

Women and Equalities Committee

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

Wednesday 6 June 2018

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Members present: Mrs Maria Miller (Chair); Tonia Antoniazzi; Philip Davies; Vicky Ford; Teresa Pearce; Jess Phillips.

Questions 480–522

Witnesses

I: Joanna Blackburn, Partner, Mischon de Reya; Aileen McColgan, Barrister, 11KBW, and Professor of Human Rights Law, King's College, London; Michael Reed, Principal Legal Officer, Free Representation Unit; and Liz Rivers, Workplace and Employment Mediator.

Written evidence from witnesses:

- [11KBW](#)
- [Free Representation Unit](#)

Examination of witnesses

I: Joanna Blackburn, Partner, Mishcon de Reya; Aileen McColgan, Barrister, 11KBW, and Professor of Human Rights Law, King's College, London; Michael Reed, Principal Legal Officer, Free Representation Unit; and Liz Rivers, Workplace and Employment Mediator, In Place of Strife.

Q480 **Chair:** In this session, we are going to be talking about sexual harassment in the workplace. This is the sixth session we have held on this subject and, very importantly, our focus today is on law and the tribunal system. We have a huge amount to get through so I am urging everybody to be brisk and concise with their answers. I apologise that we are starting slightly late. Vicky is going to start for us.

Vicky Ford: The Government have said that they are satisfied that civil law is already comprehensive in protecting against sexual harassment, but the EHRC has suggested that the current law on sexual harassment is insufficient. Who is right and what protection does the law provide against sexual harassment? Perhaps we should have done a quick introduction.

Chair: I am sorry, I apologise, my mistake.

Vicky Ford: When you start answering, could you answer and also introduce yourself at the same time?

Chair: Joanna, could you say who you are and where you come from?

Joanna Blackburn: I am a partner in the employment department at law firm Mishcon de Reya.

Aileen McColgan: Aileen McColgan. I am a professor of human rights law at King's College London and I am a practitioner at 11KBW.

Michael Reed: I am from the Free Representation Unit, which is a charity representing claimants who cannot afford lawyers.

Liz Rivers: I am a workplace and employment mediator at In Place of Strife.

Chair: I should say at the start that, Liz, obviously a lot of these things will not be necessarily things that you want to participate in and we thoroughly understand that.

Q481 **Vicky Ford:** Joanna, do you want to start? Who is right on this issue? The Government have said that civil law is already comprehensive in the protections it gives against sexual harassment, but EHRC has said that the current law is insufficient. Who is right and what protections do we have under the current law?

Joanna Blackburn: Neither is right or wrong is the obvious answer. There are comprehensive laws. They have been in place for a very long



time, but they also have some pretty notable gaps in their application. To me, there is a wider problem, which is how you then communicate with employers how to live the law. That is where you are getting a significant breakdown in the applicability of the laws and why we still have the problems we have decades after these laws came into force. I spend my time advising employers about 70% of my time and employees about 30%, so I see both sides of the argument. My employer clients are unsure about what they should be doing in order to properly comply with the law and, as a result, they are being ineffective in ensuring that the law is given proper life in the workplace.

One of the things that has struck me—I have been doing this for about 25 years—is how rarely employers feel able or even engaged with the idea of utilising statutory defence in the Equality Act. There is an opportunity for employers to be able to avoid liability for discriminatory acts if they can show that they have taken all reasonable steps to prevent the wrong that has been done. I had a straw poll with various colleagues in my firm and others. We have never used it and seen it used. Why is that? Ordinarily, if there is a defence on a piece of legislation, you would see that being picked up and used. It is because lawyers feel uncertain that they can advise their clients that they have done all things that were reasonable to stop the discriminatory act, and it is employers feeling that they do not know what they are supposed to be able to do.

I do think that there is a huge opportunity for doing something outside the strict legislative framework to address better implementation of the laws we already have. Others or I can talk about the fact that, yes, there are gaps.

Vicky Ford: I will come back on that.

Aileen McColgan: To a large extent I agree, though I think the EHRC is closer to the line than the Government. There is a very, very modern and relatively comprehensive Equality Act, but it does not apply to third-party harassment or it does not readily apply to third-party harassment. That is an increasing problem given the gig economy and the fact that people are working with people who are not employed by the same employer. That is a real issue. There is a limited application of the Act. Although it extends beyond employees tightly defined, it does not cover all people who are working in a position of subordination.

Importantly, enforcement is a real problem for people given the three-month time limits and the expense of litigating in the tribunal. Even without the tribunal fees it is a costly business. You are not going to win—well it is very difficult to win a claim—without legal representation. Michael's FRU can only go so far and the three-month time limit, particularly when it is applied to people who have been subject to sexual harassment and psychologically damaged, as is often the case, is a very heavy burden to overcome. Then there is the fear of being victimised, and people are regularly victimised for raising complaints about harassment.



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Michael Reed: I would agree with all of that. Broadly speaking, the law covers what it should. Most things that should be unlawful are. The real issue is making those rights real. It is no good having a law that says, "This should not be happening". When it does happen people want a way of stopping it or preventing it. That is where the barriers come in of the structural problems, some of which have been touched on.

The big one I would mention is that people are often still in the workplace when this happens and face difficult choices. You may go to a lawyer who will tell you, "This is unlawful. You can bring a case in the Employment Tribunal" but immediately you are going to think, "How is that going to affect my career? How is that going to affect my progression?" or in other areas of the economy and in other jobs, "Am I still going to have a job next week if that is what I do?"

Q482 **Vicky Ford:** Can I just focus on the law and next on implementation? Just focusing in on the law, you have described it as a modern piece of law but there are some gaps, for example, on the gig economy and shared economy. Are there also gaps, for example, for volunteers and interns? Are there any other gaps that you think we should be aware of?

Joanna Blackburn: You have identified the ones that spring into mind. The volunteer and the intern are often the most vulnerable people in an organisation—they are passing through with no locus in the organisation and not subject to any sort of induction or training or understanding of where they sit in the organisation. As Aileen said, the lack of clarity on third-party harassment is a considerable issue. It only gets worse in many respects as society is empowered to be bolder. In the previous session, which we listened to—the way the public interact with employees I think has radically changed over the last 20 years. The employees often do not feel they have any protection in that regard, and they don't.

Q483 **Vicky Ford:** Would that be something where you need to change the law or change the guidelines around how it is used?

Aileen McColgan: You need to change the law.

Joanna Blackburn: We need to change law.

Aileen McColgan: It is straightforwardly the law. The Equality Act does not apply to volunteers. You cannot change that with guidelines.

Q484 **Vicky Ford:** Do you have any evidence on that three-month issue of that being a particular barrier?

Aileen McColgan: I have dealt with women who have been sexually harassed. Those are the women who have access to a barrister and have been cowed by it.

Joanna Blackburn: However, there is an issue that we need to be very careful about. If you start splitting out and having different time limits for different parts of employment legislation, you are going to make it more



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complex for individuals. They are more likely to make mistakes. If there is a three-month time limitation for bringing a claim of unfair dismissal or of ordinary sex discrimination but six months for harassment, you may find that people are missing the claims they should be bringing thinking they have a six-month time limit. Consistency is key for employers and employees to understand.

Aileen McColgan: Extend the time limit for everybody is what I would say to that. Have a longer time limit for discrimination. You need it for maternity claims, too.

Michael Reed: I would agree. I would add that all the limits in the Employment Tribunal are bizarrely short compared with all the other areas of the civil justice system. If you have a personal injury claim, or if you have a breach of contract claim in the normal courts, you are talking about time limits measured in years. In employment you have three months, which is not a lot of time in practice where something has happened and you are absorbing the blow of that, you are thinking about what to do, you are talking to other people and then you may be trying to get advice. You are trying to fund advice. You are trying to get an appointment with the Citizens Advice Bureau or something like that. That whole process can take weeks or months. It is not that people can step out of the incident and walk around to their lawyer and say, "I need some advice and can we think about putting a claim in?" Of course, people are trying to resolve these things very often in the workplace, as they should do, rather than immediately going to the tribunal.

Aileen McColgan: That was the point I was going to make. The three-month time limit runs from the act of harassment or discrimination, as it may be, and the clock is ticking during any time spent in the workplace trying to resolve that and mediate to avoid having to go to tribunal.

Q485 **Vicky Ford:** A final question: you said that the responsibilities of the employer are not clear enough. They don't know what they have to do. How might one try to change that? How could you improve that? For example, should they have to do mandatory harassment risk assessments, like you have to do a health and safety risk assessment? Would that sort of process help?

Joanna Blackburn: I am not sure bringing in a mandatory risk assessment is going to assist. I do think having very clear guidance set down by Government to employers as to what they should be doing to tackle workplace harassment, of all its varieties I should add—

Q486 **Vicky Ford:** Set down by Government?

Joanna Blackburn: Why not? It can cover training. If you look at what is going on in New York at the moment, the New York State Legislature has approved mandatory sexual harassment training for all employers to give to their staff if they employ over 15 people. I think it is currently



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going for approval to the governor and the mayor. California is expected to follow suit.

I am not suggesting that we have mandatory laws around training but certainly we could have a set of guidelines that employers understand on policies and training; what the training looks like; the regularity; the fact that it has to be interactive, as the New York training will have to be; processes as to how you report; anonymous reporting lines; and how you deal with people once they have reported to try to tackle victimisation, which I think everyone will agree is a huge issue. If employers followed that guidance and knew they could rely on it as a statutory defence, they would have an incentive. You would be giving them a carrot as well as a stick. You will get better take-up if an employer can see that there is something in it for them other than—one would hope—the improvement to the work environment for everybody.

Aileen McColgan: I would go further than Joanna and I would support the EHRC's recommendations for a mandatory duty. The point you make about risk assessment is a really interesting one because if an employer were to look at the question, "Where in my organisation is sexual harassment likely to occur?" they would be forced to confront issues like: is there a massive power imbalance between individuals with limited oversight of other people into the way they work together? That might cause employers to become savvy about the circumstances in which sexual harassment is more likely to occur.

Michael Reed: If I may echo something that some of the witnesses in the previous session were saying, it is important not to get distracted by some of the really difficult questions around the edges. Of course, there are circumstances around what the appropriate way of dealing with a complaint is but, in terms of the workplace, most of this is pretty simple. You need to make it clear that your employees must not sexually harass other people. The fact is everybody knows what that means in the vast majority of cases, and you need to take it seriously when there are issues and complaints.

One of the things that I am struck by in the work that I do—we deal with things like unfair dismissal and breach of contract claims—is that employers deal all the time with allegations against their employees around theft, around drug use, around alcohol use, and frankly they seem to have a handle on that. They take the problem seriously. They conduct investigations. They take action. Sometimes they get it wrong. Sometimes they could do better on both sides of the line, but the fact is very often when issues of sexual harassment seem to come up there isn't that same process.

Q487 **Jess Phillips:** Some people have already referred to this. Elizabeth Prochaska of the EHRC has suggested that the current system places a crushing burden on the individual, by expecting them to go through and endure protracted legal processes in order to access justice or remedy



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the situation. Do you agree that there is too great a burden on the individual to hold employers to account and that fails to protect employees from sexual harassment?

Aileen McColgan: I strongly do. I think it is an area where it is vital that proactive obligations be placed on employers to protect their staff.

Q488 **Jess Phillips:** Do others believe that it should be shifted from the complainant to the regulators or the employers themselves?

Joanna Blackburn: Most employers will not have regulators. If you are talking about switching burdens of proof, that gives rise to much wider issues and you simply cannot extract out sexual harassment and talk about—

Q489 **Jess Phillips:** We are talking more about the burden to prevent—the burden that if it happens it is an employer's responsibility rather than all the legwork having to be done by often people with little power and agency.

Joanna Blackburn: I am not sure I accept that all the legwork is done by individuals in preventing sexual harassment. Obviously, it inevitably comes down to individuals to report, be it somebody that has witnessed somebody else being harassed or the complainant themselves. There should be no instance where legal proceedings are brought without the desire of the complainant to bring those proceedings. The complainant should be at the centre of the decisions that are made about what happens next.

I am not sure how you move that burden and I do not accept that the burden on leading the issue of prevention rests with the employees. It firmly, currently, rests with employers. Whether they are doing a good job of it is an entirely separate question.

Q490 **Jess Phillips:** Are there sufficient incentives to encourage employers to protect those they employ from sexual harassment?

Joanna Blackburn: There are obviously incentives, whether they are sufficient and whether they are clearly enough explained I think is another matter.

Q491 **Jess Phillips:** What are the incentives?

Joanna Blackburn: A workforce where your people stay, good retention, good reputation, no disputes, no legal claims. The cost of sexual harassment in the workplace goes way beyond dealing with legal claims; its real impact is on your workforce around the people that are suffering. It creates a ripple effect through an organisation. People talk, organisations have reputations, you have a glass door. These things matter. I think employers increasingly understand the impact of the easier spread of information about what kind of place they are to work.

Q492 **Jess Phillips:** They do now?



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Joanna Blackburn: I think they do.

Q493 **Jess Phillips:** To follow that through, do you think there will be less sexual harassment now and employers will be doing more?

Joanna Blackburn: In my practice I have seen a huge change in the conversations I have had with my employer clients over the last eight months. It has been a sea change, but still with employers being a little lost as to what they do beyond having a policy and doing some training. You have to go beyond that. That is only the start.

Q494 **Jess Phillips:** The EHRC has suggested that the Government should place a mandatory duty on employers—which Aileen has already stated that she would support—to take reasonable steps to protect people in the workplace from victimisation and re-victimisation, and that this should be supported by statutory codes of practice. I know that you agree, Aileen. Joanna, Michael, Liz, you can join in if you want? Joanna, do you agree?

Joanna Blackburn: I don't at this stage. There are some stages we should go through first before we get to a mandatory duty and a code of practice.

Q495 **Jess Phillips:** What are those steps?

Joanna Blackburn: There is just so much more to be done on assisting with implementation of the existing laws and setting out a framework for what compliance looks like for employers, and giving a chance for that to take hold before you get into those mandatory roles.

Michael Reed: I agree. I think it is a tool. This is a very serious problem. There are lots of ways of approaching it and we should not restrict ourselves to saying, "We are going to rely only on the claimants bringing the cases. We are only going to rely on regulators enforcing it. We are only going to rely on public education. We are only going to rely on a statutory code of practice". It needs to be addressed on a number of different fronts.

Part of my reason for that is that I am not sure that it is putting any significant additional burden on the employer. Employers are already responsible in law under the Equality Act. Sexual harassment is unlawful and they should be taking—and indeed many employers are taking—steps to try to address that and to deal with that.

Q496 **Jess Phillips:** What will happen to those that aren't?

Michael Reed: Some will change their approach—not all, but some is worth achieving.

Q497 **Jess Phillips:** "Some" is no comfort for the women who work in the ones that don't.

Michael Reed: No, but you are moving some of those women from employers who don't to employers who do and you use other approaches of trying to get to the ones who don't. That is when you move into things,



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like the Employment Tribunal, like the rights to bring a claim, like the Commission's other powers. There is no one-size-fits-all solution.

Q498 **Jess Phillips:** Aileen, you said that you did agreed with the duty. To all of you: if not a duty, what alternatives would you propose to increase employer action to tackle and prevent sexual harassment?

Joanna Blackburn: As I have just set out, I think there should be a clear set of guidelines that employers should be following to hit best practice and, if they do, encourage them to believe they will be able to rely on a statutory defence so they have a real incentive to engage properly.

Q499 **Jess Phillips:** Do you think that works in maternity discrimination?

Joanna Blackburn: Maternity discrimination is a whole other wide subject that one could go into. I do think that employers are well aware of their obligations in that regard. You will always have employers that will seek to buy their way through non-compliance.

Aileen McColgan: It seems to me a code of practice is the traditional way of making clear to employers what is required. There used to be more codes of practice than there are today emanating from the Equality Commission. That is a very good way to make very clear what is expected. I think we all agree that people should be engaged in training and policies and making sure policies are in place. If we all agree that, it seems to me that it is quite a sensible thing to make them mandatory.

Q500 **Chair:** Could I just ask for clarification, Joanna? You said you felt guidance should be issued, isn't that what a statutory code of practice would do? If you issued a statutory code of practice that would give the guidance that employers could rely on in court to say they had taken all reasonable steps.

Joanna Blackburn: I have less of an issue with a code of practice being issued; I question whether the mandatory duty is necessary because the law is already there.

Q501 **Chair:** A statutory code to help explain it might assist?

Joanna Blackburn: It may assist, yes.

Q502 **Tonia Antoniazzi:** Following the recent Court of Appeal decision in the *Unite the Union v. Nailard* case, what options does an employee have for bringing a case against their employer where there is third-party harassment?

Aileen McColgan: It is extremely difficult. In some cases, harassment by third parties—as it was accepted to have done in the *Nailard* case—will amount to harassment by somebody acting as an agent of the employer, but that is a fact-specific situation. Where one is harassed by a customer or a client—the waitresses who were being harassed in the well-publicised dinner—they are not going to win claims on the basis that the harassers



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were acting as agents of the employers, so the possibilities are very limited.

In some cases, there may be an agency claim. If the employer behaves differently to you as a woman complaining about sexual harassment by a patient or a client than they would have behaved if you were a man complaining about sexual harassment, you can win a discrimination claim, but it is not going to happen. What we need is the reinstatement of liability for third-party harassment.

There is an argument that it is already in because of a proper interpretation of the underlying directives. But you cannot expect employees to manage that, so what you need to do is reinstate third-party harassment claims.

Michael Reed: I would agree. I would say particularly the problem with the direct discrimination argument—you are saying, “I raised a complaint. Complaints of other types are dealt properly. Mine, because it was about sexual harassment, was not dealt with properly”—is that the people it leaves out are the worst employers who are not dealing with anybody’s complaints properly. They are not treating you less favourably because you are a woman. They are treating everybody badly and there is no distinction.

I would also echo the point Aileen makes. Expecting litigants in person without sophisticated employment law advice to raise these sorts of arguments in their own case is putting a very heavy burden on them.

Q503 Tonia Antoniazzi: Does the current law around third-party harassment strike a fair balance between the need to protect employees and provide them with a means of redress and the need to ensure the burden on employers is not too great?

Joanna Blackburn: I absolutely agree with Aileen and Michael that the law needs to be put back to where it was, possibly with further amendment. The previous laws around third-party harassment required there to be two instances of harassment before the employer’s obligation to do something was engaged. That is at least one too many and I don’t think it puts an unreasonable burden on employers.

The reality is that employers have to be cognisant of the situations that their employees are in. I am a partner in a law firm. If we put our associates in meeting rooms with a client and the client is abusive to one of our members of staff and we do nothing about it, it should rest on us. That is our responsibility.

Q504 Tonia Antoniazzi: Should the Equality Act be amended to make employers liable if they do not take reasonable steps to protect the employees from third-party harassment? If so, what is the best way of doing this?



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Joanna Blackburn: We are back into the same area. It is a straightforward legislative change.

Q505 **Tonia Antoniazzi:** Could section 26 be amended to do this effectively?

Joanna Blackburn: Section 40 was the old one, and I think you do not have to derogate. Others may disagree on the number of instances before the obligation is engaged. I think the Fawcett Society has said that one instance is the right instance. I have to say I agree with that. You cannot necessarily know in every instance that you may have an issue, but once it has been brought to your attention you should do something about it.

Michael Reed: Of course, the reasonable steps element can then feed into that. What is reasonable when there has been a single incident may not be the same as what is reasonable when there have been a dozen incidents.

The other thing I would add on the third-party provisions is we sometimes think about that as being a customer or somebody else who is wholly outside the business, and obviously that is one of the ways in which it is right. The other way that third-party harassment can arise is when you have interlocking companies and agency workers, and it is not the idea of just somebody who walks into a store. It can be somebody in a non-legal sense—a colleague who works beside you but is employed by a separate company or through a different agency. That creates these very complex legal questions, some of which are covered in the existing law—if you have a clever lawyer to make that argument—and some of which simply are not. I have certainly dealt with cases like that.

Q506 **Tonia Antoniazzi:** Aileen, do you have anything to add?

Aileen McColgan: Just to underline the concern about being fair to employers is met by section 40, as was, because employers will not be automatically liable for harassment by third parties. It is really only harassment that they could have prevented and failed culpably to do so.

Michael Reed: It is really not making them liable for the harassment at all; it is making them liable for their failure to take reasonable steps to protect their employees.

Q507 **Teresa Pearce:** We have already touched a little bit on what I want to talk about. For some employees, going to a tribunal is very unattractive or difficult. You have mentioned the time limits. You have mentioned fear of career progression being damaged and that sort of thing. What other main barriers do you think there are to people taking a case through the system? For instance, do you think the fact that the case might be reported in the newspapers is a barrier?

Joanna Blackburn: There is a regime to deal with the reporting issue. People can apply for restrictive reporting orders. Aileen and Michael may have different experience, but where a claimant has applied for a



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restrictive reporting order in a case where they are bringing a claim of sexual harassment, I have never known a tribunal not to grant it. That RRO stays in place until promulgation of judgment normally, but there are circumstances where it can be extended. The tribunals are well aware of their powers in that regard.

The greatest barrier is the barrier of cost and inequality of arms, but that is true of all legal cases involving individual versus corporate, or the vast majority. Normally the employer outguns the employee in terms of resource. That is an inherent issue in the system and one that I am afraid you are not going to be able to solve because we are not going to have legal aid for employment cases again. Even that does not really assist, because the thresholds were so low for legal aid and the reality is that the costs of bringing tribunal claims are significant.

Q508 Teresa Pearce: Michael, we heard before that the likelihood of getting a case through successfully without legal representation is very slim. What other difficulties are there for those who cannot afford to buy a lawyer?

Michael Reed: Where do I start? There are three main factors. One is that you are asking people to do something that is simply technically difficult. There is a reason that, if the Government is sued, they do not send the civil servants in on their own. They go and get a lawyer, because lawyers do a technical task. It may not be as brilliantly intellectual as we all try to pretend sometimes, but it is a technical task that needs training and experience.

Asking people to run a sexual harassment case, when they are challenging evidence, assembling evidence, making legal argument, when in many cases they have no training to do that and they may not have the educational background or the language skills, they can be vulnerable in all sorts of ways that makes that incredibly daunting. They are often entering a very alien, very intimidating environment.

I am here today and this is a little intimidating. Of course it is because it is not something I do all the time. You are answering questions. You are presenting your evidence, but this is nothing compared with going into an employment tribunal and giving evidence to people who may look quite different to you, come from very different backgrounds, who are carrying out this arcane process that you do not really understand, who are talking about the importance of disclosure. Simply on a technical level it is very difficult.

Q509 Teresa Pearce: What you are saying is: the law is clear on sexual harassment but access to the law depends on the ability to pay for a lawyer?

Michael Reed: Very often. Even beyond that, the emotional cost of going through a tribunal, with or without a lawyer, is very great, and you are talking about something very often quite traumatic, quite difficult happening.



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The fact is, in general, people don't bring sexual harassment cases about minor incidents or things that don't bother them because why would they? They bring cases where they feel they have been treated very badly, where they are very aggrieved and where they are emotionally injured. They are reliving that process. They are talking about that. They are thinking about that, and they are confronting possibly being cross-examined by the person who harassed or assaulted them in a tribunal over the course of days, and the emotional burden of that is very great.

- Q510 **Teresa Pearce:** Thinking about victims of sexual harassment, do we look at what they feel about this? Is there any survey done of people who have been through the system of how they felt about it and what improvements could be made? What you are describing is a hostile environment. To ask somebody who has been traumatised to go through that, there needs to be more support like there are in other courts sometimes for victims, that they can give evidence in a different way. What can be done to make sure that people who are bringing these cases are dealt with sensitively? Do you think it is because of the hostile environment that other people have experienced that people sometimes drop out before the end of the case?

Michael Reed: Yes.

- Q511 **Teresa Pearce:** Some people don't bring a case at all. Other people start a case but then it is just all too awful, so there is no justice.

Michael Reed: Absolutely. Some people drop out part way through the process. The fact is it costs money. The fact is what you need is early advice and support. I would say you certainly do need legal help as there was around Employment Tribunal cases. I would say you need legal aid.

The Free Representation Unit was set up in 1972 and we were going to prove that representation in tribunals made a difference to the outcome, as a result of which legal aid would be extended and then we would shut down. We have not succeeded in this aim at all. But you can do some things. You can get advice and you can get support out of organisations, like PSU and some of the experts in that.

The other thing that you can do, which is very important, is make sure the system is resourced properly and run efficiently. My view is that every moment you are in any kind of employment litigation is very difficult, but certainly this type of employment litigation where it is very emotional. You are hurting people actually on both sides, because it is also emotionally very tough and potentially traumatic to employers on the other side who have to deal with allegations and have to look at their processes. Every day that that goes on has a very high emotional cost. If people are going into the tribunal system, you want that resolved as quickly as possible. You don't want the case put off for three months because there isn't a judge available or there isn't a member available. Obviously, you also have to balance the need to deal with the case



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properly and to do justice but, with that in mind, you need to do it as quickly as possible.

- Q512 **Jess Phillips:** What do we think are the most important changes that could be made to improve the tribunal system? We have already covered off potentially extending it all to six months, which I think is the EHRC's recommendation. Are there any other killer quick—

Aileen McColgan: It is vital to understand that if people complaining about sexual harassment have got to a tribunal, it will be because when they have raised it before they have not been dealt with properly. They will have been damaged by the original sexual harassment. They will have been further damaged by the way that that harassment has been dealt with, and they will be psychiatrically vulnerable as a result of that and, as Michael was saying, to deal with that needs resourcing.

It is different from a rape case because in a rape case the alleged victim of rape is a mere witness. She is only a witness; it is not her case in a criminal case. Here it is the victim's sexual harassment. It is her case.

Chair: I think Liz wants to come in.

Liz Rivers: Yes, I want to say that mediation is a very powerful antidote to some of the stresses of going through a formal process, such as an internal investigation or the challenges of taking a case to tribunal, as long as it is offered within a context of robust remedies for the complainant. It is very powerful, and the point about things being addressed well early is very important. The more the complainant victim is given a range of options that empower her to speak, the more effective that can be and the easier it is then to resolve things quickly to everybody's satisfaction.

- Q513 **Jess Phillips:** Are you talking about resolving it financially or resolving it so that both people can stay at work, for example?

Liz Rivers: In the first instance, it is generally about dealing with things at a relationship level. There has been a rupture in a relationship here. This needs to be resolved. There needs to be clarity about what happened and the impact of the behaviour. What will be put in place to make sure that it doesn't happen again? What needs to be done to redress and repair the harm? Hopefully, it may well be possible, in those situations, for working relationships to be restored and for the mediation to be a very educative process for everybody involved and part of changing the culture of organisations.

When that does not happen and a dispute is not well handled and it turns into a legal claim, then the mediation tends to centre on a financial settlement. That is a different type of conversation.

- Q514 **Jess Phillips:** Do you think Acas conciliation and judicial meditation is providing appropriate alternative routes: good, bad, ugly?



Liz Rivers: I work as a private mediator. I am generally engaged by the organisation. What I would say is, given the particular sensitivities of these types of disputes, I would advocate specialist mediators who specialise in this area—people who are mediators for a living. That is what they do all the time, and they have the resources to meet people face to face—a lot of Acas conciliation takes place on the phone. I think you need a very careful, delicate, sensitive process that is responsive to the individual circumstances of the case and sufficient resources.

Q515 **Jess Phillips:** Suzanne McKie, QC, suggested something like the dispute resolution system used in family courts could be used in the tribunal system. Could you envisage this providing a better route?

Liz Rivers: I am not familiar with how it works in the family court, but maybe some dedicated service within the Employment Tribunal would be valuable.

Joanna Blackburn: I am a huge advocate for mediation in these situations, because they can provide a holistic response to a complaint in a way that a tribunal simply cannot. I think we all agree that, by the time you end up in a tribunal, the relationship is so fractured that you tend to come down to apportionment of financial recompense, which does not necessarily move the agenda any further with the employer.

Q516 **Jess Phillips:** Do you think that those financial recompenses should be increased as a preventative measure?

Joanna Blackburn: If I can just pick up on the mediation and then I am very happy to deal with that. By the time you get to judicial mediation, it is too late: the tribunal case has been brought, it has gone quite a long way down the line, people are entrenched and also, with the best will in the world, the environment for judicial mediation is not conducive to the kind of conversations that Liz is talking about.

In a much earlier stage, access to specialist mediators would bring about the biggest change in the outcome for the complainant. That is something I would have thought there would have been a big enthusiasm for from the mediator community, who are always looking for ways to better spread the good work that mediation does. That is undoubtedly something that employment law practitioners would hugely welcome as a service to offer to employers. Employers would welcome avoiding using lawyers at all and going straight to the mediators.

Q517 **Jess Phillips:** You are fighting for the work; she is fighting to get rid of it.

Joanna Blackburn: I am a mediator too, so I am fine.

Should the damages be increased? Again, there is a structural issue because, when you look the Vento damages bands—Vento damages are the damages for injury to feeling as opposed to loss of income, which is a simple metric of what you earned and what you have lost and what you



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are likely to lose—correlate to other forms of injury-based damages. Personal injury damages are the obvious thing. You have to be very conscious of the connection between the two areas and not putting one set of damages out of balance with another regime.

What is the damage you get for the loss of an eye or loss of a limb, versus the damages you get in an Employment Tribunal for injury to feeling? On the question of whether or not there is a 25% uplift for not following Acas codes, they need a code to follow and maybe that comes back to what you have been talking about. That is a slightly different question.

Q518 Chair: Just finishing off on some very specific questions for Liz. We have talked a little bit about the role that mediation should play—Joanna said she is a great advocate for it as well. Are there cases in which it will be absolutely unsuitable to use mediation? We have had some evidence that suggests that would be the case.

Liz Rivers: The two main arguments proposed against mediation in sexual harassment are: first, that there is too much of an imbalance of power between the alleged perpetrator and the complainant; and that you might simply be replicating that in the mediation.

The job of the mediator is to ensure a level playing field and to ensure an environment in which both parties are able to speak freely and feel empowered to speak, so the process itself has a power balancing effect. Also, I think it is very important that the context within which it happens is one where the organisation is taking the complaint very seriously, the individual is given the option for a formal investigation—if that is what they want—to ascertain the facts, and there is a culture in the organisation that they will challenge those in power. If this is a situation where the alleged perpetrator has power over the individual that they will fearlessly challenge that person for their behaviour, and if that message is communicated and that is the culture of the organisation, a complainant can go into that conversation knowing that they have back-up.

Q519 Chair: I know others want to come in, but I just want to drill down slightly. Could mediation actually help perpetrators as well as victims?

Liz Rivers: Absolutely. It gives them an opportunity to listen to and understand the impact of their behaviour on somebody else. The difficulty with adversarial processes, such as investigations and tribunals, is that it is a fault finding process that apportions blame and it almost always has the impact of making people defensive. All their energy goes into defending their behaviour rather than being open to learning.

What mediation does is it removes that and it says, “We are here to understand what happened”, and there is an opportunity then for somebody to listen and hear. It can be profoundly educative and far more powerful as a tool for changing behaviour, raising awareness and



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changing the culture of organisations, than simply going through an investigation or a tribunal.

Q520 **Chair:** Any other comments on that? I am conscious of the time.

Michael Reed: I would just say very quickly that mediation is a brilliant tool. One of the things to bear in mind is that the cases that reach the Employment Tribunal are the tiny, tiny percentage of cases that are perhaps seen as the most serious or the most difficult to resolve. In some cases, we can do mediation and help get better outcomes and avoid the tribunal, which is good for all the reasons that I have talked about, but you will always have the need to go to tribunal in some cases.

Also, a lot of mediations occur in the shadow of the tribunal. It is the fact that an employer knows, "If I don't take this seriously, and if I don't do my best to resolve it, I may end up in the tribunal and I may have to defend it that way". Without that, there may be much less willingness to put in the resources.

I have done judicial mediation a few times and I think it is a very good tool within the system. Of course, in some ways, it comes a bit too late and it would be better if it were there a bit earlier. I would say that I think Acas is doing a very valuable, very useful job but I don't think it is mediation. What they are doing is ringing up employers and employees, saying, "Are you interested in settling this? Have you thought about it?" You are talking about a few e-mails—a few short phone calls in most cases. It is not the kind of much more significant process or much more significant work that the mediation is doing. It would be lovely if Acas was in a position to do that in all cases but it is very often not.

The other thing I would say, going back to cost, is that I have seen external mediation used most often where you have quite senior employees and well resourced employers who have the money and think it is worth spending it. You do not see it at the end of the sort of stuff that I deal with, because the claimant certainly does not have the money and the employer is not going to spend money in that circumstance.

Aileen McColgan: Maybe the Commission could be encouraged to include or at least consider mandatory consideration of mediation at an early stage in any code of practice. By "mediation at an early stage", I do mean when the first complaint has been raised, before anyone has issued a claim, and before it has got too late to try to mediate the relationship between harasser and harassee.

Q521 **Chair:** Just before we close, when we were talking about ways to improve the tribunal system, we did not talk about a couple things around statutory questionnaires and also tribunal powers to make wider recommendations. Any quick thoughts on that just before we close?

Joanna Blackburn: Yes.

Q522 **Chair:** Good ways of trying to improve what Aileen said.



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Joanna Blackburn: The questionnaires should be back. They should never have been taken away.

Aileen McColgan: Most employers agree.

Chair: Brilliant. Thank you very much. I am sorry we have overrun. I hope that has not inconvenienced you for the rest of your day. I thank you for all the time you have taken to be here today and also to prepare for this session. We are really appreciative of that and, on behalf of the Committee, thank you very much.