PREVENTING SEXUAL HARASSMENT
PUTTING THE NEW DUTY INTO PRACTICE

Louise Skinner, Thomas Twitchett and Cary Marshall of Morgan, Lewis & Bockius UK LLP examine the new duty to prevent sexual harassment and discuss what employers should do to ensure compliance.

In October 2017, in response to an explosive press exposé detailing allegations of sexual harassment in the Hollywood film and television industry, millions of women, and some men, took to social media to share their experiences of sexual harassment and assault using the hashtag #MeToo (*www.forbes.com/sites/hollycorbett/2022/10/27/metoo-five-years-later-how-the-movement-started-and-what-needs-to-change/*).

Since then, the #MeToo movement has sparked a global reckoning (*see box "Global impact of the #MeToo movement"*). As millions more individuals from all walks of life continued to share their experiences of sexual assault and harassment, particularly in the workplace, the pervasiveness and extent of the problem were thrown into sharp relief. In the intervening years, various attempts have been made by governments, policymakers, the media and others to get to grips with sexual harassment in the workplace and everyday life (*see box "The 2023 Act timeline"*).

In the UK, in July 2021, following reports published by the Equality and Human Rights Commission (EHRC) and the Women and Equalities Select Committee (WESC), the government acknowledged that existing legal protections against harassment in the workplace left room for improvement (*see News brief "Preventing sexual harassment at work: a new duty for employers", www.practicallaw.com/w-032-3671*). In particular, the government committed to shoring up protections for employees by imposing a proactive duty on employers to prevent sexual harassment in the workplace. This duty is now contained in the Worker Protection (Amendment of Equality Act 2010) Act 2023 (2023 Act), which received Royal Assent on 26 October 2023 and will come into force in October 2024 (*www.practicallaw.com/w-041-5122*) (*see box "The new duty to prevent sexual harassment"*).

It is clear that, around the world, existing protections against sexual harassment have been found lacking, and momentum is growing towards creating sustained and positive change. This article considers what the new duty means in practice and the steps that employers can take to ensure that workers are protected from sexual harassment and inappropriate workplace conduct.

EXISTING FRAMEWORK

The Equality Act 2010 (2010 Act) is the main source of legal protections against sexual harassment in the workplace in the UK, although other legislation supplements its protections (*see feature article "Sexual harassment in the workplace: a ticking time*

bomb", www.practicallaw.com/w-014-2736). Section 26 of the 2010 Act defines sexual harassment as unwanted conduct of a sexual nature that has the purpose or effect of violating a person's dignity or creating for that person an intimidating, hostile, degrading, humiliating or offensive environment (*section 26, 2010 Act*). Examples of such behaviour can include sexual comments and jokes, suggestive looks, staring or leering, propositions or sexual advances, intrusive questions about a person's sex life, sexual gestures, sexually explicit emails or text messages, or unwelcome touching or hugging. A person can be sexually harassed by someone of the same or a different sex.

The 2010 Act prohibits both sexual harassment and any less favourable treatment because an employee has rejected, or submitted to, conduct of a sexual nature. For the purposes of the 2010 Act, it does not matter if the unwanted conduct is not intended to cause distress as long as the conduct has the effect of violating a person's dignity or creating an offensive environment. In fact, whether unwanted conduct violates a person's dignity or creates an offensive environment depends on the victim's perspective and whether their reaction is reasonable in all of the circumstances.

The 2010 Act not only prohibits employers from sexually harassing their employees or job applicants, it also provides that employers can be vicariously liable for acts of sexual harassment carried out by their employees in the course of their employment (*sections 40 and 109*). An employer does not need to have approved of, or even been aware of, its employees' actions in order to be liable for sexual harassment carried out by its staff. However, employers may have a defence if they can show that they took all reasonable steps to prevent the harassing employee from acting unlawfully (*section 109(4), 2010 Act*) (section 109).

Despite the existing legal protections, the #MeToo movement revealed that workplace sexual harassment remains an endemic issue in the UK.

Under-reporting

It has become clear that, although a significant percentage of the workforce report that they have experienced workplace sexual harassment, many victims keep silent due to barriers to reporting, including fears about not being believed, fears of victimisation, the lack of clear reporting procedures and beliefs that perpetrators would be protected. For example, a 2020 survey conducted by the Government Equalities Office reported that 29% of those in employment had reported experiencing some form of sexual harassment in their workplace but only 15% of those individuals had formally reported their experiences (*https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1002873/2021-07-12_Sexual_Harassment_Report_FINAL.pdf*).

Inadequate protection

In March 2018, the EHRC published a report (EHRC report) highlighting gaps in the legal protections against sexual harassment in the workplace, concluding that the existing obligations and guidance for employers were insufficient to protect workers from sexual harassment (*www.equalityhumanrights.com/sites/default/files/2021/turning-the-tables-ending-sexual-harassment-at-work-march-2018_2.pdf*). The EHRC report found that employees were not being protected from harassment at work and instead were being silenced by toxic cultures, fears of victimisation, and inconsistent or non-existent responses to any allegations.

Global impact of the #MeToo movement

The #MeToo movement has encouraged many lawmakers around the globe to take a close look at existing workplace anti-harassment legislation, if any, in order to identify gaps or determine where protections could be improved.

In 2019, the International Labour Organization (ILO) adopted the first international treaty recognising the right of everyone to a world of work free from violence and harassment, including gender-based violence and harassment. The ILO's Violence and Harassment Convention will require the 36 governments that have ratified it to put in place the necessary laws and policy measures to prevent and address violence and harassment in the workplace (*www.ilo.org/global/topics/violence-harassment/lang--en/index.htm.*)

A number of countries have taken action. For example, in the US, at least 22 states and the District of Columbia have passed laws bolstering workplace anti-harassment protections since #MeToo went viral (*https://nwlc.org/resource/metoo-five-years-later-progress-pitfalls-in-state-workplace-anti-harassment-laws/*).

In Australia, after a 2020 Australian Human Rights Commission report found that sexual harassment remains a pervasive issue in Australian workplaces, numerous legislative reforms have been enacted to prevent and address sexual harassment at work (*https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020*).

In Mexico, after the Mexican Commission on Human Rights published a damning report on sexual harassment and access to justice for victims, reforms to the Labour Law were enacted in 2020 that established new grievance mechanisms to redress sexual harassment in the workplace (*www.openglobalrights.org/workplace-sexual-harassment-mexico-gender-transformative-remedies/*).

RECOMMENDATIONS FOR REFORM

In the EHRC report, the EHRC made a series of recommendations seeking to change workplace culture, increase employer accountability, create greater transparency around incidents of harassment, and strengthen protection for harassment victims. Among other recommendations, the EHRC stated that the government should:

- Introduce a mandatory duty on employers to take reasonable steps to protect workers from sexual harassment and victimisation in the workplace. The EHRC stated that, in its view, the existing section 109 defence for employers taking all reasonable steps to protect employees from harassment in the workplace did not encourage best practice, was inadequate to protect workers and did not incentivise employers to take action.

- Introduce a statutory code of practice on sexual harassment and harassment at work specifying the steps that employers should take to prevent and respond to sexual harassment. The EHRC stated that this would offer necessary steps and guidance for employers to take to prevent harassment, and set out best practice.

- Limit the use of non-disclosure agreements (NDAs) and confidentiality clauses, which the EHRC was concerned were being used to discourage reporting of sexual harassment (*see "Non-disclosure agreements" below*).

- Increase limitation periods for harassment claims in an employment tribunal from three to six months. The EHRC explained that this would minimise the risk that victims will run out of time to bring a claim, as victims would have more time to process what has happened to them, exhaust internal routes (such as bringing a grievance) and seek legal advice.

WESC report

The EHRC report was closely followed by a WESC report in July 2018, which raised similar concerns and pointed out that employers had consistently failed to tackle workplace sexual harassment, sufficiently protect employees, or even acknowledge the extent of the problem (*https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72505.htm#_idTextAnchor008*). Accordingly, the WESC concluded that the epidemic of inaction and poor practice demonstrated that employers were currently not taking this issue seriously, and that they were not adequately incentivised to take action on sexual harassment in the workplace.

The WESC considered and agreed with many of the EHRC's recommendations, including the creation of a mandatory duty on employers to protect workers from harassment, the introduction of a statutory code of practice on sexual harassment, and amendments to employment tribunal limitation periods. The WESC also recommended that, due to the prevalence of sexual harassment by customers, clients or other third parties, the government should reintroduce a positive duty on employers to protect employees from third-party harassment, as existed in law from 2008 to 2013 (*https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf*).

The 2023 Act timeline

2017

The #MeToo movement begins.

2018

The Women and Equalities Select Committee (WESC) inquiry and report and the Equality and Human Rights Commission (EHRC) "Turning the Tables" report are published, highlighting serious concerns around workplace sexual harassment.

2018

The government responds to the WESC report and commits to consult on whether to introduce a mandatory duty to protect employees, including from third-party harassment.

2019

The government undertakes the promised consultation on sexual harassment in the workplace.

2021

The government publishes its response to the consultation and commits to introduce a duty for employers to prevent sexual harassment in the workplace, ask the EHRC to produce a statutory code of practice on sexual harassment, and introduce a duty on employers to prevent third-party harassment.

2022

The Worker Protection (Amendment of Equality Act 2010) Bill is introduced in the House of Commons.

2023

The Bill receives Royal Assent.

Government response

In its December 2018 response to the WESC report, the government confirmed that it would ask the EHRC to develop a statutory code of practice on sexual harassment although, to date, the EHRC has published only technical guidance on sexual harassment in the workplace (the technical guidance) on 30 January 2020 (*https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1801/1801.pdf; www.equalityhumanrights.com/our-work/sexual-harassment-workplace*). The government also committed to consult on a number of the WESC's proposals, including the mandatory duty to protect employees from sexual harassment, how to strengthen and clarify laws in relation to third-party harassment, whether to extend tribunal time limits and how to best regulate the use of NDAs.

In 2019, the Government Equality Office conducted the promised consultation and, on 21 July 2021, the government published its long-awaited response (the response) (*www.gov.uk/government/consultations/consultation-on-sexual-harassment-in-the-workplace/outcome/consultation-on-sexual-harassment-in-the-workplace-government-response*). In the response, the government committed to, among other things, to introducing:

- A duty requiring employers to take all reasonable steps to prevent sexual harassment in order to encourage employers to take positive proactive steps to make workplaces safer for everyone.

- Explicit protections from third-party harassment.

THE NEW DUTY

Following the response, the Worker Protection (Amendment of Equality Act 2010) Bill (the Bill) was introduced in 2022 as a private members bill in the House of Commons by Liberal Democrat MP Wera Hobhouse.

The original plan

As originally conceived, the Bill sought to strengthen protection for employees by requiring employers to take all reasonable steps to protect employees from harassment, including harassment from third parties such as clients or customers. The Bill received early government support but, as it moved through Parliament, these initial proposals were watered down.

Third-party harassment. As originally drafted, the Bill sought to reintroduce protections against third-party harassment. However, these protections were not included in the final legislation so those harassed by third parties in the course of employment may be left with no legal redress. This is particularly so given the repeal of the previous 2010 Act provisions that held employers liable for third-party harassment in certain circumstances and the Court of Appeal's 2018 decision in *Unite the Union v Nailard*, which held that employers will only be liable for third-party harassment in very limited and exceptional circumstances, such as when an employer's failure to protect an employee from third-party harassment is because of the employee's protected characteristic (*[2018] EWCA Civ 1203*).

The impact of these limited protections should not be underestimated; sexual harassment of employees by third parties is a serious issue. In fact, a recent Trades Union Congress poll found that 39% of the incidents of workplace sexual harassment reported in the poll had been perpetrated by a third party (*www.tuc.org.uk/news/new-tuc-poll-2-3-young-women-have-experienced-sexual-harassment-bullying-or-verbal-abuse-work*). As noted in the EHRC report, third-party harassment tends to be handled particularly poorly by employers, whether because of fears of tarnishing important client relationships, beliefs that such harassment is a normal part of a job, or other similar justifications.

Reasonable steps duty. The Bill initially included a requirement for employers to take all reasonable steps to prevent the sexual harassment of employees. However, in the final legislation, the word "all" was removed and the new duty is for employers to instead take "reasonable steps" to prevent sexual harassment.

Scope of new duty

Although the duty imposed on employers by the 2023 Act is less onerous than that originally envisaged by the Bill, it is still significant.

The new duty does not create a standalone claim that employees can bring in employment tribunals. Rather, claims for breach of the new duty can only be considered by employment tribunals where an employee's claim for sexual harassment has been upheld. If an employee makes a successful claim for sexual harassment and the employer is found to have breached the new duty, the 2023 Act also gives employment tribunals the power to increase any compensation award by up to 25%.

In addition, the 2023 Act gives the EHRC the power to enforce the new duty. The EHRC's enforcement duties include the power to:

- Conduct investigations when it suspects that a person has committed an unlawful act.
- Enter into binding agreements with persons or organisations in order to address ongoing issues of discrimination or harassment.
- Assist with or intervene in certain disputes.

In recent years, the EHRC has taken action against a number of large companies that have failed to properly address issues of sexual harassment in their workforces.

Reasonable steps. It is unclear what might constitute the reasonable steps that employers should take to prevent sexual harassment. The phrase "reasonable steps" is not defined in the 2023 Act and there is not yet any guidance on what it entails or how this requirement might be interpreted differently from the originally proposed "all reasonable steps". Indeed, although the removal of the word "all" suggests a lower threshold of responsibility for employers, many practitioners are speculating that employment tribunals will interpret the new duty in a similar way to the existing section 109 defence for employers that can demonstrate they took all reasonable steps to prevent sexual harassment.

Preparing for the new duty

Employers may wish to consider the following practical steps:

- Creating an anti-harassment policy and reporting procedure that are clearly communicated to workers, effectively implemented, and monitored and reviewed regularly.
- Implementing relevant periodic training, including refresher training sessions.
- Properly investigating complaints raised by workers and taking action where wrongdoing is identified (*see box "Areas to prepare"*).

The EHRC has stated that it plans to update the technical guidance to reflect the new duty and to set out steps that employers should take to comply with the law (*see Briefing "EHRC guidance on sexual harassment: shifting the burden back to employers", www.practicallaw.com/w-024-5862*).

The new duty to prevent sexual harassment

In a nutshell, the new duty to prevent sexual harassment contained in the Worker Protection (Amendment of Equality Act 2010) Act 2023 (2023 Act) will:

- Require employers to take reasonable steps to prevent the sexual harassment of employees during the course of their employment.
- Sit alongside and bolster employees' existing protections from sexual harassment in the Equality Act 2010 (2010 Act).
- Apply to sexual harassment only, as defined in the 2010 Act. This means that the new provisions are aimed at addressing and preventing unwanted conduct of a sexual nature that has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person. The 2023 Act does not apply to harassment based on other relevant protected characteristics, such as race, disability, or religion or belief.

Despite the lack of clarity around what it may mean to take reasonable steps to prevent sexual harassment, employers can and should take action now to ensure that they will be able to comply with the new duty.

Although the 2023 Act does not contain the protections against sexual harassment from third parties as originally proposed, employers should not ignore this issue. Employers should consider steps to protect employees from harassment by third parties, including by ensuring that there are adequate and clear channels for victims and bystanders to report instances of third-party harassment, or hanging visible signs in public areas or areas where there may be interactions with external individuals explaining that threats, violence and harassment will not be tolerated.

LOOKING TO THE FUTURE

Although the fallout from the #MeToo movement has been slow, employers should be aware that this new duty is likely to be the start, rather than the end, of the changes that they can expect to see in relation to protecting employees from sexual harassment at work.

Further potential reform

A general election is expected during 2024. The Labour Party has recently unveiled new plans to strengthen workers' rights, including plans to clamp down further on sexual harassment in the workplace. In its green paper, "A New Deal for Working People", Labour identified sexual harassment law as a key area of reform, and committed to requiring employers to create and maintain workplaces and working conditions free of harassment, including by third parties (*https://labour.org.uk/wp-content/uploads/2022/10/New-Deal-for-Working-People-Green-Paper.pdf*).

This promise is likely to be welcomed by the many stakeholders who remain frustrated that the government reneged on its promise to introduce protections against third-party harassment, and employers should be prepared to see changes in this area (*www.fawcettsociety.org.uk/news/the-worker-protection-bill-will-become-law*).

Labour has also suggested that it will seek to amend the new duty to protect employees from sexual harassment to revert to its original drafting, which would make employers responsible for taking all reasonable steps, not just reasonable steps, to prevent sexual harassment in the workplace. It is therefore in employers' best interests to ensure that they have robust processes in place to address this issue.

Areas to prepare

Employers can prepare for the new duty to prevent sexual harassment by focusing on the following areas.

Policies	• Review, evaluate, update and recirculate harassment policies regularly. • Ensure that policies contain a clear definition of sexual harassment and statements that such behaviour is unacceptable. • Ensure that policies contain an effective reporting procedure for any complaints.
Training	• Develop targeted sexual harassment training for managers, staff and workplace sexual harassment champions. • Conduct updated and tailored harassment prevention training, including situational training to make staff aware of what workplace harassment looks like, what they can do if they experience it, whether directly or as a bystander, and how complaints should be handled.
Registering and reporting complaints	• Ensure that there is a clear reporting path for any complaints and that employees know how to access this framework. • Maintain detailed anti-harassment procedures to deal effectively with complaints in a sensitive manner, including both informal and formal resolution routes. • Consider establishing an effective online reporting tool to promote the reporting of sexual harassment.
Risk assessments	• Assess and conduct targeted risk assessments to idenfiy risk factors and determine what actions can be taken to minimise risk. • Establish a risk management framework for sexual harassment.

Non-financial misconduct

New proposals from the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) have highlighted the importance of stamping out non-financial misconduct, including discrimination and harassment, in creating healthy work cultures and improving outcomes for consumers and markets. In 2023, as part of broader efforts to increase diversity and improve inclusion in the financial sector, the FCA and the PRA launched consultations proposing to take various regulatory actions (*see News brief "FCA and PRA guidance on diversity and inclusion: moving the dial", www.practicallaw.com/w-041-1258*).

The proposals include, among other things, better integration of non-financial misconduct considerations (including bullying, sexual and other harassment, or similar behaviour) into staff fitness and propriety assessments, the FCA Conduct Rules, and the suitability criteria for firms to operate in the financial sector. It is clear that regulators, like law and policy makers, are committed to taking sexual harassment seriously, and employers in the financial sector should watch the progress of these proposals carefully (*see feature articles "Non-*

financial misconduct: key lessons and themes", www.practicallaw.com/w-034-0412 and "FCA and PRA enforcement in 2023: a shake-up", www.practicallaw.com/w-041-8915).

Non-disclosure agreements

As noted above, in recent years there has been considerable scrutiny of the use of NDAs in light of concerns that they have been used unethically to silence victims of sexual harassment (*see News briefs "New guidance on NDAs: the EHRC takes a firm approach", www.practicallaw.com/w-022-9646 and "Non-disclosure agreements: time for straight talking", www.practicallaw.com/w-024-1619*). In the sphere of education, for example, the Higher Education (Freedom of Speech) Act 2023 now prevents English higher education institutions from entering into NDAs with staff, students and others in relation to sexual abuse, sexual harassment, sexual misconduct and other types of bullying or harassment. The enactment of this law has prompted broader proposals and discussions around extending a similar ban to other workplaces.

In addition, both the Legal Services Board (LSB) and the Solicitors Regulation Authority (SRA) weighed in on the discussion, with the LSB publishing a call for information on the misuse of NDAs, and the SRA conducting a review and producing a report on the use of NDAs in workplace complaints (*https://legalservicesboard.org.uk/news/chairs-blog-october-2023; www.sra.org.uk/sra/research-publications/thematic-review-nda/*).

The SRA has since committed to running an awareness campaign around NDA best practice, while the LSB has acknowledged a need for further analysis and the development of policy proposals to address the misuse of NDAs. Accordingly, this topic will almost certainly remain in the spotlight, and employers should be aware that future proposals and even legislative reform restricting the use of NDAs in relation to sexual harassment may be forthcoming.

Proactive prevention

In essence, the new duty seeks to move the UK along a path towards creating a culture of proactive prevention of sexual harassment, rather than one of reaction or redress. The legacy of #MeToo is lasting and employers can expect the legal and cultural reckoning to continue. Although change is slow and often piecemeal, employers should keep sexual harassment prevention at the top of their agendas, stay ahead of the curve, and create a robust set of policies and practices that can be adapted in the event of any future change.

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