



## **Government Equalities Office Consultation – “Sexual Harassment in the Workplace”**

**A Response by**

**The Chartered Institute of Legal Executives (CILEX)**

**[October 2019]**



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## 1. Summary of Recommendations

- 1.1. CILEx welcomes the government's efforts to tackle sexual harassment in the workplace. (Para 3.1, 4.1–4.2)
- 1.2. It is hoped that the new proposed duty shall be beneficial in focusing efforts towards prevention and thereby proactively avoiding incidents of workplace sexual harassment. (Para 3.2, 4.4)
- 1.3. CILEx awaits the proposed statutory Code of Practice, intended to provide the detail behind this new duty, and stresses that any obligations imposed on employers should not become simple tick-box exercises. (Para 3.3–3.4, 4.3)
- 1.4. The new preventative duty ought to be supported by parallel reforms for improving access to justice within the employment tribunal. This includes: extended limitation periods, providing the tribunal with powers to enforce their own orders, and opening up access to legal aid. (Para 3.5)
- 1.5. 79% of CILEx members agreed that the current three-month limitation period is not sufficient for bringing a claim before the tribunal and creates additional barriers for victims seeking justice. (Para 4.18)
- 1.6. CILEx members favoured an extended limitation period of 9-12 months for bringing an Equality Act claim, (Para 4.19) and a further extension for pregnant women in recognition of the additional pressures they face. (Para 4.20)
- 1.7. Other possible circumstances for extensions to the limitation period were also put forward, such as instances where the victim has suffered from mental health issues. (Para 4.21–4.22)
- 1.8. CILEx calls for non-legislative solutions in complementing the new statutory duty to address wider factors which have contributed to sexual harassment incidents and barriers to reporting. These include: a lack of employer awareness of how to prevent harassment, structural workplace inequalities and institutionalised behaviours, and general societal attitudes. (Para 4.5, 4.10, 4.24–4.25)
- 1.9. Dual enforcement of the new statutory duty, by virtue of individual claims and existing enforcement under the European Human Rights Commission, is welcomed to account for the limitations of enforcement bodies. (Para 4.6–4.8)
- 1.10. 73% of CILEx members agreed with adopting a compensatory model for the new preventative duty, mirroring those available under the existing TUPE provisions. (Para 4.9)
- 1.11. Majority of CILEx members further agreed that this new duty, and wider Equality Act protections, ought to extend to instances of third-party harassment, (Para 4.11–4.13) as well as to volunteers and interns, where they are not already covered by relevant provisions. (Para 4.14–4.17)

## **2. Introduction**

- 2.1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 20,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers.
- 2.2. This response has been informed by member feedback provided from both a practitioner perspective (with almost 1,250 Chartered Legal Executives specialising in employment law) and a personal perspective, from members more generally in workplace environments who have had personal experience of this and related matters. Contributions have therefore been gathered from a wide range of CILEx members from across our membership base.
- 2.3. As it contributes to policy and law reform, CILEx endeavours to ensure relevant regard is given to equality and human rights, and the need to ensure justice is accessible for those who seek it.

### 3. General Points

3.1. CILEx has long been an advocate for eliminating barriers in the workplace and encouraging greater diversity within the legal profession. It is our belief that everyone has the right to be treated fairly and equally at work, to have their rights and interests protected, and their personal life respected. Underpinning this aim is the duty, as the legal profession, to uphold the rule of law; safeguarding that all are equal before the law and that mechanisms are in place for adequate enforcement of legal rights and protections.

3.1.1. However, CILEx is concerned to see that this has not always been the case within the context of workplace protections. Earlier research into the impacts of pregnancy and redundancy protections<sup>1</sup>, confidentiality clauses<sup>2</sup> and access to the employment tribunal<sup>3</sup> have demonstrated that workplace harassment, bullying and discrimination still take place and that weak enforcement has prevented those culpable from being held to account.

3.1.2. CILEx welcomes these proposals, alongside the government's wider initiatives (such as the Good Work Plan initiatives) to help combat these inequalities and provide a safer working environment for all. These reforms must seek to rectify the current dichotomy between what is law and what is practice and ensure that mechanisms for enforcement are sensitive to the needs of victims: *"It is very easy to uphold the law without actually doing anything to help the victim."* (CILEx member quote)

3.2. CILEx supports the principle behind these reforms in gravitating towards preventative action and strengthening enforcement mechanisms so that the onus is removed from the victim.

3.2.1. Having surveyed members working in employment law, as well as those working more widely in other areas of the profession, CILEx has received professional and personal feedback on the impacts that these proposals could have.<sup>4</sup> Almost three quarters of all members responding to our survey, agreed or strongly agreed that sexual harassment is still prevalent in the workplace, with a general consensus that this can largely be attributed to workplace power imbalances alongside a lack of enforcement where harassment has occurred.<sup>5</sup> A greater focus on the role of employers before an incident takes place, would thereby be beneficial in establishing a more level playing field from the outset,

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<sup>1</sup> CILEx Submission, *Department for Business, Energy and Industrial Strategy Consultation: Extending redundancy protection for pregnant women and new parents*, (April 2019).

<sup>2</sup> CILEx Submission, *Department for Business, Energy and Industrial Strategy Consultation: Confidentiality Clauses*, (April 2019).

<sup>3</sup> CILEx Submission, *Law Commission Consultation: Employment Law Hearing Restructures*, (January 2019).

<sup>4</sup> Majority (40%) of CILEx members responded to our surveys on these proposals from the capacity of an employee, worker or intern with personal experience of these matters; 15% responded from the capacity of a legal professional with experience in employment matters; 17.5% responded in both a personal and professional capacity, and 27.5% preferred not to say what capacity they were responding in.

<sup>5</sup> 78.7% of survey respondents selected these two options as the most likely reason for why existing laws may have been ineffective in stopping sexual harassment incidents. Taken in conjunction with qualitative member comments, results still demonstrate that these were the most likely reasons selected by CILEx members.

Other reasons included: a lack of awareness of legal protections; a lack of oversight within the workplace; nuances in identifying sexual harassment which can make it difficult to determine the extent of severity; social norms.

alongside the proposals put forward for strengthening enforcement mechanisms.

- 3.3. However, in implementing these proposals it is important to ensure that the new statutory duty does not become a simple tick-box exercise. The risk of this happening arises by virtue of the very nature of preventative action whereby it becomes more difficult to interpret and apply legal principles by a reliance on contextual factors.<sup>6</sup>
- 3.4. As such, CILEx looks forward to the publication of the supplementary Code of Practice in the hope that this will provide extra clarity around how the preventative new duty shall be implemented. In the absence of this code, it is hard to determine the true scope of these proposals in terms of what the new duty shall entail and how it is intended to operate; as conceded by the consultation paper, this is exacerbated by the current ambiguities around what 'all reasonable steps' means in practice.<sup>7</sup> CILEx thereby awaits more detail on these factors, to better understand the practical application of the new proposed duty, i.e.: the extent of employer obligations required, best practice standards for preventative measures, and the protections intended to be offered to employees/workers.
- 3.5. In addition, CILEx would like to emphasise the importance for these proposals to be supported by parallel reforms to employment tribunal restructures,<sup>8</sup> which go beyond remedying the barriers caused by limitation periods and seek to overcome additional barriers which have undermined access to justice when enforcing workplace protections. This includes reforms proposed for providing the tribunal with powers to enforce its own orders, ensuring that claims are appropriately handled by specialist judges, and removing arbitrary technicalities which have prevented 'workers' from having their cases heard.
  - 3.5.1. Furthermore, as stated previously, CILEx fully endorses that legal aid should be available for litigants in the employment tribunal, as well as other areas, so that access to justice can be improved.<sup>9</sup> Integral to this is that the courts and tribunals are, and are seen to be, accessible to those who need them. This has particular significance with regard to employment claims given the Government's Employment Tribunal fees regime that was found to be illegal in the Supreme Court's judgment in *R (UNISON) v Lord Chancellor* [2017] UKSC 51. That fees regime will inevitably have lingering deleterious effects, and the government will wish to assure itself that the perception that the employment tribunal prices people out of justice is not putting people off bringing legitimate claims.

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<sup>6</sup> For instance, it is recognised that the current statutory defence of 'taking reasonable steps' under sexual harassment laws, are determined by looking at the contextual factors at play. This approach becomes much harder to adopt in the context of the new proposed duty, as it is intended to be imposed pre-emptively and therefore as there is no incident per se, there are fewer contextual factors to draw from. Consequently, it is still yet to be seen how this new duty shall be gauged and employer responsibility determined.

<sup>7</sup> Government Equalities Office, *Consultation on Sexual Harassment in the Workplace*, (11 July 2019), para 1.4-1.6.

<sup>8</sup> See footnote 3.

<sup>9</sup> See footnote 1 and 2.

#### 4. Responses to Specific Questions

##### Q1. If a preventative duty were introduced, do you agree with our proposed approach?

- 4.1. A recurring theme amongst member opinion suggested that the prevalence of sexual harassment at work is not due to intrinsic deficiencies in existing laws, but due to problems of workplace culture and social norms which can only be remedied through effective enforcement of legal protections (echoing, in part, the Women and Equalities Select Committee findings).<sup>10</sup> As one member commented:

*“Laws do not impact culture without enforcement or strong messages. Cultures where sexual behaviour in the workplace is accepted as banter or the norm dismiss legislation and minimise its impact making those subject to the behaviour feel the laws are not worth pursuing. Peer pressure in these environments is rife for example even where a woman or man considers action there is pressure to not take such behaviours so seriously by others.”*

- 4.2. With this in mind, CILEx welcomes that these proposals do not intend to reinvent the wheel, but more sensibly build off existing concepts within the Equality Act with a greater focus on reforming the crux of the problem, i.e.: the disregard of existing legal protections owing to workplace attitudes and wider problems of enforcement. In establishing a proactive duty for preventing workplace harassment, it is hoped that employees/workers can trust that the legislative protections available to them are being taken seriously by their employer, as before-the-event prevention becomes just as important as after-the-event enforcement.<sup>11</sup>
- 4.3. However, given earlier evidence provided to the Women and Equalities Select Committee inquiry (2018) suggesting that existing legislative protections lack clarity (notably around the definition of ‘all reasonable steps’),<sup>12</sup> CILEx urges that work still needs to be undertaken to help bolster awareness of concepts under the Equality Act and wider laws. As such, CILEx awaits the anticipated statutory Code of Practice aimed at clarifying the law on this matter and reiterates the difficulties in providing our full support for these proposals whilst there is still some ambiguity around the detail behind it.

##### Q2. Would a new duty to prevent harassment prompt employers to prioritise prevention?

- 4.4. CILEx tentatively agrees that establishing this new duty should see a shift towards prevention and a move away from placing the onus on victims to challenge unlawful conduct. Just over half of all survey respondents agreed that the new duty would be useful in shifting the focus to prevention, which could in turn prove beneficial for enforcement. As one member put it:

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<sup>10</sup> House of Commons, Women and Equalities Committee, *Sexual Harassment in the Workplace*, Fifth Report (Session 2017-2019) HC 725, Conclusions and Recommendations, p.48.

<sup>11</sup> Member comments included: “*the earlier these issues are identified the easier they are to deal with. Enforcement would not need to be a priority if prevention was successful.*”; “*Prevention [is] better than after the event.*”

<sup>12</sup> Women and Equalities Committee, *Sexual Harassment in the Workplace: Oral Evidence*, HC 725, Evidence given by Joanna Blackburn, Q481 (6 June 2018).

*"[Current laws] are effective but only if enforced - many women feel unable to complain about their harassers for fear of retribution or perhaps understanding that it's not 'the norm' or just banter. If a better, safer space could be created to share the issues, and an environment showing zero tolerance to this created in the first place then perhaps the laws would be more effective further down the line."*

- 4.5. CILEx welcomes this proposal as the first step in preventing workplace sexual harassment, whilst emphasising the importance for this new statutory duty to be reinforced with non-legislative solutions to address the wider systemic factors that have contributed to this issue.
- 4.5.1. An overwhelming message from CILEx members throughout survey responses highlighted that alongside these reforms, wider efforts shall still be required in: (a) educating employers on preventative measures,<sup>13</sup> (b) overcoming institutionalised workplace behaviours which are conducive to these issues,<sup>14</sup> and (c) shifting the dynamic in societal attitudes and cultural thinking.<sup>15</sup>
- 4.5.2. In respect of the former (the need to educate employers on preventative measures), survey respondents identified the proposition that 'employers do not know how to prevent sexual harassment effectively' as the most likely reason for why they may not have taken adequate steps to prevent workplace harassment to date.<sup>16</sup> Consequently, the Government Equalities Office may wish to reassure itself that additional resources are made available to employers to help support promotion of best practice.
- 4.5.2.1. Nonetheless, it is noted that the second most likely reason selected by members was that 'employers do not take their responsibilities to comply with the law seriously enough'; and to that end, CILEx recognises that the new preventative duty will be useful.
- 4.5.3. In respect of (b) members highlighted the backdrop of the legal profession as an example of institutionalised workplace behaviours which are conducive to these issues. For example, the lack of diversity within certain parts of the legal profession, particularly with regards to gender equality, coupled with hierarchical management structures and outdated norms, were seen to have contributed to

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<sup>13</sup> Member comments included: "*Employers may miss the early signs and the problems grows*"; "*There are no preventative measures devised specifically for this. And employers seem reluctant to try and devise any. Also, there's no way of checking if any future or current employee is the type of person that would sexually harass or assault someone...*"; "*It needs to start earlier so that it is preventing poor conduct and attitudes whilst going through education and support given to both employers and employees through availability of education.*";

<sup>14</sup> Member comments included: "*This type of behaviour is institutionalised in some professions and it needs employees to stand up and have a joint voice to prevent this type of behaviour. In many businesses the most senior staff are also the perpetrators so there is no higher to go to report the issues.*"; "*Sexism is still rife in the legal profession with males being treated more favourably than females, with regard to wages, promotion and capability.*"; "*Gender pay gap. Disrespect to females in lower roles, or lower income, same roles. Attitudes need to change.*"; "*People are afraid of their peers reactions, how it will affect the person accused even. Women are often made to feel like sexual harassment should be expected as it is so common. Making a stand against it needs to be publicised more.*"

<sup>15</sup> Member comments included: "*Legislation is all very well but it is changing attitudes that matter. This should start in Law School where you are not only taught the law but also what to expect when you go into the workplace and what is and is not acceptable.*"; "*I feel that it is a wider issue than solely looking at employers.*"; "*it is a whole society issue and employers cannot solve society's ills. Standards have changed and there are duties upon employers in place. More education of employers and employees may well be needed but the starting point is respect for all.*"

<sup>16</sup> The options provided for in our survey question included: 'Employers are unaware of their legal responsibilities' OR 'Employers do not take their responsibilities to comply with the law seriously enough' OR 'employers do not know how to prevent sexual harassment effectively' OR 'I disagree, the problem does not lie with employers.'

incidents of unreported sexual harassment<sup>17</sup> and have created additional barriers to workplace protections and enforcement. One member commented:

*“I have never been so aware of my gender as in any meeting I take with male lawyers. In these meetings, their ‘polite’ behaviours, such as opening doors, pouring drinks, manners of address call out gender. This wouldn’t be so bad if reciprocation were acceptable, but I often encounter situations where I reciprocate and the man cannot accept; e.g. a man won’t walk through a door I am holding. I would not get away with calling them ‘my dear man’, though they call me ‘my dear girl’ with monotonous regularity. Before working in the legal industry, I worked in the medical industry, tech industry and academia.”*

Wider reforms to improve access of opportunity within workplace environments, as well as reforms to structural inequalities such as gender pay gaps, would help in this regard and thereby be complementary to the above proposals.

4.5.4. Finally, in respect of (c), (wider societal attitudes and cultural thinking), one member observed:

*“Culturally in the UK we blame the victim, we look for reasons that something either isn’t harassment, or the victim elicited it in some way (clothing, being too friendly, being drunk). Our workplaces are a reflection of our society. Women who raise complaints are often the ones exited from a business. I have experienced harassment and been involved in many cases as an employment lawyer and would do everything I could not to report it.”*

CILEx stresses the importance of wider public education and awareness initiatives in helping to overcome these societal barriers, as well as independent support services for victims; although, it is recognised that a gravitation towards prevention is a positive step in changing these attitudes for the better.

### Q3. Do you agree that dual-enforcement by the EHRC and individuals would be appropriate?

4.6. 59% of survey respondents agreed that dual-enforcement by the EHRC and individuals would be the best option for enforcing compliance with the new preventative duty. This would enable punitive measures via the Tribunal/County Court to be imposed for non-compliance, acting as a stronger deterrent for employers to adhere to the preventative duty, as the enforcement powers of the EHRC are not always sufficient.<sup>18</sup>

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<sup>17</sup> Member comments included: “Law is still a male dominated profession with many senior lawyers holding old fashioned views. People may be reluctant to speak out for fear of doing so damaging their career prospects.”; “The fact that those with the power to ‘hire and fire’ are often men means that a woman feels like she can’t speak up against anything if she wants to keep her job or get a promotion. People joke about sexual harassment, but the law isn’t well known, and many companies do not have the relevant whistleblowing or disciplinary policies in place.”

<sup>18</sup> Member comments with respect to the EHRC’s current enforcement powers included that they are: “Not tough enough” and that “they should be able to impose financial penalties”. One member commented: “if the EHRC has power to enforce fines, then I think the EHRC would have more clout in enforcement.”

- 4.7. This option was also seen to be beneficial in increasing awareness of enforcement mechanisms by providing a wider choice of redress routes as well as empowering victims by giving them the chance to ensure compliance.
- 4.7.1. This is particularly prudent given survey findings which indicated that 77.2% of CILEx members were only slightly aware or moderately aware of the enforcement bodies currently available for handling various employment related matters.<sup>19</sup>
- 4.8. Nevertheless, CILEx agrees with the consultation paper's findings that where individual enforcement is permitted, a question arises over whether an incident of sexual harassment would need to have occurred to form the basis of the claim. As stated previously (paragraph 3.4 above), more detail is first needed on how the new preventative duty would be implemented as it is difficult to determine whether it would be proportionate to allow individuals to raise a claim in the absence of an incident, without knowing the extent of employer liability under the duty.

Q4. If individuals can bring a claim on the basis of breach of the duty, should the compensatory model mirror the existing TUPE provisions and allow for up to 13 weeks' gross pay in compensation?

- 4.9. 72.7% of survey respondents agreed that non-compliance should result in a financial penalty for the employer, mirroring the existing TUPE provisions. However, amongst these respondents, 65.6% agreed that this should only be the case where an act of sexual harassment has taken place, so as to minimise the risk of abuse of the system.<sup>20</sup>
- 4.9.1. One possible exception to this stance, was where non-compliance of the duty has been flagged to the employer on previous counts and the employer still fails to take the issue seriously.

Q5. Are there any alternative or supporting requirements that would be effective in incentivising employers to put measures in place to prevent sexual harassment?

- 4.10. CILEx provisionally supports the implementation of reporting requirements as proposed by the Government Equalities Office. This suggestion was similarly put forward amongst survey responses, in addition to the following suggestions made for incentivising employers to implement preventative measures against sexual harassment: 1). Routine inspections from auditors/outside inspectors, 2). Mandatory

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<sup>19</sup> Once again it is noted here that majority of CILEx members surveyed on these proposals do not practice employment law but responded on the basis of their own personal experience (see footnote 4 above). Those that were aware of relevant enforcement bodies commented: "None of them worked for me or my friends. They are very limited in what they can do"; "They have neither the powers nor the staff to effectively address the myriad of problems that exist."; "[They are] not effective as they are not well known or even heard of by the public."; "I think the HSE is effective and the EHRC used to be but in recent years (maybe due to budget restraints) I feel they have been less prolific."

<sup>20</sup> One member commented: "No harassment should happen at work. We go there to earn a living. Discrimination, harassment, assault - none of these should be part of anyone's job. If employers strive to provide a good, safe work environment, then employees strive. But I also believe that the employees should be personally held responsible for their actions too. It's the only way anyone would think twice before doing something. Personal responsibility seems to elude most people nowadays. In situations like these, personal responsibility is paramount for ensuring improvement of various situations."

in-house training on the topic of sexual harassment in the workplace,<sup>21</sup> 3). Greater public awareness of what is, and what isn't, appropriate behaviour (to establish a greater societal consensus around what behaviours qualify as harassment),<sup>22</sup> 4). Financial sanctions for employers who have failed to act where allegations have been made, 5). Best practice standards to help provide advice and guidance for employers on how to prevent workplace harassment; 6). Parallel initiatives to combat gender pay gaps and inequalities within employment (as discussed previously in paragraph 4.5.3 above).

- 4.10.1. However, in introducing reporting requirements, care must once again be taken to ensure that this does not simply become a tick-box exercise as a concern raised by member feedback was that “a statutory duty would worsen the existing box-ticking culture in firms where training is carried out only to satisfy compliance.” CILEx thereby continues to endorse a dual enforcement approach which recognises the importance of non-statutory initiatives in complimenting legislative reform.

Q6. Do you agree that employer liability for third party harassment should be triggered without the need for an incident?

4.11. CILEx recognises the need for the law and legal protections to be appropriately balanced in favour of both parties, and employer liability must thereby be premised on some act or omission on behalf of the employer. In the absence of a sexual harassment incident, the imposition of liability could be linked to the new preventative duty to avoid workplace sexual harassment (where preventative measures for third-party harassment are within the scope of requirements put forward in the expected statutory Code of Practice).

- 4.11.1. In addition, CILEx agrees with the earlier decision to repeal the ‘three strikes’ rule owing to the principle that access to legal recourse and remedy should not be determined as a quantitative sum. Requiring that a person has to have been a victim of unlawful conduct on two prior occasions in order to establish employer liability is not a sure-fire way of ensuring proportionality of approach, as this overlooks the merits of individual cases.

Q7. Do you agree that the defence of having taken ‘all reasonable steps’ to prevent harassment should apply to cases of third-party harassment?

4.12. 79.6% of CILEx members agreed that the consultation’s proposed preventative duty should extend to incidents of third-party harassment as “*there has to be uniformity. Harassment is not an issue solely in relation to employees/employers.*” (CILEx member quote)

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<sup>21</sup> One member suggested that the ‘Respect Works’ courses were particularly beneficial in this regard.

<sup>22</sup> Suggestions were put forward for greater news presence and instructional webinars to aid in this regard.

This suggestion was made in recognition of member comments highlighting that the inconsistencies in approach of what amounts to inappropriate behaviour, may have contributed to unreported incidents: “*I think there are major issues with identifying sexual harassment and the subsequent issues with enforcement stem from there.*”; “*It is not always taken seriously, or people do not understand what substitutes as harassment.*”; “*Employers may not recognise that there is a problem or may not see the behaviour as a problem due to their own attitudes and outlook.*”; “*What some people deem harassment others see as banter. Words can have a more debilitating effect on people.*”;

- 4.13. CILEx members identified that third-party harassment does happen in practice and highlighted the additional complexity and pressure that this can create for a victim. Within the legal profession, incidents which have been instigated by clients were particularly prevalent, creating additional pressures around fear of loss of client accounts and uncertainties around navigating reporting procedures.<sup>23</sup>

Q8. Do you agree that sexual harassment should be treated the same as other unlawful behaviours under the Equality Act, when considering protections for volunteers and interns?

- 4.14. 90.9% of survey respondents agreed that in principle the Equality Act's workplace protections, including sexual harassment protections, should be treated the same as other unlawful behaviours and thereby extend to volunteers. As CILEx members rightly pointed out these protections do not stem from remuneration but from a civic and moral duty.
- 4.14.1. Members noted that volunteers can be heavily relied upon in certain industries such as charity shops, local theatres, youth organisations etc. and should not be placed at a disadvantage for working in these roles or environments.
- 4.14.2. CILEx believes that these same principles ought to apply for interns (see paragraph 4.15 below).

Q9. Do you know of any interns that do not meet the statutory criteria for workplace protections of the Equality Act?

- 4.15. CILEx did not receive any member feedback to suggest that interns are not already within the scope of these protections, however, should any evidence come to light that this may be the case, CILEx urges the government to ensure that those on internships and work experience commitments, are also covered by the Equality Act protections.

Q10. Would you foresee any negative consequences to expanding the Equality Act's workplace protections to cover all volunteers, e.g. for charity employers, volunteer-led organisations, or businesses?

- 4.16. Members did note that this proposal could result in a hesitancy amongst employers to seek the assistance of volunteers or offer work experience/internship opportunities. However, a simple solution would be to ensure resources are made available to volunteers/interns and their employers (such as training and best

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<sup>23</sup> Member comments included: "This often occurs and is often not reported especially where they are "good" clients"; "Staff in law firms get a lot of harassment from clients. This week in my job a member of staff was told by a client he would make her lose her job because he thought she was being rude to him."; "Managing Clients is easier than managing colleagues and bosses are probably more willing to sack off a Client/ customer / visitor. However staff need to be reassured that they can report issues and be supported and listened to - no matter how important the Client etc may be to the firm"; "Employees should not be expected to be exploited sexually to further their employers business, including in relation to work for which they are rewarded with commission, it should not be lawful for someone to flirt with a client to get work."; "people dealing with the public require and are entitled to protection."

practices) to instil these behaviours without imposing heavy cost burdens on either party. This is in keeping with CILEx's earlier recommendations calling for non-statutory initiatives more generally so that employers and employees are better positioned to understand the legal rights and protections available.

Q11. If the Equality Act's workplace protections are expanded to cover volunteers, should all volunteers be included?

- 4.17. Whilst CILEx members appreciated the practical difficulties in extending these protections for ad hoc or one-off volunteering arrangements, there was a strong consensus that these protections ought to apply nonetheless.

Q12. Is a three-month time limit sufficient for bringing an Equality Act claim to an Employment Tribunal?

- 4.18. 79% of CILEx members agree or strongly agree that the current three-month limitation period is not sufficient for bringing a claim before the tribunal and in turn greatly undermines access to justice. CILEx is deeply concerned by the presence of this barrier to enforcement as it is already recognised that power imbalances in the workplace, coupled with fear of reprisal and stigma, make it challenging for victims to seek legal support and report incidents of harassment when they occur.

- 4.18.1. Anecdotal evidence from members, including those drawing from their own experiences attested to this,<sup>24</sup> emphasising the need for enforcement processes to provide adequate time for victims to come to terms with what has happened (including dealing with difficult emotions such as denial, embarrassment or humiliation), time to seek prior guidance or support (including in the form of counselling or medical attention) before deciding how best to tackle the situation, and time to obtain necessary evidence/information (which may also warrant that internal workplace investigations take place first).

- 4.19. Enforcement mechanisms and processes ought to be sensitive to these barriers and the acute needs of victims who have often experienced traumatic, stressful and emotional events where discrimination, workplace bullying, or harassment has occurred. CILEx thereby provisionally agrees that the limitation period for bringing Equality Act claims ought to be reformed to a period of 6 months as a minimum to bring this in closer alignment with other employment-related claims.

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<sup>24</sup> Member comments included: "I am currently dealing with a matter and it's taken me over 6 months to pluck up the courage to say something. I've missed the 3-month window and so there is no drive or pressure on the other side to handle my matter."; "It may take longer than that to gather evidence and obtain information from internal departments."; "3 months is not sufficient for a number of reasons i.e. this behaviour can result in the victim becoming depressed and withdrawn which can delay a complaint. Equally as outlined above peer pressure and culture within a workplace can significantly impact the ability of a victim to feel brave enough to bring a claim, especially where the perpetrator is a manager or more senior."; "Sexual harassment and assault are very humiliating for the victims and very scary too. The fear and humiliation prevent victims from making any complaints in the initial stages of being subjected to such treatment. It's much later on, after receiving support from family and professionals (if they seek this support!) when the victim might feel able to report this and take action against it. Sometimes "later on" can mean years..."; "It can take courage to speak up about this type of matter and Claimant's may also require counselling or other medical treatment before feeling able to speak up."

- 4.19.1. That said, a period of 9-12 months was the average length favoured by survey respondents as reasonable for Equality Act claims, in recognition of the sensitivities involved in these cases.

Q13. Are there grounds for establishing a different time limit for particular types of claim under the Equality Act, such as sexual harassment or pregnancy and maternity discrimination?

4.20. CILEx has previously called for additional flexibility for pregnant women to bring their case before the tribunal post-partum, so that pregnant women are not expected to undertake these enforcement procedures, which are often stressful and time consuming, whilst pregnant.<sup>25</sup> 86% of survey respondents agreed or strongly agreed with this proposal.

- 4.20.1. One member shared her own experiences of trying to challenge workplace discrimination whilst pregnant, including fears that this might impact upon her professional reputation in the long-term upon return-to-work:

*“I have personal experience whereby a former employer of mine retracted return to work terms whilst I was on maternity leave which I had agreed with them prior to going on maternity leave. This was discriminatory as another employee had the terms that I had agreed with them. As a result, I did not return to work for that firm and found another job. I was left feeling upset, vulnerable, stressed and angry but I did not have the energy at the time to bring a claim and was worried that my professional reputation would be tarnished by information being leaked on the local grapevine to suggest I was "trouble". Despite that being over 21 years ago I remain disappointed with myself that I did not bring them to account. I imagine it is not unusual for mid-grade employees to find themselves in such a position whereby they wish to preserve a professional reputation and therefore fail to pursue claims for fear of it affecting their future career prospects.”*

4.20.2. Amongst survey comments was the consideration that discrimination in these circumstances may only come to light once the woman returns to work despite the discriminatory action having taken place during her maternity leave. Enforcement procedures must be sensitive to these concerns and able to cater for such likelihoods.

4.20.3. However, it was suggested that the time limitations imposed post-partum still need to be somewhat limited to an appropriate and sensible length of time to ensure that victims are encouraged to report improper behaviour as soon as possible.

4.21. Other potential areas raised which could warrant an extended limitation periods (in addition to instances of pregnancy or maternity) included: situations where the victim has suffered mental health issues; discrimination on the grounds of ill-health or disability; and constructive dismissal.

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<sup>25</sup> See footnote 1.

4.22. However, it is arguable that extended limitation periods are needed more generally in the current climate, owing to the absence of greater public awareness and access to legal aid for enforcing employment protections.<sup>26</sup>

4.22.1. This is also in consideration of wider problems that have arisen around employment tribunals. CILEx strongly advocates for wider reforms to help strengthen the tribunal as an avenue for recourse, including: providing the tribunal with powers to enforce its own orders; removing arbitrary technicalities which have prevented 'workers' from having their cases heard; simplification of processes and access to legal aid.<sup>27</sup> These reforms to tribunal processes are not only needed in the context of Equality Act claims but wider employment related matters.<sup>28</sup>

Q14. If time limits are extended for Equality Act claims under the jurisdiction of the Employment Tribunal, what should the new limit be?

4.23. Please see above for CILEx's response to this answer (paragraph 4.19.1)

Q15. Are there any further interventions the Government should consider to address the problem of workplace sexual harassment?

4.24. CILEx members identified certain areas relating to sexual harassment that may have been overlooked within previous public discourse on this topic, including the presence of male sexual harassment, and the availability of legal advice/awareness of legal protections for those of whom English is not their first language.

4.25. As stated previously (paragraph 4.5) further interventions to be considered in addressing the problem of workplace harassment, include the need for non-legislative initiatives to supplement the new proposed statutory duty. These initiatives should look to providing wider support and further reforms to (a) better educate employers on measures for preventing workplace harassment; (b) address structural inequalities within workplace environments which have led to institutionalised behaviours conducive to these issues, and (c) more generally instigate the culture change needed to safeguard against harassment at a wider societal level.

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<sup>26</sup> One member commented: "To be frank I believe extended time limits should apply to all aspects. For a number of people the realisation that behaviour is discriminatory/unfair etc comes long after and usually as a result of someone pointing this out. For others the focus on just getting through the day or finding another job outweighs the desire to assert their rights. There should be extended time periods and better information for employees on all matters of rights within the workplace."

<sup>27</sup> Please see paragraph 3.5 above.

<sup>28</sup> Anecdotal evidence provided by members support this finding: "The tribunal process is complicated and can be expensive in cases where someone has lost their job. I am aware of instances of constructive dismissal and harassment that have not been pursued by friends due to a lack of funding and understanding of the process themselves"; "The two-year rule. I was involved in a case where a CEO was harassing an employee, but she had no recourse - she couldn't stay but had only been there 18 months, so she was not eligible to sue for constructive dismissal. As it was the CEO, no disciplinary action could be taken within the company."

**For further details**

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