

Women and Equalities Committee

Oral evidence: [Sexual harassment in the workplace](#),
HC 725

Wednesday 31 January 2018

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Members present: Mrs Maria Miller (Chair); Tonia Antoniazzi; Angela Crawley; Philip Davies; Eddie Hughes; Jess Phillips; Mr Gavin Shuker; Tulip Siddiq.

Questions 1–46

Witnesses

[I:](#) Neil Carberry, Managing Director, Confederation of British Industry; Clare Murray, Managing Partner, CM Murray LLP; Christine Payne, General Secretary, Equity; Ksenia Zheltoukhova, Head of Research, Chartered Institute of Personnel and Development.

Examination of witnesses

Witnesses: Neil Carberry, Clare Murray, Christine Payne and Ksenia Zheltoukhova.

Q1 Chair: Can I start by thanking everybody for the time they have taken to be here today? We know it takes a huge amount out of your diary, not only to be here but also to prepare. On behalf of the whole Committee, thank you. I would like to particularly welcome our witnesses, who are here to talk about sexual harassment in the workplace, and to remind you that we are being webcast today. I would also like to remind you that, in December 2017, we held an evidence session that looked at a whole range of ways in which sexism and sexual harassment can affect women's lives every day. Since then, we have announced an inquiry looking specifically at sexual harassment in public places and we are accepting written evidence for that inquiry at the moment. Details are on our website.

However, today, we are talking specifically about workplace harassment, which remains an important issue that has been very prominent in the media over the last few months. We want to continue to talk about how sexual harassment happens in the workplace, what employers should be doing to prevent and respond to it, and whether the current legal framework is adequate. It is those issues that we would like to cover today. Following on from this one-off evidence session, we will be considering, as a committee, whether we want to launch a further inquiry in this area.

We have the usual procedure; we have our colleagues here, who will be asking a range of questions. Could I get people to say their names and where they come from?

Ksenia Zheltoukhova: I am Ksenia Zheltoukhova, head of research at CIPD, which is the professional membership body for HR and people development.

Christine Payne: I am Christine Payne and I am the general secretary of Equity, which is the trade union for actors, other performers and creatives in the entertainment industry.

Clare Murray: My name is Clare Murray at CM Murray. I am an employment and partnership law specialist. We undertake a lot of work involving sexual harassment allegations, where we look at it from the complainant, the employer and also the alleged harasser's perspective.

Neil Carberry: My name is Neil Carberry. I work for CBI on these issues.

Chair: To remind everybody, the acoustics in this room are appalling, so always try to lean forward and speak into the microphone. Thank you.



Q2 Angela Crawley: We will get straight into what ultimately could be done to put sexual harassment higher up the agenda for employers, and what Government should be doing.

Clare Murray: In terms of getting it higher up the agenda, it is obviously a very important issue. It potentially affects at least half the population, in that sexual harassment in the workplace is predominantly aimed at women, although it can also be aimed at men, but perhaps that is less talked about.

How we get it up the agenda is with issues like general awareness raising, so having discussions like this; perhaps requiring a stronger framework and providing greater protections; making the existing legislative framework more robust; and providing greater sanctions. Frankly, we are at a stage where we are about to implement extremely strong protections relating to data protection from May this year, and last September we brought in very strong protections to prevent money laundering, all of which affect businesses.

These are really stringent regimes that have criminal and civil sanctions. They make it clear that, for a business to be able to show reasonable steps defences, they have to have done things like undertaken very proactive risk management and risk assessments in their workplace to identify low, medium and high risks. They have to tailor their training and their policies to those risks. They have to have officers. There are sanctions if they do not have them, and they do not get the benefit of the "reasonable steps" defence if they do not adhere to those proactive steps.

I am not saying that that is automatically something that we should go to, but we should be willing to consider placing as much importance on protecting people's safety and their wellbeing at work as we do on their data and on preventing money laundering through businesses. That would be my starting point.

Neil Carberry: To build on that, I recall something my boss, our director-general, said in an article in the *FT* earlier in the week. There is a lot that businesses can be doing. Harassment, after all, is illegal and most of our members regard the general duty of care they have to their employees as extremely important. We are certainly open to a discussion about making sure that that duty of care effectively extends to avoiding harassment.

What are we looking for from businesses? We are looking for clear approaches, policies being well communicated and creating an environment where reporting is encouraged. It is of deep concern to our members that so much harassment goes unreported. There is also something that sits in the background, which Carolyn wrote about in her article on Monday, which is that, in general, business is too male. It is still too male at senior levels. That creates spaces where embedded culture goes unchallenged, and that needs to change.



Ksenia Zheltoukhova: The CIPD has done quite a bit of research on how to set positive organisational cultures and organisations, and, more importantly, how to create environments in which diversity is represented at senior management levels. We are happy to contribute that.

One way to encourage employers to look at these issues is to have greater accountability and potentially greater reporting on wider organisational culture issues, and not just diversity issues. There is currently a consultation from FRC on what accountability boards should have in terms of people management and human capital reporting. We will be submitting evidence to suggest how the reporting measures could be expanded from things like the gender pay gap and diversity on boards to wider and broader issues of organisational cultures.

Christine Payne: I do not disagree with anything that has been said, but one way to get this higher up the agenda for employers is for those they employ to have more confidence in reporting. That means not just having the correct procedures in place and having people trained to properly deal with preventing sexual harassment and with allegations of it. They really have to create a space, a safe working environment, where workers feel confident that they can report and that, when they do report, it will be taken seriously and properly investigated.

As the trade union in the entertainment sector that represents a lot of the workers who have been the victims of this appalling behaviour for many years, one of our key objectives is to work with employers to really tackle what we call the culture of fear that is endemic in our industry. How do you do that? You do that in two ways: by making employers realise, accept and step up to the mark of what their responsibilities and duties of care are. The legal framework is, of course, very important in that. But, equally, it is getting the workers to feel confident and empowered that they can come forward. That is a huge challenge, and it is certainly something that my union has been focusing on.

Q3 **Angela Crawley:** All the research suggests that employers' responses to the report are variable. Why do you think that the responses are so variable? We have heard on many occasions the need for specialist training for managers to prevent sexual harassment cases. In the first instance, why is reporting so variable? In the second instance, how can we encourage better training for managers to deal with sexual harassment cases appropriately?

Ksenia Zheltoukhova: Reporting, as I just mentioned, is a very clear issue in this matter. I suppose you could go very broad and say that every organisation and employer has to have a standard and a policy on diversity and inclusion more broadly, and that that is just best practice full stop. But sexual harassment is such a special issue, given the sensitivity around reporting and bringing this up as an issue with an employer, so there has to be a special provision for that from the employer's point of view. It can all start with a very clear policy and a clear statement by the senior management and HR about the behaviours



that are inappropriate, as well as ensuring, as you mentioned, that line managers are aware of how to deal with these behaviours.

Training is not necessarily the only solution, because it also comes down to how you recruit and promote people into line manager positions, and whether they have the competence and can demonstrate the behaviours that are required when dealing with sexual harassment issues. For me, the components of success would be a clear policy, including what line managers' responsibilities are, and at least two ways for someone experiencing sexual harassment to bring this forward, both in an informal way, such as mediation, that allows them to keep their privacy, and a formal way, in terms of the grievance and disciplinary procedures.

Christine Payne: It is variable in our industry, the entertainment industry, because the industry itself is variable. There is a danger that you focus on traditional workplaces—theatres, film studios, television studios and things that you are familiar with—but many of our members work in social clubs, on cruises, in the circus, are models or comedians working in comedy clubs or work in shopping centres. The perpetrators can be colleagues, managers and audience members. The variables in our industry are so wide that you have to look at the workplaces, and then you need to look at the pattern of work. Our members are very rarely on permanent contracts.

Angela Crawley: I was going to say: is it a contractual issue?

Christine Payne: It is the insecurity. Our members are doing their job and looking for their next job. The perpetrator can be in the job that they are doing; then they move on and the perpetrator is still there, because they have not had the confidence or the processes in place in order to properly report. That is why the entertainment industry in itself is a variable that needs to be considered, as well as considering more traditional workplaces.

Clare Murray: There are some very good employers out there who will react very well and deal with it; there will be a due process and it will be handled sensitively for everyone concerned. There are, though, barriers to reporting around shame, lack of trust and lack of women in senior management they feel they can speak to. There is also a lot of onus on the alleged victim to be the one to report, but culturally we are so *laissez faire* and people often take the view that it goes with the territory. We need to reflect very carefully on that. There needs to be a culture change in a lot of workplaces that encourages reporting, not just by the individual who is the subject of the alleged harassment, but by colleagues. That is happening more often these days. It is about awareness raising across the workplace as to what is and is not acceptable.

Q4 **Angela Crawley:** I want to move on to the aspect of the EHRC guidance for employers and whether you feel that the emphasis from EHRC and the guidance that it provides is sufficient. Do you have any suggestions for



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improving the guidance? I thought that would be a good place to bring you in, Neil. Feel free to answer the previous question as well.

Neil Carberry: Guidance is always helpful, from both ACAS and the EHRC, on these issues. The smaller an employer gets, the more important it is that guidance is clear and that good, relatable examples are given in the text. We could do more on that, although the content of the guidance is helpful.

Broadly, in relation to the wider question, I do not disagree with anything Clare just said. To our mind, we have moved from a world where employers struggle to understand how they could impact this to everyone having a policy. Most businesses of any size have a policy. The critical thing is how that policy is applied, particularly when something happens. It is pretty clear from the data on underreporting that many people have seen things that constitute sexual harassment in their working lives. When someone observes that and it is not dealt with well by an employer, that is dissuasive to reporting any future cases.

That comes back to this need for a change of culture, particularly around encouraging anyone who observes harassment to feel able to report it, and around giving people who have been harassed ways to report it that they trust. Some of our members are working with external parties to deliver anonymous hotlines as a first step to reporting. Initiatives like that in companies that have the capacity to set that up are very valuable to encourage reporting.

Q5 **Angela Crawley:** You are right that anonymous reporting works in a large firm; however, I am interested to know more about the content and the guidance that EHRC can provide that would be applicable to both large and small firms.

Ksenia Zheltoukhova: There have been some conversations about the consistency of various guidelines. You can take the EHRC ones or the ACAS ones. There are two specific things. One is about the language around it and the definition of sexual harassment. It has to be made very clear that the judgment on the severity of the case has to be with the victim and not with the objective observer, because sometimes it is impossible to judge the true impact that something has on an individual, if you are not a party to that situation. Secondly, I would agree in terms of the means provided to deal with the incidents that can be trusted, which are the formal and informal ways.

The final thing I would add to the guidance, which potentially builds on the point that was just made, is about encouraging employers and providing specific ways to look at the culture and the power balance within an organisation more broadly. You can deal with an individual issue of sexual harassment, but that does not necessarily solve the wider cultural issues. I feel that employers need some pointers on how to consider their culture and the power balance on the whole. That can



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potentially solve multiple issues, like sexual harassment, but also other bullying and inclusion issues.

Christine Payne: I agree with a lot of what has been said, but there is a danger that we get hooked on traditional workplaces and what is an employer. If you have a venue that is allowing its space to be used by a visiting theatre company, what are its duties of care there? They are with the theatre company, obviously, as it goes into that venue, but is there not equally a duty of care on the venue as it is allowing that company to use its premises? Equally, with our variety members, if you have an act in a social club and the performer is molested, either on the stage or in the car park on the way back to her vehicle, again, does the venue not have a duty of care, although its contract will be somewhere else, to make sure that it provides a safe environment, which means safety from audiences as well?

The limitation at the moment is the assumption that the employer will be in a standard workplace, and that that will be very straightforward and very easily communicated. When you get the disparate workplaces that our members are in, there has to be a little more imagination and consideration of that, given that the spotlight has been on the entertainment industry.

Q6 **Angela Crawley:** Clare, I know you will probably come at this from a different angle, and we will move on to the more informal procedures and the guidance that the EHRC can provide. From your own legal experience and background, are there specific measures that the Government could take to amend legislation that would be beneficial to tackle this area?

Clare Murray: I do. There are a number of things that might be considered. For example, an obvious one—and I know it has been talked about a lot—is the third-party harassment.

Chair: We will come on to that a bit later. Could you save your thoughts?

Clare Murray: Of course. Please stop me if there are things that you want to discuss later. There are other things, like the reinstatement of the statutory questionnaire, which was a huge way to really level the playing field between complainants who were considering bringing proceedings against their employers and harassers in the workplace, and employers. I appreciate that not everyone will share that view. If you are an employer on the receiving end of that, and it is excessive, it can appear burdensome. On the other hand, it was an incredibly important way of ensuring an information level playing field, before someone went on to take the really significant decision to issue proceedings.

What we have now is a much more informal, non-statutory process. That should be reviewed. When we acted, pre-repeal, for complainants, we almost regarded it as a negligence issue not to submit a very tailored statutory questionnaire that went to the specific circumstances, the



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complaints, the background, the training and whether there were any related complaints. It is about using that in a proportionate way.

- Q7 **Chair:** Particularly, how do you respond to suggestions that informal resolution procedures are not suitable for sexual harassment cases? Would you agree with that or not?

Clare Murray: It should be led by the alleged victim as to, in the first place, what their preference is, as far as possible. It may well be that, in certain perceived minor incidents—and it should be about their perception as to whether they perceive it as a minor incident—it could be dealt with in an informal manner through mediation or through a discussion, et cetera.

There will come a point where there needs to be a formal process, and an employer has an obligation, not just to the individual but to the wider workforce, to ensure that these issues are dealt with in a fair and open way.

- Q8 **Angela Crawley:** On that point, if you were to lead it from a perception-based harm principle, how would that help the evolution of case law? There would be a variability, would there not?

Clare Murray: The starting point is just saying to the complainant what we would normally do and that this is our usual process: “We will investigate. We will speak to any witnesses. If there is a case to answer, we will then move to a disciplinary”. If someone has other ways that they would like it to be considered, because they think it is a minor incident and that it can be dealt with in an informal way, they should listen to that. Often complainants say, “Look, I am very concerned. I do not want this to be discussed”. There then has to be quite a careful balancing act between the employer’s obligations and the individual.

- Q9 **Philip Davies:** I want to ask Christine about the point of why sexual harassment occurs in the workplace, given what she was saying. I just wondered whether or not the “casting couch” is still something that exists in your industries.

Christine Payne: Very unfortunately, it has been shown that it does.

- Q10 **Philip Davies:** How widespread is that?

Christine Payne: The *Stage* newspaper undertook research recently, not specifically about casting but about sexual harassment and inappropriate behaviour generally in theatre. That is where it was focusing. It showed that there was a very, very high percentage of inappropriate behaviour, and 70% of what was reported was not resolved and not properly investigated.

In terms of the specifics that you have mentioned and the casting process, there have been improvements, in part because the casting directors have self-organised and have set their own standards. There are two particular organisations, the Casting Directors’ Guild and the



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Casting Directors Association, and they are both setting standards of good behaviour. In fact, last week, they launched their own code that said that, to be a member of the CDG, you have to adhere to these principles and, if you observe any inappropriate behaviour, you have a duty to report it. One of the very good parts of their code is that all castings should be held in an appropriate workplace, in an appropriate space, and should involve at least three people, including the person being auditioned.

We would like to professionalise that even more. We have produced our own—you may be familiar with it—manifesto for casting, which seeks to identify how you professionalise and improve the casting process. We would not have produced that if we did not think that there were issues to be addressed.

Q11 Philip Davies: Do you think that there are some Harvey Weinsteins out there in UK film, theatre and TV? Do you think there are some people out there who have not been uncovered in the way that he was?

Christine Payne: Slowly but surely, people are being uncovered and they are being investigated.

Q12 Philip Davies: Do you still think that there are some out there in the UK?

Christine Payne: I think it is likely. Do you?

Philip Davies: I have no idea. You are the expert, not me.

Christine Payne: An expert in what? An expert in understanding that this is a very difficult industry for people to report in. That is what has been highlighted. It is very difficult. Of course there may be perpetrators out there, and there may be victims who are too afraid to come forward, but that gives us all the more reason to seek to improve things.

Q13 Philip Davies: One issue that comes out is that there are people out there who know that these things are happening, but nobody says anything or people are too frightened to say anything. With the knowledge of the people you have and the people you represent, are there people out there whom people know about but nobody has yet said anything about publicly?

Christine Payne: Probably.

Q14 Philip Davies: Are there people you know, you have heard about and your members talk about? I am not asking for any names. I am just saying: are there people out there you know, your members know and people talk about?

Christine Payne: It is becoming perfectly clear that there are. There are investigations. People are coming forward quietly and doing the right



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thing. I do not think it is for me to speculate whether that will go beyond those we have already identified.

- Q15 **Chair:** I think Philip is voicing a frustration we all have, when people like the chief executive of the EHRC say, "Sexual harassment is rife across all our industries", and yet we are not, as Members of Parliament, necessarily getting the details of that so that we can make sure that action takes place. That is what we are keen to see: these problems being surfaced, rather than being written off, as Clare said, as something you just have to put up with.

Christine Payne: If the question is, "Has this union dealt with allegations and claims of sexual harassment over the years?", the answer is yes.

Chair: Brilliant.

Christine Payne: I am not prepared to say more than that because obviously it is a confidential matter, but the answer is yes.

- Q16 **Tulip Siddiq:** Thank you, everyone, for coming. My question is around the legal protections that exist in workplaces for workers who are experiencing sexual harassment. Do you feel that these legal protections are effective and, if not, are there ways in which they can be strengthened?

Clare Murray: There is a framework in place at the moment that prohibits sexual harassment in the workplace, and it covers a wide range of activities. It gives remedies, although there are shortcomings with that, such as, if a woman raises and brings a complaint, her main remedy, even if she is successful, is compensation. There is a declaration and a recommendation in the individual circumstance, but it is mostly about compensation. Unless someone chooses to leave their job and be jobless, if they leave their job and move into another job that gives them a comparable level of pay, there is really no loss there for them to claim.

They are left with what is called an injury to feelings award, and that is a very modest amount. There are three tiers and at the absolute top end, for the most extreme forms of discrimination and harassment, you are looking at £42,000. At the lowest end, you are looking at £800. There are three tiers, depending on the severity.

You might have a feel as to where you could end up but, if you are going to end up bringing a claim, there are risks. There are costs risks if you are a claimant. There is no guarantee, if you win in the tribunal with a harassment claim, that you will get your costs. You may be at a costs risk if you lose, so that is a big risk. You do not have to be legally represented, but it is a really quite overwhelming thing to do it without legal representation. Can you afford adequate legal advice?

Even if you go through all that, what is the remedy? If you have not lost your job or you have not lost earnings, you have this potentially really



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quite modest award. What do you do about that? From a reactive point of view, we should be looking at more robust remedies. I am not endorsing the US model but, for example, in the US, where there is conduct where an employer has effectively turned a blind eye to this sort of behaviour—and some have facilitated it—there can be punitive damages. At a federal level, they can be between \$50,000 and \$300,000. At a state level, in New York for example, the punitive damages can be uncapped, although I understand they tend to be in the hundreds of thousands rather than millions.

It is about having the sort of sanction and potential remedy that not only will encourage victims to feel there is a meaningful remedy and not so much risk if they bring a claim in terms of costs—and we should address costs risks as well—but, equally, will capture the attention of employers. Make it as noteworthy to senior management as data protection and as anti-money laundering. Everyone is focusing on data protection, and it is only because we are having these discussions and because of recent events that people are focusing on sexual harassment.

Q17 Tulip Siddiq: I am conscious of time, so I shall press on. Could you tell us a bit of information about the volume of cases that have been taken to the employment tribunal and whether that has changed over the years?

Clare Murray: I do not have specific statistics generally, but there was a downwards trend after the introduction of tribunal fees across the board. We are starting to see renewed levels of claims being brought in the tribunal, and that will help encourage. Tribunal fees had a distinctly chilling effect. If you are an individual facing sexual harassment, the idea that you may also have to pay £1,200 to bring your claim in the first place, and then another amount of money to take it to a hearing, is a very difficult position to be put in.

Q18 Chair: What Tulip is pressing at is the information on the volume of cases. Is there much information on the volume of cases?

Clare Murray: There are statistics generally on the volume of cases going to the employment tribunal. There is no data specifically on sexual harassment cases; they are caught up within the wider statistics for sex discrimination. We can give you that data separately. What is interesting is that the average compensation award for any sex discrimination claim is £19,000. You have to ask whether, particularly with sexual harassment, that is an effective remedy.

Q19 Tulip Siddiq: You have said that you are giving us the data, but you have also said that the data is not available in terms of differentiating what was sexual harassment. Is that right?

Clare Murray: We can give you the wider sex discrimination statistics, including all sorts of sex discrimination claims, not relating to harassment but wider discrimination, such as failure to promote or recruit because you are a woman. There are no specific sub-category statistics that



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identify sexual harassment in the workplace, i.e. unwanted conduct of a sexual nature.

Chair: That presumably would be useful.

Clare Murray: As a headline figure, it would be useful. How informative it would be as to what is actually going on in the workplace is another issue because, as we have already discussed, people tend to be reluctant in the first place to report cases. They can often be quite PR-sensitive and it can often be difficult to work out the complexities of them. These matters are often settled, and very few of them make it through to the tribunal. It is helpful to have, but I would not regard it as a measure of the extent of the issue within the workplace.

Q20 **Eddie Hughes:** You were talking about risk and it felt like you were focusing on the financial element. Is there a reputational risk, with either success or failure, in that you would have to make the judgment: "Do I pursue this, and what might people think of me as somebody who has pursued this sort of claim?"

Clare Murray: Do you mean as an individual?

Eddie Hughes: As an individual.

Clare Murray: Yes, there is a reputational aspect that potential complainants will be concerned about. When alleged victims come to us for advice, it is very rare—I can perhaps count on one hand within my career of around 25 years—that people have said, "You know what? I want to go to the police, I want to go to court and I want to make them pay". You might have a couple of people who start that way. Most people say, "You know what? I just cannot deal with this any more. It is just too stressful. It is unacceptable. I want to reach a confidential agreement with the employer and I want to move on with my life". Most people want, in that sort of scenario, to move on.

Q21 **Eddie Hughes:** To Philip's point earlier, are there people out there who are predatory, who should be stopped, and, if people do not bring claims, because nobody wants the hassle that goes with it and they think, "My reputation is on the line and there is a significant financial cost associated with this, so I will move company or hope this thing goes away", does that help perpetuate the problem?

Clare Murray: There are two things to that. One is that it needs to be led by the wishes of the individual, the victim. I appreciate that there is a wider public interest, but ultimately it is about the victim and how they feel about it. It should be led by them. Until you have a system that gives more effective remedies, you cannot really expect people to take those risks. That is something that can be looked at.

Because this is now so high on the agenda of employers generally, managers are taking it seriously. Even where people are not bringing claims in the tribunal, they are certainly threatening them. They are



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certainly discussing them. They are being raised internally. They are being dealt with internally. We are seeing far more often that employers take an active stand and will put someone through the disciplinary process. They might reach an agreement with the individual complainant, but more often you are seeing the accused harasser, if the complaints against them are found to be largely substantiated, being exited or subjected to some other penalty that makes them pay. There is a wider thing about zero tolerance generally within the workplace on these issues at the top level that will make a difference.

Q22 Chair: Neil, to what extent does business recognise that at the moment what Eddie says is happening, which is that people are not really willing to take those cases forward because of the relatively high risk, including financially, of them doing that? To what extent would business welcome a change in the law so that there is a better balance there?

Neil Carberry: You start from the principle that harassment is illegal, and of course you have two routes to redress there: there is criminality involved in some cases of harassment, and there is the employment tribunal route. Businesses would accept that the path to justice is slow. It is a longstanding point of agreement between us and the TUC that the employment tribunal system is too slow. You have seen a progressive rise of this up the agenda in executive committees and in boardrooms over the last couple of years. To Clare's point about zero tolerance and how you act when things happen, it is beginning to change. The reaction of our members to some of the news coverage over the last week has been pretty vitriolic. They have been in some cases saddened, and in other cases angry, about the things that still go on in the business community. It being under the spotlight is the right thing.

In terms of the law, we are aware that what needs to change is people's experience in the workplace. There are a range of things that you can do to do that, and business leaders themselves have to drive most of it. Coming back to what I said earlier, if our members accept that they have a wide-ranging duty of care, whether or not the language in the Equality Act or the Health and Safety at Work etc Act is broad or specific enough to cover harassment, they would be willing to look at what legal changes need to be made to encourage people to come forward.

Chair: That is really helpful.

Q23 Tulip Siddiq: You have said, Clare, that a lot of people do not want to go to tribunal, which is a well-known fact. Once they do go, do you feel that the tribunal system is an effective way of dealing with complaints?

Clare Murray: The actual process can be intimidating, but it is informal. There is the potential to apply, for example, for restricted reporting orders, although they will not be easily given because there is a tension with open justice. There is the costs risk of going to the tribunal, which should never be underestimated. Broadly speaking, if you put aside



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whether there is an effective remedy or not, it is reasonably fit for purpose.

Q24 **Tulip Siddiq:** It could be improved.

Clare Murray: It could be improved.

Q25 **Tulip Siddiq:** Do you want to elaborate on what we could recommend in terms of improvements?

Clare Murray: In terms of the overall tribunal process, bringing the statutory questionnaire back in.

Q26 **Tulip Siddiq:** Do you think bringing that back would improve the tribunal process?

Clare Murray: I do. For a start, it would help individuals decide whether or not they really have a potential case. They are often sitting there thinking, "Is it just me?" It would give them a bit more of a level playing field and early access to information that is relevant to their claim in subsequent proceedings. Looking at costs, can more comfort be given on costs, particularly in sexual harassment cases, as to the extent to which you are exposed and the extent to which you might get your costs depending on the outcome? Those would be the most significant.

Christine Payne: Another improvement might be to give claimants more time in lodging their claim. At the moment, it is only three months, and that is a very short time to properly exhaust any internal procedures that there might be with the employer. If we are encouraging employers to improve their procedure, we should be encouraging claimants to go through it. Three months really is not enough time. At least six months would be a better period and would give time for reflection, along with the questionnaire. We should also look at whether self-employed people can be included under the Equality Act definitions, because a lot of our members are self-employed and are excluded from that access. How can you broaden access, to include more workers?

Clare Murray: I would entirely endorse what Christine has said about the time limits. Often, individuals feel pressurised to take action that they might not otherwise take because it is such a short period of time. When time passes, they might start to feel differently and they might make other choices. It is about giving them that breathing space in what can be very stressful.

Taking up your point about extending who is covered, a really significant gap is that volunteers are not covered. There is a huge body of volunteers and the idea that a volunteer could go to work, be sexually harassed and not be covered by the Equality Act, although they might have criminal protections if it goes into criminal areas, needs to be considered.



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Neil Carberry: Can I pick up on a couple of those points? Within the employment tribunal system now, the tribunals could make better use of practice directions in cases related to harassment, in order to flex the case specific to the fact that harassment claims are different in many ways. There is a case for looking at how we manage the time period. Coming back to the comment colleagues on the panel made around exhausting our work within the company, you could have a stop on a stop-clock or something like that.

One point I want to raise where I slightly disagree with Clare is around the return of the statutory questionnaire. If businesses experienced all questionnaires in the manner that Clare described hers earlier as relevant to the specific case, that would not be an issue. Businesses support the current right that exists to protected disclosure in discussion, and there could be a case for firming that up. But one of the reasons the statutory questionnaire was abolished was that many businesses experienced it as a 200-question-long list of things that were not relevant to the dispute in question, where they suspected what was happening was a search for an equalities-based claim to access higher levels of compensation, when the claim itself was about something unrelated. While there may very well be a case for improving disclosure in these cases, it would be a mistake to jump back to the law as it existed before the questionnaire was removed. Most businesses would favour something else.

Q27 **Chair:** Do you want to respond to that?

Clare Murray: Yes. I entirely understand, because we look at it from all perspectives and I have advised clients who are on the receiving end of those questionnaires, as well as the ones who have drafted and submitted them in the first place. There is obviously an issue about relevance and proportionality in those questionnaires. Lawyers have done themselves or the claimants a disfavour by asking too much. But these questionnaires were never mandatory. It was always the case that, if you failed to reply or were evasive in your replies, it was open to the tribunal to draw adverse inferences of discrimination, harassment, et cetera.

We often did it, and we were on the receiving end of it. Often, if you asked a question that was not relevant, the response would simply be, "This is not relevant". The more that questionnaires get used as part of the daily process, the better people will understand the parameters of what is and is not proportionate. I do not expect Neil to necessarily accept that from his perspective.

Neil Carberry: Where we agree is that there is a case for transparency in these cases. It is a case for appropriate transparency.

Clare Murray: Yes.

Q28 **Jess Phillips:** We have heard in the past week about allegations in the media of third-party sexual harassment of workers by clients and



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customers. Is there sufficient protection in the law for workers at risk of third-party harassment?

Clare Murray: It is very timely, but it is not new. There was very clear third-party harassment protection. What we are talking about here is me as an employer, for example, being aware that one of my members of staff is being harassed by a client, but it could apply to other third parties. Under the old law, up to 2013, it was the case that, if an employer like me was aware of two incidents where one of my staff was being sexually harassed by a client or another third party, after the second—

Q29 **Jess Phillips:** Do the two incidents have to be the same third party?

Clare Murray: No, the two incidents have to be the same employee: two incidents for that employee in respect of any third party. It was only after those two incidents that I would then be under a duty to intervene and take all reasonable steps to try to prevent a third incident. As a bit of background, the principle that led to the legislation came from a case where two black waitresses were at an all-male private dining event. They were sexually and racially harassed by speakers, and then they brought claims against their employer.

Jess Phillips: It was Bernard Manning.

Clare Murray: Yes. There are some clear parallels. It was found that there was third-party harassment protection in that case. It was overturned by another case and then, it being overturned, it resulted in the specific statutory protections. I know there was discussion subsequently that it is not being used, so we should just take it off the books because it is burdensome to expect. That was taken away in 2013.

Q30 **Jess Phillips:** Was it not being used?

Clare Murray: I do not think that it was not being used; I just think it did not go far enough. Imagine you have someone who is an employee who has all the challenges that we have talked about, and then add to that that you are not being sexually harassed or harassed in other respects by your employer but by a third party. It just adds to that. The law was not effective enough because it meant that there had to be two prior instances. If, as an employer, I am told that, on the first occasion, a client is sexually harassing one of my staff, I have an obligation to intervene straight away.

Q31 **Chair:** You would not be a fan of reintroducing it.

Clare Murray: I would be a fan of reintroducing it, but in a more effective way, so that, once you know as an employer that one of your staff is at risk, you should be taking reasonable steps to protect them. We should be looking at that.

There has been discussion among some legal commentators that the existing law may be interpreted so that inaction by an employer falls



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within unwanted conduct related to gender, so you have not taken effective action about this third-party harassment because it is related to the fact that I am a woman. While that might be possible, I do not think that you can expect people to complain or bring complaints on the basis of the whims of the interpretation of a tribunal.

Q32 Jess Phillips: To be clear, you would suggest putting Section 40 back into the Equality Act and stopping the three strikes element.

Clare Murray: Yes, there should be an obligation to intervene and to take reasonable steps after the first incident of which you become aware.

Chair: That would not be directly reintroducing that.

Jess Phillips: No, it would be remodelling it.

Ksenia Zheltoukhova: I agree with what Clare is saying. We obviously talked about young women as the main statistic in a sexual harassment claim but it can equally apply to men. It has to be a specific sexual harassment thing, not just in general.

Neil Carberry: I would agree with Clare that the answer to your original question is “maybe”, and that is not very satisfactory.

Jess Phillips: I am a politician; I am used to unsatisfactory answers.

Neil Carberry: The challenge, then, is that we need to do something else. The removal of Section 40 was not something that the CBI campaigned for, so we would be happy to look at bringing it back. The critical thing is getting the balance of responsibility for employers right. Employers are very happy to be held accountable for things they can reasonably be held accountable for. If you did, for instance, go from three strikes to two strikes, coming back to the question earlier around guidance, you would need to be very clear about the definition of those strikes and what reasonable action by an employer would look like, in order to build confidence, particularly with small firms, that they were doing the right thing.

Q33 Jess Phillips: Young women working in Primark, for example, told me about how many times they have been harassed by customers. I suppose, in that instance, the employer could say, “Where anybody reports to us that somebody has done that, that person will be ejected from the shop”. That would be the bare minimum of a standard.

Clare Murray: It is about raising awareness of it.

Jess Phillips: I am afraid to say, as someone who has worked behind bars for many years, that that is not the standard that exists.

Neil Carberry: I agree.

Clare Murray: I would add the idea of having proactive obligations on employers to undertake sexual harassment risk assessments so that an employer, in the same way as with data protection and money



laundering, has to look at its workplace in its particular business, whether in retail, a bar or a law firm, and say, "In our business, at a senior management level, this is what we perceive to be the low, medium and high risks in our business of potential sexual harassment". It is about having a proactive requirement of sexual harassment assessments, i.e. looking at your workplace and drawing up an action list.

For example, in a shop, an employer says, "Look, clearly, based on past problems, customers are a problem with random, casual harassment and upwards. How do we address that reasonably?" Is it with posters, like they have on the Tube: "It is not right; we do not accept harassment and you will be ejected"?

- Q34 **Jess Phillips:** In the NHS there was a big move to say, "Do not harass the staff" and you see it everywhere. It is not sexual harassment, just viciousness. Christine, did you want to say something?

Christine Payne: I totally agree.

- Q35 **Jess Phillips:** You all agree that Section 40 should be brought back on different grounds.

Christine Payne: Yes. Just to put my two pennies' worth in, I agree that the questionnaire should be reinstated as well. It is not a fishing exercise and, if that is what it became, that needs to be looked at. It is a useful tool, and it should be a useful tool for both sides to identify where the areas of concern are and whether there is a claim to be made.

- Q36 **Chair:** We are moving on to our final section of questions on non-disclosure agreements. Some sexual harassment cases are settled using pay-outs or settlement agreements, which might include confidentiality clauses. I would be interested to hear about the pros and cons of using settlement agreements to close cases. We have done inquiries before on maternity discrimination, and we have heard that come up in that context, as well as in the context of sexual harassment.

Christine Payne: Can I separate compromise agreements from non-disclosure agreements? In our industries, non-disclosure agreements are becoming used more and more frequently. They were always used, to some extent, to protect script confidentiality and intellectual property, and we completely respect that. If an actor is going to be sent all or part of a script for *Star Wars* that they need to read, we absolutely respect that there needs to be confidentiality.

- Q37 **Chair:** I am talking purely in terms of employment-related issues, rather than commercial-related issues.

Christine Payne: In terms of employment-related issues, the non-disclosure agreements for our members are being used more broadly, to say that they should not say anything about anything that goes on either in the casting process or in the workplace, beyond the need to have some confidentiality around commercial issues. For



example, if there was inappropriate behaviour in a casting session or on set, the implication is that the non-disclosure agreement could prevent them from saying anything. Now, if it was a criminal act, that would take precedence over any non-disclosure agreement, but it is the pressure and, again, this culture of fear and intimidation that our members are being put under when they are being asked to sign this agreement just to go to work.

Neil Carberry: We saw the worst of this in the *FT* story last week. One of the things that we talked to Matthew Taylor about last year, when he was doing his review of good work, is that we start with the principle that everyone should have a statement of their terms and conditions and their rights at work because, first and foremost, you cannot sign away your right to bring a claim in an NDA. There is clearly scope to improve practice significantly around making sure, any time they are asked to sign an NDA, people are advised, have a right to take a copy and, like all contracts, have some form of cooling off period. Those two things ought to improve practice generally.

Coming back to the question, and in the terms that Clare was talking about it earlier, we need to acknowledge that sometimes a compromise agreement like this is what the individual bringing the claim wants. While we have to find tools to improve practice significantly, we also need to preserve the ability to bring this effectively to closure for the claimant.

Q38 **Chair:** Picking up on what Neil said there, that people cannot sign away their rights, Clare, are lawyers acting unethically or even worse?

Clare Murray: We have a code of conduct as lawyers, and lawyers need to be mindful of that in any sort of situation, including this. We have specific obligations about being independent, et cetera. We need to be mindful of that, but it is more about looking at it from the complainant's point of view. It is the case that complainants do not usually want to go to court. They have a confidentiality provision as part of an overall settlement, which will usually include an enhanced amount of money. They have to have legal advice to be able to sign away their rights to bring claims. As part of that overall settlement, there will normally be a provision that says, "Mutually, neither of us can talk about the circumstances leading up to this, the contents or the existence of it".

Q39 **Chair:** Is it unethical for somebody to be asked to sign a contract that could be concealing wrongdoing?

Clare Murray: Well, a contract and a confidentiality provision is not effective to conceal wrongdoing. Whatever the agreement may say—and I suggest there are issues around awareness of this and greater information for the individual when they are signing up, and it is the responsibility of their lawyer, because they have to be legally represented, to explain what they are signing up to—as a matter of basic law, a confidentiality agreement cannot prevent someone from making a protected disclosure under the whistleblowing legislation. There is also a principle of no confidence in iniquity, which basically means that a



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confidentiality provision cannot stop someone in the public interest making a disclosure about serious wrongdoing.

- Q40 **Chair:** It feels to me like, if you are not a legal professional, and have been given a piece of paper by two sets of lawyers and are being asked to sign it, even though it might be unenforceable, you would be sitting there thinking, "I would not like to try that one out". Surely there is some duty on those advisers. Some will not be lawyers, and obviously some are trade union officials. Why is this not being policed better by those professionals who are putting these unenforceable agreements in front of ordinary workers?

Clare Murray: It is something that needs to be reviewed by our own professional body, to give greater guidance as to when it is and is not appropriate to include these confidentiality provisions and the extent of them, and perhaps a notification within the body of the agreement. There is usually a certificate that says, "I have advised this person and I have given them independent legal advice on the terms and effect". Perhaps there should be consideration there as to whether there is a separate paragraph to say, "I have specifically advised them as to the terms and effect of the confidentiality clause and the circumstances in which disclosures of wrongdoing can still be made". That could be a possible way forward.

- Q41 **Chair:** Can I specifically bring Neil in on this? Do you think that it is entirely proper for employers to always give a copy of any agreement to the employee involved?

Neil Carberry: That would be entirely proper. Picking up on Clare's point, there is some developing practice in the NHS, but also in some private sector employers, of putting that statement about you being unable to sign away your right to make a declaration under the whistleblowing Act on top of the agreement itself, which would be a good thing to help grow in the use of this kind of agreement.

- Q42 **Chair:** If an employer did not want to give a copy of an agreement to its employee, what should the sanction be? It seems a strange set of circumstances.

Neil Carberry: It does, and there should be a sanction, although I must admit that I have not yet given thought as to what it should be.

Clare Murray: Even at the most basic level, data protection legislation should allow someone to have access to a copy of the contract that they have signed, because you would expect that it would fall within personal data and that they can get a copy of that under a normal subject access request.

Chair: Perfect, that is really helpful.

- Q43 **Mr Shuker:** In the case of the *FT* story last week, I understand that people were essentially signing a non-disclosure or a confidentiality



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agreement presumably without legal advice. In your understanding, would that be binding?

Clare Murray: The binding requirement is in relation to signing away claims. It would not be binding to sign away any discrimination or harassment claims that they have. That agreement would not be binding to stop them making protected disclosures under the whistleblowing legislation, or to stop them from making public interest disclosures of serious misconduct. The problem is that they almost certainly will not know that.

Q44 **Mr Shuker:** By virtue of not receiving independent legal advice at the time of signing it, it would not undermine the document that they had signed; it is the fact that there are some more fundamental principles in law that provide those protections, which they may themselves not understand at the time of signing.

Clare Murray: As with many of these things, it is an awareness issue.

Q45 **Mr Shuker:** Just on that, how do you feel in terms of representing the profession where documents that people are signing that seem to have legal effect are undermined by those conditions? Presumably it is in your interest as a profession to crack down on those kinds of practices. I just wondered what actions the profession had taken.

Clare Murray: We have a professional obligation to make sure that we do not take advantage of people who, say, are not legally represented or who are in a vulnerable position. It is something that we need to reflect carefully on and perhaps something for our regulatory body to consider.

Q46 **Chair:** Just bringing CIPD in here, what do you think can be done to prevent these sorts of agreements being abused? They have a place—we have heard that—but what can be done to stop them being abused?

Ksenia Zheltoukhova: We are on to a fundamental paradox here. We want to solve this long-term issue of stamping out sexual harassment generally in society, but we are also dealing with the immediate issue of victims and their need to be protected and dealt with appropriately in the way they find sensitive. I would always say that prevention is better than cure. Let us absolutely have the regulation that deals with sexual harassment instances and follows appropriately when wrongdoing has happened. There is no doubt about that but, for me, that is a separate issue.

I would advise that there is broader work to be done with employers, potentially with employers that are small businesses, which do not have dedicated HR advice on issues of power, organisational culture and so on. In terms of specific things that employers could do, one is definitely about diversity in the organisation, diversity in senior management teams. We have recommended steps on how this can happen, in terms of progressing women to more senior positions. The second is the more general culture around the business and line manager behaviours that



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enable people to work in a safe environment, and to bring up instances where there is a risk of sexual harassment occurring.

Christine Payne: I would advise any worker who is presented with such an agreement to, wherever possible, contact their union if they are a member of a trade union. All trade unions can give advice on any contract that is being presented to them. If they are being presented with a contract that they do not understand or that is very last minute, we would always advise our members not to sign it, take it back and have a look at it, and get advice. It might mean that they lose the job, and that is a decision that they have to make. We would advise them not to sign something that is so detrimental to their rights and interests on a first reading, and then at least they would make that informed decision.

Chair: Can I thank all of you for your answers to our questions this morning? It has been an incredibly helpful session for us in terms of thinking about the issues that might need further investigation. Thank you for your time. Thank you for your frankness and your openness. We are really very grateful to you. That is the end of the evidence session this morning. Thank you.