1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Women and Equalities Committee call for written submissions in its inquiry into sexual harassment in the workplace.

2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar’s high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Committee Questions

In formulating our submission, we have considered each of the committee’s questions.

1. **How widespread is sexual harassment in the workplace, and has it increased or decreased over time**

   Evidence, both statistically and anecdotally indicates that, whilst overt sexual harassment has decreased in the workplace, there is still widespread harassment at certain levels. Harassment at the level of alleged ‘banter’ or ‘jokes’ continues and needs to be addressed but there is still endemic serious harassment in the work environment.
A BBC Survey in October 2017 concluded that half of women are sexually harassed at work and a fifth of men. 63% of women and 79% of men did not report this. A poll by Opinium research\(^1\) in November 2017 found that 20% of women at work had been harassed and 7% of men. Of these, 58% of women did not report the harassment and 43% of men did not report. Of those who reported some 12% say that the incident was not even acknowledged by the employer. 3 in 10 stated that the perpetrator was given a warning and among women a third say that their complaint was not acted upon by senior management. It was found that intimidation was the main reason that a report was not made, with 57% of women stating that they felt intimidated by the way they were spoken to at work.

These statistics are very similar to those found by ABC news in America. Worryingly, it was found that at least 25% of the perpetrators were the complainant’s manager.

2. **Who experiences sexual harassment in the workplace, who perpetrates it and what the impact is on different groups**

The nature of the environment and workplace has a clear correlation to the scope of harassment. Where conduct or banter is accepted or not challenged, a workplace environment may be created where some practices are regarded as ‘acceptable’ and are tolerated or, at least, put up with. Flirtations at work may stepover acceptable boundaries and be totally unacceptable.

It is notable that the YouGov\(^2\) survey found that the perception of sexual harassment differed depending on age, with 64% of aged 18-24 women finding ‘wolf whistling’ to be harassment compared to just 15% of those over 55; 28% of women aged 18-24 stating that ‘winking’ is usually or always harassment compared to 6% of over 55; a man touching a woman’s lower back being considered harassment by 48% of women aged 18-24 compared to 29% of women over 55; and commenting on a woman’s attractiveness as being harassment by 28% of women between 18-24 versus 11% of those over 55. Between men and women, 57% of women thought looking at a woman’s breasts was sexual harassment compared to 43% of men, but men were more likely to consider ‘wolf whistling’ as harassment, at 45% compared to 33% of women.

That is not to say that such conduct is considered as acceptable. It may also be that younger women are more likely to be harassed with 41% of 18-24 year olds compared to 6% of over 55 saying that they have been harassed in the last five years.

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\(^1\) [http://opinium.co.uk/one-in-five-women-have-been-sexually-harassed-in-the-workplace/](http://opinium.co.uk/one-in-five-women-have-been-sexually-harassed-in-the-workplace/)

\(^2\) [https://yougov.co.uk/news/2017/10/19/most-18-24-year-old-women-have-been-sexually-haras/](https://yougov.co.uk/news/2017/10/19/most-18-24-year-old-women-have-been-sexually-haras/)
3. What actions should the Government and employers be taking to change workplace culture to prevent sexual harassment, give people more confidence to report sexual harassment, and make this issue a higher priority for employers

It is apparent from the statistics that context is important. It is important that management and employees know and recognise what constitutes sexual harassment at work. The comment made by the harasser in *Insitu v Heads* [1995] IRLR 4 (“Hello big tits”) was so obviously harassment but in other contexts the harassment may be more subtle. The EAT adopted Counsel’s submissions in *Driskel v Peninsula Business Services* [2000] IRLR 151:

(1) Sexual harassment is helpfully categorised in *Reed and Bull* [1999] IRLR 299, op cit. At 302:

'It seems to us important at the outset that “sexual harassment” is not defined by statute. It is a colloquial expression which describes one form of discrimination in the workplace made unlawful by s.6 of the Sex Discrimination Act 1975. Because it is not a precise or defined phrase, its use, without regard to s.6, can lead to confusion. Under s.6 it is unlawful to subject a person to a “detriment” on the grounds of their sex. Sexual harassment is a shorthand for describing a type of detriment. The word detriment is not further defined and its scope is to be defined by the fact-finding tribunal on a common-sense basis by reference to the facts of each particular case. The question in each case is whether the alleged victim has been subjected to a detriment and, second, was it on the grounds of sex.'

(2) The finding of less favourable treatment leading to ‘detriment’ is one of fact and degree so that a single act may legitimately found a complaint, cf *Insitu Cleaning Co Ltd* [1995] IRLR 4, op cit.

(3) The ultimate judgment, sexual discrimination or no, reflects an objective assessment by the tribunal of all the facts. That said, amongst the factors to be considered are the applicant’s subjective perception of that which is the subject of complaint and the understanding, motive and intention of the alleged discriminator. Thus, the act complained of may be so obviously detrimental, that is, disadvantageous (see *Insitu* [1995] IRLR 4, op cit) to the applicant as a woman by intimidating her or undermining her dignity at work, that the lack of any contemporaneous complaint by her is of little or no significance. By contrast she may complain of one or more matters which if taken individually may not objectively signify much, if anything, in terms of detriment. Then a contemporaneous indication of sensitivity on her part becomes obviously material as does the evidence of the alleged discriminator as to his perception. That which in isolation may not amount to discriminatory detriment may become such if persisted in notwithstanding objection, vocal or apparent. The passage cited from the judgment of the US Federal Appeal Court is germane. By contrast the facts may simply disclose
hypersensitivity on the part of the applicant to conduct which was reasonably not perceived by the alleged discriminator as being to her detriment – no finding of discrimination can then follow.

(4) In making its judgment a tribunal should not lose sight of the significance in this context of the sex of not just the complainant but also that of the alleged discriminator. Sexual badinage of a heterosexual male by another such cannot be completely equated with like badinage by him of a woman. Prima facie the treatment is not equal: in the latter circumstance it is the sex of the alleged discriminator that potentially adds a material element absent as between two heterosexual men.

(5) Throughout the tribunal should remain conscious of the burden and standard of proof. That said, the notion that discrimination may well be covert and is not readily admitted is as applicable in the context of sex as in the context of race. The passage cited from King v Great Britain China Centre [1991] IRLR 513, op cit, consistently proves authoritative guidance on these aspects.

There is both an objective and a subjective context to sexual harassment. The Government needs to do more to publicise the fact that the views of the victim are paramount.

There is a whole raft of legislation that can assist a person who has suffered from sexual harassment. Claims under the Equality Act 2010 provide a civil remedy in the Tribunal. The definition of harassment under the Act is “unwanted conduct of a sexual nature” which violates the persons dignity or “creates an intimidating, hostile, degrading or offensive environment”. This is a definition that every Employer and employee/worker should be fully aware of. A campaign which highlights that “Its about dignity at work” could be helpful in highlighting the basic human right not to be harassed.

There are other statutes which also assist: The Prevention from Harassment Act 1997 which tackles unwarded calls and messages, visit to home, unwanted advances and persistent and distressing comments whilst the Malicious Communications Act 1998 covers the sending of indecent emails and messages. Criminal offences may be committed. Again, more needs to be done to highlight that sexual harassment may potentially be a criminal offence.

4. How can workers be better protected from sexual harassment by clients, customers and other third parties

This is a question which must be answered on two levels: what better legal protections can be provided and what better policies would be useful?
As to legal change the Bar Council fully supports the recommendations of the Fawcett Society in the Sex Discrimination Law Review 2018\(^3\) –

*Perpetrators of sexual harassment in the workplace can be third parties, such as clients or customers. Section 40 of the Equality Act 2010 provided protection to employees in these cases, but it was repealed in 2013 – we recommend that section 40 is reintroduced, with an amendment so that it requires only a single prior incident of harassment. Pregnancy and maternity, as well as marriage and civil partnership status, should also be included as protected characteristics when it comes to prohibiting harassment.*

The most practical response is to make sure that employers of all sorts protect their staff. Re-introducing section 40 would send a strong signal to the market that employers would be responsible for harassment from third-parties when at work. So, this would encourage the making of better policies. However, the Bar Council also sees a role for the Equality and Human Rights Commission to intervene more in contexts where women are at risk of such harassment. The EHRC’s Code of Practice 2010 addressed this issue at paragraphs 10.20 – 10.24\(^4\) when section 40 was in place. The recommendations of good practice in that Code should be encouraged widely in particular –

- *having a policy on harassment;*
- *notifying third parties that harassment of employees is unlawful and will not be tolerated, for example by the display of a public notice;*
- *inclusion of a term in all contracts with third parties notifying them of the employer’s policy on harassment and requiring them to adhere to it;*
- *encouraging employees to report any acts of harassment by third parties to enable the employer to support the employee and take appropriate action;*
- *taking action on every complaint of harassment by a third party.*

5. **How effective and accessible are tribunals and other legal means of redress and what can be done to improve those processes**

One very useful practice which was recently adopted by an Employer is to have word or phrase; i.e. “that’s not cool”, which is recognised by the workforce as being a clear instruction to desist. This may prevent conduct or words escalating, particularly in the environment where comments are being made which the recipient or person in earshot regards as unacceptable. This may head off workplace issues from escalating

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\(^3\) See in particular page 8 in the main review at https://www.fawcettsociety.org.uk/Handlers/Download.ashx?IDMF=e473a103-28c1-4a6c-aa43-5099d34c0116 and pages 7 – 8 in the Executive Summary at https://www.fawcettsociety.org.uk/Handlers/Download.ashx?IDMF=1f3c13a4-2112-48db-9569-eadc6741f317

\(^4\) https://www.equalityhumanrights.com/sites/default/files/employercode.pdf
and mean that the person concerned has a swift means of stopping harassment on an informal basis with escalation. If the safe word is ignored it may be treated as misconduct.

Whilst Tribunals can award aggravated or exemplary damages there is a case for making it mandatory that Employment Tribunals should consider awarding higher compensation in cases where it considers that the Respondent has flagrantly or unreasonably failed to protect the victim in the workplace, similar to the Tribunal’s power to award a 25% uplift on compensation where the ACAS Code has been ignored or not followed in disciplinary cases.

The power to make a recommendation which should be followed at threat of an increase in compensation should also be reinstated in this area.

There is also an argument that serious sexual harassment which is misogynistic should be treated as a hate crime and a petition calling for the CPS to make such incidents a hate crime has been signed by more than 65,000 people. This is something that should be considered. Nottinghamshire police register incidents against women that are motivated by an attitude of a man towards a woman and includes behaviour targeted simply because they are women as a hate crime, as it allows police to investigate the incident as a crime and to support the victim. There is a gap in the Crime and Disorder Act which includes an offence of harassment motivated by the complainant’s race or religion but not when it is sexual. This should be considered.

6. 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

It must be remembered that many cases in the Employment Tribunal settle rather than go to a full hearing and that such settlements are likely to include a confidentiality clause. The claim is ultimately for compensation and the Claimant may wish to accept an offer which includes a NDA. There are perhaps three stages to consider:

- An internal settlement within the workplace.
- Settlement where a dispute has arisen with a settlement signed by a Legal Advisor.
- Settlement after Tribunal proceedings have commenced.

In the last two cases the settlement will be signed off by a legal adviser. Section 147 of the Equality Act 2010 sets out the requirements before a settlement is enforceable. We question whether a NDA in the workplace could ever be regarded as enforceable without a legal adviser where the victim has raised a complaint.
Inappropriate agreements should be treated as unenforceable. If agreements are only to be regarded as enforceable as a matter of contract and statute if there has been a legal advisor who has signed off on the agreement, this may prevent abuse, but there should be a proviso that any monies paid under an inappropriate and unenforceable agreement does not have to be returned where the employer has not pointed out the need for legal advice and ensured that the victim employee has taken legal advice. In some cases, the victim may want an NDA so there is some advantage to it.

It may also be questioned whether NDA’s should be treated as ineffective where the victim is asked to provide a statement or evidence to assist another complainant where the harasser is a repeat perpetrator.

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