



Law Society
of Scotland

Written Submission

Sexual Harassment in the Workplace Inquiry

March 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Employment Law Sub-committee welcomes the opportunity to consider and respond to the Women and Equalities Committee of the House of Commons' inquiry: sexual harassment in the workplace. The Sub-committee has the following comments to put forward for consideration.

General comments

As our experience relates only to those claims which have made it to the point of involving solicitors, it would be difficult to comment authoritatively on how widespread the incidence of such conduct is in the workplace or who perpetrates it or whether it has increased or decreased over time. In addition we do not have access to the Employment Tribunal statistics on claims of unwanted sexual behaviour, since such claims are not broken down separately from, for example, claims of discrimination or constructive unfair dismissal (which will often include claims of unwanted sexual behaviour). For these reasons we do not comment on the first two points of this inquiry, relating to how widespread sexual harassment in the workplace is, and who experiences it, perpetrates it, and its impact on different groups.

We do have some anecdotal evidence of sexual harassment within the Scottish legal professions. In our 2013 survey of the legal profession, some respondents noted that there had been occurrences of discrimination in the workplace including some instances of harassment.¹ This year's version of that survey will contain a number of questions focusing specifically on sexual harassment in the Scottish legal profession.

In late 2017, the Society's *Journal* conducted a salary survey which asked a question regarding sexual harassment in the profession. Again, some members raised their experiences anonymously.²

¹ Law Society of Scotland, [Profile of the Profession 2013 – Demographics and work patterns of Scottish solicitors](#) (2013)

² Journal of the Law Society of Scotland, [Survey comments: harassment does happen](#) (9 November 2017)

We have published preventing bullying and harassment guidance for some time now and continue to promote it to members.³

Actions to change workplace culture

We are aware that many employers have in place policies and procedures intended to prevent such conduct and to give people routes to report, as part of their grievance procedures. Members of our Employment Law Sub-committee have been involved in assisting employers to draft and implement such processes over many years. Recent press coverage has suggested a number of high profile employers have failed to prevent inappropriate conduct taking place. In addition, their grievance procedures have apparently not been used successfully by workers who have experienced such conduct. As a result, we expect that responsible employers may well be taking steps to review their policies to ensure that employees are encouraged and practically able to make use of them when such issues arise.

Employers might also be encouraged to use their non-executive directors on the boards of companies, public sector bodies and third sector bodies (for example, the Chair of the Board's Audit and Risk Committee) as points of contact for grievances to be raised, where there is any reluctance to raise them with executives (particularly where allegations involve senior people in these organisations). The recent adverse publicity in relation to the failures of policies intended to protect workers in a variety of organisations (including large charities, political parties, law firms and others) and the general raising of awareness of the ability to speak out through campaigns such as #MeToo is likely to have a positive effect on making this a higher priority for employers. The increased use of social media to address complaints is a concern for employers, which may encourage them to raise awareness of protections available amongst their workers and encourage them to make use of their existing employment policies and procedures as the first port of call.

Better protection of workers from sexual harassment

We note that there are already a number of routes for those affected by sexual harassment to obtain protection using the law, including not only criminal sanctions against sexual crime but also the Protection from Harassment Act 1997 and the Equality Act 2010 which protects people from discrimination in the workplace and in wider society. It may be that wider publicity to make people more aware of the legal protections and specific measures which are available should be given. This could reassure those who suffer from sexual harassment or unwanted conduct which falls short of criminal conduct that there are

³ Law Society of Scotland, [Preventing Bullying and Harassment: Guidance for individuals, firms, and organisations](#), (2017)

different remedies available, short of making a report of criminal activity to the police, and which will assist them to achieve their objective (including to have the unwanted conduct cease).

Where harassment has been caused by clients, customers and other third parties, there may be a perception on the part of workers that they have no remedy open to them. The potential protection from an unfair dismissal claim which is available to employers who dismiss a worker on the insistence of a third party (the dismissal being justified for 'some other substantial reason' under section 98 of the Employment Rights Act 1996) is unlikely to be an easy one to use. However, consideration might be given to imposing a duty on such an employer to seek to arrange for the worker concerned to be provided with suitable alternative work if possible.

However, it seems doubtful that changes in the law would make much difference, given the legal protections which are already in place. A culture change, through changes in attitude on the part of employers and an increase in the confidence of those who seek to use the available remedies, is likely to be of more significance.

Effectiveness of legal means of redress

Following the removal of fees in Employment Tribunals, which acted as a disincentive to bringing claims, there is presently no financial barrier to prevent claims of sexual harassment being brought before the Employment Tribunal. The tribunals are accessible to workers and the increased involvement of ACAS in conciliation in advance of claims being submitted should also assist.

Use of non-disclosure agreements in sexual harassment cases

To support a culture change, there is a cogent public policy argument that Settlement Agreements entered into between employers and workers should not contain non-disclosure clauses in relation to allegations of sexual harassment or unwanted sexual contact. However, there may be circumstances where both parties, having the benefit of legal advice, agree to a non-disclosure clause in their own respective interests. Should these circumstances arise, it seems unlikely that either party would wish to have the matters which have led to the settlement to be disclosed publicly and it would seem excessive to make such clauses unlawful, unless there is a public interest in disclosure.

In any event, it is difficult to envisage that where such a clause is agreed to and is then broken by the worker, in circumstances where there was public interest in doing so, that there would be good prospects of recovery of settlement sums already paid to the worker. It is noted that the NHS appears to be experiencing no difficulties since the use of non-disclosure clauses was stopped, as a matter of policy. A

number of charitable and public bodies, as well as private sector organisations employing certain categories of professionals, have a duty to report allegations of serious misconduct in certain situations.⁴ This includes where the interests of the public or the reputation of the profession may be adversely affected should the individual concerned be allowed to continue in practice without some form of restriction or re-training. Such further action would be a matter for the professional body concerned. Consideration could perhaps be given to extending such an obligation to report to include a wider range of employers' organisations, though we recognise that careful consideration would require to be given to the ability and resources of such employers' organisations to act fairly and in accordance with the principles of natural justice in determining the outcome.

⁴ See for example guidance from the Charity Commission ([How to report a serious incident in your charity](#)) OSCR ([Reporting notifiable events to OSCR](#)), and ICAS ([Reporting potential disciplinary offences to ICAS](#))



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