third parties, such as customers and suppliers of the employer.

Employees and job applicants who, in good faith, take or support any action against an alleged harassment are protected from victimisation under the Act, even if their complaint is not upheld. For example, if someone makes a complaint of alleged sexual harassment against their employer at an Employment Tribunal and is then victimised by being unfairly selected for demotion, they would be able to bring a further claim of alleged ‘victimisation’ against the employer under the Act. They could bring an action even if their original complaint had not been upheld. Co-workers who support a colleague’s harassment complaint are also protected from victimisation.

A case of alleged sexual harassment (or victimisation) in the workplace which is caught by the Act must usually be brought to the Employment Tribunal within three months of the alleged incident having taken place. In the case of continuing discrimination, the three-month time limit begins to run at the end of the period of the discriminatory conduct, or within such other period as the Employment Tribunal considers “just and equitable”.

As well as employment, the Act also provides protection against sexual harassment in the provision of services, the exercise of public functions, the occupation, disposal or management of premises, education and associations such as private clubs. It does not apply in other circumstances such as harassment in the street or harassment in the context of personal relationships, but this may be unlawful under other legislation. The Government is providing evidence to the separate inquiry by the Committee into the sexual harassment of women and girls in public places.

The Act does not cover Northern Ireland, which has its own equality legislation that largely mirrors that applicable in Great Britain.

**Remedies**

An employee who feels they have been harassed in the workplace is able to take legal action in an Employment Tribunal if they are unable to reach a resolution through the employer’s grievance procedure, or through the Acas Early Conciliation Service. Where an Employment Tribunal makes a finding of sexual harassment (whether by the employer or by another party), it can order the employer to pay compensation to the employee (or former employee); may make a declaration about the employee’s rights; and may make a recommendation, if appropriate, about steps that the employer should take to reduce or to obviate the adverse effect of the treatment that the employee (or former employee) has suffered.

Compensation in sexual harassment cases, as with discrimination cases more generally, is unlimited and may extend to exemplary damages.
Information about sexual harassment complaints and cases

Tribunals

12 For reasons of practicality, Employment Tribunals statistics for discrimination claims are only collected by Her Majesty’s Courts and Tribunals Service at the level of the relevant protected characteristic, which includes all claims for sex discrimination, harassment and victimisation as one category. This means that cases relating specifically to sexual harassment cannot be separately identified. For this reason, we have not included any Employment Tribunal figures in this evidence, although these are available on the basis mentioned above if needed.

Equality Advisory and Support Service

13 The Equality Advisory Support Service (EASS), the Government’s helpline for individuals seeking advice in relation to concerns about discrimination and human rights, keeps data which distinguishes individuals’ queries about sexual harassment from the larger category of contacts on sex and gender discrimination. These statistics span all fields covered by the Equality Act (not just employment) and the EASS’s primary focus is on goods and services (Acas is the main provider of employment-related advice to individuals). However, bearing these limitations in mind, EASS’s data nevertheless shows that, since the current helpline provider took up contract in October 2016, it has received more than 37,000 contacts from members of the public, of which 1,602 (4.3%) are recorded as involving sex or gender employment discrimination issues, and of these 248 (15%) are recorded as being about sexual harassment. It should be noted that these are numbers of contacts, not separate cases – a single case can sometimes generate many separate contacts. However, the statistics may be useful in showing broad indications of comparative volumes.

14 The EASS shares anonymised aggregate monitoring data with the EHRC, with the aim of keeping EHRC aware of case volumes and trends. EASS also gathers (anonymised) individual case data which can be passed to EHRC on a “for information” basis; and also forwards strategic individual cases to EHRC for potential legal action on a monthly basis. At present, contacts recorded on sexual harassment are included in the first category of data exchange only: GEO will discuss with EASS and EHRC at the next EASS Management Board meeting in March, whether it would add value for EASS now also to provide individual case data to EHRC.

Third Party harassment

15 Specific provision against harassment at work by third parties was introduced in subsections 40(2)-(4) of the Act. This provided that an employer’s liability for third party harassment would be triggered where an employee had been harassed by a third party in the course of the employee’s work. However, this liability only arose on the third occasion that this happened and where the employer knew about the
previous occasions, but had failed to take reasonably practicable steps to prevent this from happening again.

16 In 2012, the Coalition Government reviewed the effectiveness of these provisions, and concluded that they were hard to understand, and had only resulted in one Employment Tribunal case since their introduction in 2008. They therefore repealed the relevant provisions in section 40(2)-(4) of the Act, on the basis that these imposed an unnecessary burden on employers. The then Government also took the view that the existing harassment provisions in section 26 of the Act, which proscribe “unwanted conduct related to a relevant protected characteristic” are sufficiently broad to cover harassment by a third party\(^2\); a view which the current Government shares.

Employers’ Dress Codes

17 The 2016 inquiry by the Petitions Committee and Women and Equality Select Committee included evidence by employees of dress code requirements that could be seen as encouraging sexual harassment. The Government intends to publish guidance on employer dress codes, as inappropriate dress codes can sometimes cause or exacerbate problems for employees in the workplace.

Non-disclosure Agreements and Settlement Agreements

18 The Government is aware of the Select Committee’s concerns that non-disclosure agreements or NDAs (also known as confidentiality clauses and ‘gagging clauses’) are being used to prevent an employee revealing ‘inappropriate behaviour’ such as sexual harassment in the workplace. It is important to differentiate firstly between the use of NDAs in employment contracts and in Settlement Agreements, and secondly between contractual provisions that seek to prevent disclosure and clauses that attempt either to avoid (or limit) the employer’s responsibility for certain actions or to prevent an employee bringing a claim.

19 NDAs can form a legitimate part of an employment contract and will commonly place information disclosure restrictions on employees regarding the way in which a company operates, its intellectual property, its data or its clients. These clauses are important to protect trade secrets that could otherwise undermine a company’s competitiveness in the marketplace. However, non-disclosure agreements cannot be used to limit a worker’s statutory employment rights (such as by preventing a worker from bringing a claim, and disclosing the facts to an Employment Tribunal) or seek to override criminal law. There are further limitations based in common law regarding the enforceability of NDAs. In addition, a non-disclosure agreement cannot stop a worker from disclosing workplace wrongdoing to the relevant authority in the public interest. NDAs that purport to prevent ‘whistleblowing’ - that is, disclosure by a worker of workplace wrongdoing to the relevant authority in the public interest - are not legally valid or enforceable under section 43J of the Employment Rights Act 1996.

\(^2\) Equality legislation before the consolidation under the Equality Act 2010 referred to treatment “on the ground of” the protected characteristic, rather than the current “related to” formulation in section 26 of the Act: the latter is generally seen as being wider in scope.
20 Settlement agreements (often conciliated by Acas, and also known as “Compromise agreements”) also provide a way to resolve workplace disputes or end a working relationship without the need to go through the cost and stress (for both parties) of an Employment Tribunal hearing, and these too can include restrictions on disclosure. Various legal safeguards exist so that such agreements cannot legitimise criminal activity or breaches of civil law, or obviate whistleblowing.

21 Settlement agreements are legally binding private settlements. Confidentiality clauses within settlement agreements can have a right and proper place, such as to ensure that both parties end the employment relationship with a clean break. However, where confidentiality clauses are used, they should go no further than is necessary to protect matters such as client confidentiality and commercial interest. Both the Equality Act 2010 and the Employment Rights Act 1996 make settlement agreements unenforceable unless the employee has received independent advice.

22 Both the Equality Act 2010 and the Employment Rights Act 1996 provide that employees cannot ‘contract out’ of their statutory rights in advance. (As far as non-discrimination is concerned, section 142 of the Equality Act 2010 prevents any such contract, which effectively overrides discrimination law, from being enforceable.) This means an employee can still make a claim of sexual harassment to an Employment Tribunal (and firstly through Acas early conciliation) even after signing a contract which ostensibly sought to avoid or limit the employer’s responsibility for sexual harassment during the course of their employment.

Guidance and Advice

23 Guidance, support and advice is available to anyone who feels they have been the victim of sexual harassment in the workplace (as well as to employers).

The Advisory, Conciliation and Arbitration Service (ACAS)

24 Acas has published a Statutory Code and practical guidance on settlement agreements, which came into effect on 29 July 2013. These make clear that gagging clauses, which attempt to prevent or restrict an individual from making a protected disclosure in settlement agreements, are not permissible.

Acas guidance and advisory work on sexual harassment at work

25 Following the increased public concern about sexual harassment in the workplace Acas published new on-line guidance on the subject in November 2017 (www.acas.org.uk/sexualharassment) covering what it is, how it happens and how to make a complaint or respond to one. The guidance helps people understand what constitutes sexual harassment and how it manifests itself in the workplace. It also provides practical guidance on how to raise concerns and handle complaints that have been made. To date the guidance has had just over 23,000 views.
26 In addition to this new guidance, Acas will shortly be running a roundtable event with key stakeholders to examine the issue of sexual harassment in more detail. Over the course of the next few months and with the help of stakeholder input, Acas will be refining and updating its on-line guidance. In particular, Acas will be extending the guidance to focus on creating a positive culture around gendered behaviours, and further clarify the role and responsibilities of the employer and management in sexual harassment cases.

27 Acas’ contacts with stakeholders also informs its advisory work and in recent months, its advisers have been actively involved with a number of organisations on tackling sexual harassment in the workplace. The focus of the work is on the introduction of appropriate policies and procedures in relation to handling sexual harassment allegations. Acas’ advisory work also goes further, addressing the question of culture and behaviours in the organisation. The objective is for organisations to identify and seek to address deficits and develop a positive, open and safe working environment, one aspect of which makes clear that unwanted behaviours, including sexual harassment, are unacceptable.

The Equality and Human Rights Commission

28 The EHRC’s statutory Employment Code of Practice provides a detailed analysis of the law and examples of behaviour likely to breach the Equality Act, as well as best practice on how to stay within the law. The Code, issued under the Equality Act 2006 and approved by the Secretary of State, is capable of legal effect. It is admissible in evidence in legal proceedings. Where a court or tribunal thinks that the Code is relevant, it must take it into account.

29 EHRC has written to large employers across Great Britain to ask them to provide evidence about what safeguards they have in place to prevent sexual harassment, what steps they have taken to ensure that all employees are able to report instances of harassment and how they plan to prevent harassment in the future. 

30 EHRC has asked individuals to fill in a survey on sexual harassment in the workplace. The aims of the survey were (i) to hear from people who had experienced, witnessed or supported others with workplace sexual harassment, to consider what might have helped in their case and what changes need to be made to tackle this issue; and (ii) to find out if staff feel able to report sexual harassment without fear of victimisation and are confident that investigations will be conducted appropriately. The survey closed on 19 January 2018.

31 If EHRC discovers that employers are failing it will consider exercising its enforcement powers, such as investigations into organisations to ensure that employees are protected.

Other legal options

32 Under the Employment Rights Act 1996, an employee with 2 years’ continuous service may claim unfair dismissal if their employer dismisses them for refusing to work in “circumstances of danger” which they “reasonably believe to be
serious and imminent”. Alternatively, they may resign and claim constructive dismissal where an employer has fundamentally breached an employment contract, including implied terms of mutual trust and confidence. If an unfair dismissal claim is made and upheld, the employee may be able to claim compensation for their losses.

Health and Safety at work

33 An employee may also bring a claim where harassment is to such an extent that the employer has failed in a duty to provide reasonable support and a safe place of work that contravenes the Health and Safety at Work Act 1974.

March 2018