

Women and Equalities Committee

Oral evidence: [The use of non-disclosure agreements in discrimination cases](#), HC 1720

Wednesday 23 January 2019

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Members present: Mrs Maria Miller (Chair); Tonia Antoniazzi; Sarah Champion; Angela Crawley; Vicky Ford; Eddie Hughes; Jess Phillips.

Questions 84–168

Witnesses

[I:](#) Kiran Daurka, Discrimination Law Association and Partner, Leigh Day; Baroness Kennedy of the Shaws QC, Director, International Bar Association Human Rights Institute; Jane Mann, Partner and Head of Employment Group, Fox Williams LLP; and Julie Morris, Employment Solicitor and Head of Personal Legal Services, Slater and Gordon.

Examination of witnesses

Witnesses: Kiran Daurka, Baroness Kennedy, Jane Mann and Julie Morris.

Q84 **Chair:** I would like to welcome our witnesses as they settle themselves in. To those watching online or in the Public Gallery, this session is the third session for our inquiry into the use of non-disclosure agreements and settlement agreements in discrimination cases. In our first two sessions we heard about how NDAs are used in discrimination cases here in the UK and about changes to the law in California to restrict the use of NDAs in sexual harassment cases. Today we are joined by an eminent panel of legal experts. Just before we start, maybe I could ask each of you to just say your name and the organisation that you work with. Kiran.

Kiran Daurka: Hello, I am Kiran Daurka. I am a partner at Leigh Day lawyers and I am also representing the Discrimination Law Association today.

Baroness Kennedy: I am Helena Kennedy. I am a practising barrister, have done for over 40 years. I write extensively on women's rights and I consider myself something of an expert in the area of the rights of women and how the legal system deals with the issues that arise, particularly for women. I am now the Director of the Human Rights Institute at the International Bar Association, which has 180 bar associations around the world.

Jane Mann: Good morning. I am Jane Mann. I am the Head of Employment Law Group at Fox Williams. We are a City law firm. I have practised for many years myself and I have acted for both individuals and companies throughout my career, so I hope I can bring a balanced perspective to this debate. My practice is in the City of London, so I have senior executives and companies and firms as clients. In the professional sphere, I was also a co-founder of the Employment Lawyers Association.

Julie Morris: Hello, I am Julie Morris. I work for Slater and Gordon. I was until very recently the head of the employment department at Slater and Gordon. We have a very large team—about 50 lawyers—and we all act for individuals only.

Chair: The one thing the Victorians did not get right in this place—which I am sure Baroness Kennedy is aware of as well—is that the acoustics are pretty awful, so if I could ask everybody to just lean forward into the microphone, both *Hansard* and the Committee will be very grateful.

We are going to follow the usual pattern. We have a whole host of questions we would love to get your thoughts on, and a range of views. We are going to start with Jess. Just before Jess asks her first question, as always, Members will be going in and out because we have so many things going on at the moment, so I hope you can bear with us on that.



Jess.

- Q85 **Jess Phillips:** Hello. We have heard throughout both this inquiry and one of our previous inquiries into sexual harassment in the workplace that non-disclosure agreements and confidentiality clauses are commonplace in dealing with cases of discrimination specifically. That is obviously what we are focusing on. Would each of you say why you think that they are so commonly used and what concerns you might have about the uses? I will start with Kiran.

Kiran Daurka: I only act for individuals and have done for the last 13 years. They are commonplace, not just in discrimination, but across any dispute within employment. It could be a collective redundancy, it could be anything. They are there. What has happened over time is that they have become more onerous. It may have started with confidentiality around the terms of the settlement. It has now expanded to a fact of the settlement agreement. Over the last maybe six or seven years, it is almost standard to see in all circumstances surrounding the termination of your employment or leading up to the settlement and the impact—

- Q86 **Jess Phillips:** Do you know why that change occurred?

Kiran Daurka: I do not know, but it is standard. I am on this side and we do try to fight back, push back on some of these and make them narrower, but it is not always possible to do so. Sometimes it is; often it is not.

The impact of them, I do think that there has been an increasing chilling effect on women being able to speak out. However, I also see the huge benefit because it allows my clients to settle their cases and move on in a way that I do not think they would be able to without a confidentiality agreement in place.

- Q87 **Jess Phillips:** Why not?

Kiran Daurka: Because I do not think employers would be willing to settle claims without the confidentiality. I think that is a primary aspect of it, but of course many clients also want the confidentiality in order to be able to get a reference or—

Jess Phillips: Or be blacklisted, yes.

Kiran Daurka: Yes, to move on.

Baroness Kennedy: I would reiterate some of the things that Kiran has said. To answer your question, which is an important one, why have we seen this growth? Lawyers are inventive, I have to tell you. You may see them as a whole crowd of dull dogs, but they are not. They actually look very creatively and see what they can do with law for their client. If they are acting for the employer, or even if they are acting for those who are on the employee side, they will try to be inventive in getting the best deal for their client. Therefore, reckon with that and reckon in any of the



recommendations that you make there will be inventive lawyering to try to find ways of getting round it.

There is that, but it also links to the growth of women's confidence in entering the workplace. We have women rising inside workplaces who are much more prepared not to accept what goes on. They make complaints, they whistleblow and then they get themselves into the whole business of being in conflict with somebody who is powerful. This is about economic difference, the lack of an even playing field here. You do not have parties on the same playing field and so women are disadvantaged in all of this.

My concern is that, yes, we have seen a huge growth of it. I do think that women do not want to see a ban. One of the things I was concerned about was that I was hearing talk among colleagues in Parliament and in the legal profession about, "Couldn't you have a ban?" I think it becomes problematic because so many women themselves would prefer to deal with it this way. They think, "I do not want to be in a place where this is the culture. I do not want to be dealing with him and they are not going to get rid of him because it is his company," or, "He is one of the senior people and his value as an asset is so much greater."

Most often when women do go into these settlements it is because they see it at that moment as being the thing that they want to do. If you are offered a significant sum of money and you are a woman who is not well off, to have the deposit for a flat or whatever it might mean, it can make a big difference to you and you try to go on with your life.

If it has been a serious assault, my experience is that many women do not find that it is the release that they thought it was going to be. That is the thing that concerns me here, that for many women they sign on the dotted line. Zelda Perkins has come to me seeking advice about how to proceed from her point of view, Zelda Perkins being the woman who worked for Harvey Weinstein and who, with her colleague, was party to non-disclosure agreements some 15 years ago. One of the people working in the offices here in London made an allegation of rape against Harvey Weinstein and Zelda Perkins has now gone public.

Q88 Jess Phillips: Yes, she came to the Committee.

Baroness Kennedy: You have had her in front of you, so you know the facts on that. One of the shocking things for me was the kind of clauses that were included in the non-disclosure agreements of those young women. They were young graduates. These were young women who were not experienced in the workplace and they were silenced. This is about the silencing of women. I know that men are silenced or bullied in the workplace too, so I reckon with that and they should be included in the generality of this.

We know that it is particularly used to cover up sexual misbehaviour, so I do think that we should be making it clear that there is a place for NDAs appropriately protecting intellectual property, protecting trading secrets



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and all of that. Women as company owners and small business owners want to be protected in the same way, but I think that we have to really look at the regulatory framework of the legal profession. I think we have to look at the powers that there could be in the Equality and Human Rights Commission to be investigating where it looks as though there might be patterns. We have to look at how we could perhaps have in annual reports disclosure of how many NDAs are used so that we can know more about all of that.

Some research has now been done by women lawyers to try to get underneath the skin of this to see the extent to which these NDAs are being used, so I just want to—

Q89 **Jess Phillips:** Yes. I am sure we would be interested to see that.

Baroness Kennedy: That is going to take some time. Also, some work has been done in taking some of the clauses that were in Zelda Perkins's non-disclosure agreement contract to law firms to say, "Would you put this into an NDA now?" One of the shocking things was that—and this might eventually come before you—some law firms were not as shocked by them as we might be: the business of not being able to go to a therapist for psychiatric help or psychological help in dealing with the abusive experience without having permissions; taking your case to another lawyer because other people have complained about the person—classically in the Harvey Weinstein case, but in other people's cases too—and having to get consent.

In order to get your deal, we know that women are often persuaded to say that the thing did not happen, to retract the allegation. Once they have done that formally it becomes very difficult because you know that in a court of law they will be cross-examined to say, "But you said that in fact it was not quite the way you had initially described it." There are problems in this whole area and we know that it fits into the pattern of something bigger, which is the silencing of women about the ways in which they are abused.

Q90 **Jess Phillips:** Thank you. Jane, Helena spoke there eloquently about some of the clauses. In answering, I suppose how common you have seen them from both perspectives, if you want to talk through the commonness of the kind of clauses, about therapists—

Jane Mann: Here is one. I have one with me and this has come from our standard settlement agreement.

Q91 **Chair:** This is a standard NDA, not relating to an individual case?

Jane Mann: It is headed "Confidentiality". I wonder if you have ever seen one.

Jess Phillips: We have seen Zelda Perkins's.

Jane Mann: In my experience that was—



Q92 Jess Phillips: I have seen absolutely hundreds, Jane, in answer to your question, because every time we do one of these inquiries people send them to me.

Jane Mann: Good. Then perhaps you have the context that I would like to give you about confidentiality in employment, because you are rightly concerned about the type of clause that was in the Zelda Perkins agreement that, in my experience, is a very unusual set of clauses. It was one I was quite surprised to read and hear about because I had not seen one like that before myself. I was very concerned about it and I was concerned about the same issues that Baroness Kennedy has raised.

I share your concerns, but I think you need to put the whole debate in the context of confidentiality in an employment relationship because it is a fundamental part of any employment relationship that an employee owes duties of confidence to an employer. That is to cover trade secrets, commercial secrets, but also personal data and information that is gained during the employment. It may be payroll data or it may be personal data. For example, if you were employing a carer at home you would have data about the person being cared for: medical records, information about finances, family matters and—

Q93 Jess Phillips: We totally understand that. We are data agents ourselves, as Members of Parliament, so we understand that. We are specifically thinking about in cases where a settlement has been reached because of discrimination.

Jane Mann: My point being that it is not unusual, and it is completely standard for settlement agreements to have confidentiality clauses in them—

Jess Phillips: Full-stop.

Jane Mann: Which continue and reinforce the duties of confidence that are quite properly and correctly owed by an employee to an employer during the course of employment and certain of those duties continue after the end of employment. The concerns that you have relate to the special extra duties of confidence that are imposed on an individual in the course of a settlement negotiation, where that individual has alleged discrimination, harassment or other forms of discrimination. The individual could also have alleged other forms of wrongdoing at work. It is extremely common and standard for the parties to agree confidentiality in relation to the matters that have been the subject matter of the dispute, possibly in a complaint, and there are good reasons why both sides may want to have confidentiality for the mutual protection of reputation and to enable both parties to put behind them the matters that gave rise to the dispute, so that both can draw a line and move on.

The concerns you have are, in my experience, relating to a relatively small category of confidentiality clauses that are imposed in the circumstances that you are looking at, where there might be a serial abuser or a serial discriminator, where the organisation at the very top



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has decided that it would prefer to pay off the individuals and put those types of clause in the contract rather than deal with the perpetrator and take action.

In considering the policy and the law in the future, you need to have regard to the fact that every day of the week people are entering into clauses, which are confidentiality clauses in an employment context, whether that is going into employment, during employment or leaving employment, and also that there is a huge range of other circumstances providing services where confidentiality is an integral and important part of the relationship.

- Q94 **Jess Phillips:** I do not think any of us—and certainly the terms of reference of the inquiry—wants to undermine the importance of confidentiality. Prior to being a Member of Parliament, I worked at Women's Aid, so I am wholly aware of the need for confidentiality. What we are specifically looking at is the patterns of the use of non-disclosure agreements in cases of discrimination. While I agree with what you are saying about serial perpetrators, one of our major concerns is discrimination against disabled people, women on maternity leave and equal pay being the thing that is being silenced.

Jane Mann: I wanted to put my point into context because it is for that reason that I am not in favour of banning non-disclosure agreements in settlement agreements, but I do share your concerns about those types of situation and I do think that it would be right to look at certain safeguards so that women or other people who are subject to discriminatory action are made aware of their rights to make disclosures in appropriate cases. Therefore, I do share your concerns, but I am concerned about a blanket ban because of the importance of confidentiality in so many situations in employment.

- Q95 **Eddie Hughes:** I am slightly confused. You mention the idea that people would be signing up to those obligations at the start or during their employment.

Jane Mann: Yes.

- Q96 **Eddie Hughes:** They would be aware of them. There would be, I presume, some sort of run-on approach to those clauses that meant that they would apply post-employment as well. Why would you need some other agreement at the end of their employment to clarify that? Surely that sort of thing gets tidied up at the start or during employment. You do not need something additional at the end as you leave to say, "By the way, you do remember that clause 7 of your contract said this?"

Jane Mann: If you breach an employment contract the confidentiality clause can fall away, so if the employer is in breach it may want to restate it. Also if you are relying on implied duties of confidence, they can be quite narrow, so you may want to describe exactly what duties of confidence you want on termination of employment.



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Q97 **Eddie Hughes:** I did not imagine they would be employed. I thought you said they were contractual obligations at the start and during.

Jane Mann: During employment there can be both implied duties and express duties set out in the employment contract. There are circumstances where the duties in the employment contract fall away on termination, but what you are concerned about is confidentiality that relates in particular to disputes that have arisen towards the end of employment and may have given rise to the termination of employment. In the settlement of those disputes, the confidentiality clauses relate specifically to those facts.

Baroness Kennedy: Usually it is about the dispute.

Jane Mann: It is about the dispute. For example, in the standard clause I have here there is a reference to an individual not talking about the circumstances that led up to the termination of employment. That is very common.

Q98 **Jess Phillips:** That is a common clause?

Jane Mann: That is a very common clause used in settlement.

Q99 **Jess Phillips:** They would not talk about the circumstances?

Jane Mann: Yes, which would not be—

Q100 **Jess Phillips:** Why is that in there?

Jane Mann: Because when parties are settling a dispute, which may involve all sorts of allegations being made in both directions, the parties may wish to bring an end to that and to give both sides the reputational protection in not talking about it in the future. Obviously, both parties may be agreed and they may be happy about it, but in the case of someone who has fallen victim to discriminatory action, they may be settling a claim that they could bring to an employment tribunal. In exchange for settling that claim they will receive compensation, which you know about, and they will also, as a condition of that, be required to observe confidentiality.

What you are concerned about is where the weakness of the individual is such that they feel obliged to accept confidentiality in exchange for a very large payment and that in fact they feel they have little option and thereafter they are gagged and they cannot reveal wrongdoing in the organisation, particularly if it is serial. The deal is fundamentally you will get compensation and that enables the individual to get redress and, as a condition of that, there is a confidentiality obligation accepted.

Q101 **Jess Phillips:** I will move on to you in a second, Julie, but just on the balance of power, who do you think that the deal is better for?

Jane Mann: It can depend. Generally the employer is in a stronger position because they have the greater resources, but in the immediate run-up to a tribunal hearing, where matters are going to be made public,



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funnily enough, it can change around and suddenly the individual can get into quite a powerful position to negotiate something, but that is only if they have been able to take the case all the way to the doorstep of the tribunal.

Q102 **Chair:** Just before we move on, could I just ask Jane one question? Have you ever drawn up an agreement for one of your clients? I do not want you to name the clients.

Jane Mann: I couldn't possibly. I am covered by a duty of confidentiality.

Q103 **Chair:** I know, but could I just ask you, have you ever drawn up a confidentiality agreement for any of your clients that stops them talking about allegations of maternity discrimination, allegations around equal pay or indeed about the level of their pay or about alleged discrimination based on disability? Do you think that would be something that you would be able to do?

Jane Mann: Yes. Many employment lawyers would draw up agreements that would, in the settlement of the dispute, require confidentiality on the part of the individual relating to the circumstances of the dispute, if it has not already become public.

Q104 **Chair:** You do not think it is inconsistent with your professional obligations to draw up, for your clients, contracts that are stopping people talking about breaches of the law, which is what you have just said?

Jane Mann: What an individual is doing is asserting a claim. They are saying, "I have been discriminated against and I am going to bring this claim to the employment tribunal," and then instead of taking it to the employment tribunal there is a settlement and that is entered into on certain terms that are agreed between the employer and the individual.

Q105 **Chair:** I will ask the question again: you do not think it is a breach of your professional duty, as an upholder of the office of the court, to make sure that the law is not diminished in the eyes of the public to allow your clients to have contracts that stop people reporting breaches of the law? That is in essence what you are doing if you are allowing your clients to potentially coerce their employees into signing a contract that stops them talking about maternity discrimination, equal pay and the disability discrimination.

Jane Mann: There is a point of clarification. The settlement agreement and the confidentiality clause do not normally prohibit disclosure to a regulator of a breach of the law, to the police authority, because an employee always has the right to make a complaint under the whistleblowing legislation or to report wrongdoing to the police. Also a confidentiality clause is not binding insofar as it relates to a criminal act it is in the public interest to disclose.

Q106 **Chair:** Kiran, do you think your clients are always aware of that?



Kiran Daurka: There is a real issue with the whole protected disclosure aspect because, first, many individuals do not understand what protected disclosure is. There is a very convoluted and complicated definition within the legislation, so have they satisfied it? Secondly, they may not be covered because they may not have the status under the legislation to be a qualifying whistleblower.

We know that there is someone at the moment who is taking her case to the Supreme Court this year in which she is saying, "I should have protections as a whistleblower," and the court so far has said, "The legislation does not allow for it," so I am not sure people will be aware that they can make a protected disclosure.

Q107 **Jess Phillips:** In your standard clause thing that you have brought for us, does it list those people who they can talk to?

Jane Mann: Ours makes it clear that you can make a protected disclosure under section 43A. One of the points I wanted to make to the Committee was that I personally am in favour of there being a notice in settlement agreements that informs the employee that they can make protected disclosures, they can disclose wrongdoing to police and other enforcement agencies. I would like the employee also to be advised that before they make such a disclosure, they take some advice as to the particular disclosure they have in mind. I am in favour of the profession working on the terms of a disclosure notice to go into every settlement agreement, which is very prominent, so even though there is wording of the sort that I am referring to, which covers the circumstances leading up to the dispute, there is none the less a warning that in appropriate cases they can make these disclosures.

Jess Phillips: I must let Julie speak, I feel.

Julie Morris: That is no problem at all. Just with the first question about how often the settlement NDAs are being used, pretty much every settlement agreement will have an NDA in it. We are now starting to see a few exceptions where there are employers who are not insisting on them. That applies across the board, not just in discrimination cases, but even if you have a collective redundancy situation and everyone is getting an enhanced redundancy payment, there will always be an NDA within that agreement.

The other thing, just so you are aware, is that there is nearly always also a non-derogatory comments clause, which basically stops the employee being able to make derogatory comments about the employer, its employees, its partners, its agents and so on. They are almost always together, just so you are aware of that. I have seen agreements where there is no NDA, but because there is a non-derogatory clause the employee cannot really say anything because they cannot say anything derogatory about the employer anyway. The two always go together.



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I definitely have a lot of clients who want a confidentiality clause, they want the whole thing to be resolved confidentially and they are very happy with it, although one of the reasons they often want an NDA is that they are concerned about their ability to get future employment. They think that if the new employer finds out that they brought a complaint of discrimination against their employer that would prevent them from getting another job. If it were more acceptable to make complaints, there would be less of an impact on your ability to get another job and then they might not be so concerned about having to resolve it confidentially.

Then there is another category of employee who accept an NDA as a necessary part of getting a settlement. The reality is that the legal costs of going to tribunal, coupled with the fact that the remedy in the tribunal is relatively limited—particularly, the injury to feelings element of harassment compensation is relatively limited—mean that it very rarely makes financial sense to go all the way to the tribunal. If your employer is making an offer to you that stops you having to incur those costs and compensates you for your claim, in most cases they will take that financial settlement. Most employees will have a price at which they are prepared to settle. It has become the absolute norm that in return the employer would expect an NDA as part of the price of that settlement.

I have a few employees who I have acted for who absolutely would reject a very good settlement because they have to accept an NDA, but they are few and far between.

Q108 Jess Phillips: The issue of repetition has already been raised and I will give you all a brief chance to answer before we have to move on. Julie, have you seen the same employer that has a culture within that organisation—or in fact the same individual—coming up again and again?

Julie Morris: I have seen it. Yes, I have seen it. I would say I saw it more 10 years ago, for example, than I am seeing it now. I think there is a change in the culture.

Q109 Jess Phillips: Improving?

Julie Morris: It is improving, but I have seen it, yes, particularly where you have a business where the perpetrator is also the owner of the company or a very powerful figure within the company.

Q110 Jess Phillips: I can think of a few examples of that. How common are cases where an employer uses multiple NDAs to deal with allegations of discrimination relating to the same person or type of discrimination? How common would you say that was?

Kiran Daurka: It is tricky from the employee's side because you may have a number of employees who have come together to see you and you realise that the employer is paying them similar amounts and using the same settlement agreement. I guess it is more for employer lawyers to know what their clients are asking, yes.



Q111 **Jess Phillips:** In-house lawyers, yes.

Baroness Kennedy: It is behind the arras that you hear the real stories, where it is lawyers in some of the big law firms. It is usually women, I am afraid, rather than their male colleagues, who are prepared to tell you. They will say, "This is going on much more frequently than people let on." Some of the big firms will say that in corporations this is much more commonplace than we ever realised. We are taken by surprise that it is. In some companies it is commonplace.

I wanted to take up a suggestion that was made by Jane. I do think that there ought to be—and I think it should be the first thing that is said at the top in bold letters, it can be boilerplate and it should be expected to be there—something that says, "Nothing in this agreement prevents the signatory to it taking up their right to go to the proper regulatory authority." You could have it in there who that might be and we can talk about who that could be.

On the business of the non-derogatory clause, I have often said to women, "Just say it politely." The truth is that what they are fearful of is the Twittersphere nowadays and all of that saying, "Don't go and work for whoever," over something that was a clash of personalities and then the whole organisation gets dirtied on social media.

Q112 **Jess Phillips:** I cannot imagine what it would be like to work for an organisation where one person does something wrong and then everybody gets tarred.

Baroness Kennedy: It does not tend to happen very often, in my experience. As the Chair has said, I think that it is just not appropriate to cover up discrimination, sexual assault, sexual harassment and bullying. Those things should not be automatically reached for where NDAs are being used much too prevalently. That is something that you should be discussing perhaps with the solicitors' regulatory bodies and to talk about it becoming clear that that is something that is unacceptable. In all of this, we have to remember that there will be women and men who in those circumstances would say, "I would rather cut and run, but I will try to take the shirts off their backs."

Q113 **Jess Phillips:** Of course. I suppose it is moving the onus away from the individual, because of course you would want to cut and run and we would understand that.

Baroness Kennedy: Nobody would criticise that.

Q114 **Jess Phillips:** Jane, if a lawyer were to become aware that their client had used multiple non-disclosures to settle a discrimination claim, what responsibilities do they have to warn leaders of their organisations or the regulator, if it is the financial services regulator? What responsibilities does a lawyer who may be having to draft up multiple things have?



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Jane Mann: Are you talking about as a person regulated by the Solicitors Regulation Authority?

Q115 **Jess Phillips:** No. Let us say you are the in-house lawyer of a big finance house. That finance house, every single time someone gets pregnant, sacks them, and you, as the lawyer who is called in to do it, are basically drafting another pregnant woman's non-disclosure agreement for going. Is there any responsibility for you then to go to the FCA and say, "I think something is going wrong here," or indeed to the managers?

Chair: Yes, or indeed the SRA, as an officer of the court, to make sure that the law is being upheld.

Jane Mann: In relation to the FCA, there is a growing body of opinion around the FCA that matters of discrimination and harassment and so on are matters of concern for the regulator under its public sector equality duty and something to be reported to the regulator.

One of the things I was going to say to you was I think it would be quite helpful if the FCA did provide a little bit more guidance itself on what it is expecting, because of course its primary remit initially was to look at the security and safety of the financial system and to look at financial morality, if I can call it that. Now, of course, there is an area of concern as to whether this more personal morality is a matter for that particular regulator.

Q116 **Jess Phillips:** Regardless of who the regulator is though—I totally agree with you that it is complicated.

Jane Mann: It is certainly an issue to be considered.

Q117 **Jess Phillips:** In-house or drafted in, a big firm working for another big firm, do lawyers have any responsibility when they see repeated breaches of the law?

Jane Mann: We give advice to clients, so we are bound by duty of confidence to our own clients. If you were external, advising a financial services institution, you would be advising that institution on its reporting obligations to its own regulator, the FCA, and that is a slightly—

Q118 **Jess Phillips:** You would raise it with management if there was repeated sexual harassment?

Jane Mann: I think I would, yes, in today's world, but I would also find it very helpful to have guidance from the regulator as to exactly what is reportable and what their concerns are, and also the extent to which this type of misconduct goes to fitness and propriety, and the ability of the regulator and also the firms to certify individuals as fit and proper to work in the financial sector.

Q119 **Chair:** In your role as an officer of the court, what are your responsibilities on a professional basis to stop the covering up of a crime or a breach of the Equality Act, a breach of the law?



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Jane Mann: I have to give that some careful consideration because I am advising individuals.

Q120 **Chair:** You think your duty to your client overrides your duty to the court?

Jane Mann: No, I do not think that at all. I am subject to various duties to the court. Can you give me an example of where you think I might have some form of reporting—

Q121 **Jess Phillips:** Not you, Jane. I do not want you to think we think that you have done it. I will give you an example. In the case of Zelda Perkins and the law firms that were involved in defending Harvey Weinstein and managing the employment law issues and settlements with people he was working with, they repeatedly allowed women to sign things that were both about criminal and the breach of employment law. In that instance, personally I think that lawyer had a responsibility to stop the criminality and also the breaking of the law. There is an example. I have many.

Jane Mann: It is helpful to have that particular example. There is an issue in relation to the actual conduct of that negotiation and the way in which that negotiation was carried out. I am aware of what I have read in the newspapers about that.

Q122 **Jess Phillips:** I do not particularly want you to comment on the specific case because obviously it is a very detailed—

Jane Mann: That is the awkwardness. Shall we take—

Q123 **Chair:** Can I just give a very simple example? If you had an example where an individual, a woman, was on maternity leave, had been a good performer, had gone on maternity leave and had then mysteriously been offered redundancy when nobody else had been offered redundancy. Kiran, that must be something you have seen.

Kiran Daurka: It is, and it is a classic case.

Q124 **Chair:** As somebody who has a professional obligation, do you think it is right that somebody who is—forget HR professionals and trade unions—a solicitor, somebody who is a qualified, practising solicitor, should be able to put in place a non-disclosure agreement, a settlement agreement with a confidentiality clause in it, when that is potentially prima facie maternity discrimination? There is a law there. The point I am making is there is a law there and there is a non-disclosure agreement or a settlement agreement, confidentiality clause, being used to cover up the breaking of the law.

Kiran Daurka: Can I also just step in slightly? It is not always lawyers on the other side. HR may well produce—but that is not always going to go through a solicitor. They are not always going to get advice on how they should be mitigating maternity discrimination and what steps they



should be making. It could be a decision made very much internally and a standard agreement produced not through a lawyer.

Baroness Kennedy: I would also like to just say to the Committee and to the Chair that this is interesting, because if you were talking about money laundering, which has criminal consequences, lawyers are really on their mettle. They are really fearful. When it comes to this whole body of stuff where the law says that you cannot discriminate, but it is not criminal, "You are offending against standards that we are setting," and it would be a regulatory offence, there is not quite the same sense among lawyers about what their responsibilities are.

Q125 **Chair:** I certainly sense that from the response that we have had.

Baroness Kennedy: That is one of the things that you are having to untangle here. I have been in the situation where, as a criminal lawyer, my client has said, "I want you to cross-examine the woman and to put it to her that she on a previous occasion stripped off in a club," or whatever. I say, "What does that have to do with the price of fish?" Then you will get sacked. You will get sacked because they do not want to be represented by somebody who is saying, "This is not admissible evidence and I am not going to even try to get it in because it is not appropriate."

I do think that when it comes to this area, lawyers think their duty is to their client. Of course people do take it to a criminal extent, like Mr Cohen in America has just been convicted of doing it for the President, but this is an area in which I think the legal bodies, from the Bar Council through to the solicitors' profession, should be clarifying for lawyers what their responsibilities are to their clients and where that responsibility ends, that their duty to the court and to the public interest supersedes it.

Jane Mann: Can I come back in? The reason I was not immediately giving you a really clear-cut answer to your question was first of all because I sympathise with the question you are asking and your concern. I was just trying to be careful in my response because I do not think at the moment—obviously, I have lawyers around me, so I will look to my colleagues for assistance—that I am under a duty to report that type of wrongdoing to any external body. Helena Kennedy has referred to the duty that we, as solicitors, have to report certain financial crime as part of our regulatory responsibility.

The reason I was just looking at you, thinking about it, was because we are not under a reporting duty, and I have already said that we are under a duty of confidence to our clients. The issue, as I see it, is around how we conduct negotiations and whether we take unfair advantage of the other side and so on and so forth, as the SRA guidance currently stands.

Q126 **Jess Phillips:** Is that the case even in things that are obviously criminal? Putting aside maternity as an example, I know that money laundering is illegal.

Jane Mann: We have to report.



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Q127 **Jess Phillips:** I also know that rape is illegal.

Jane Mann: We have a reporting obligation with money laundering.

Q128 **Jess Phillips:** In the case of something where there is a criminal threshold, would it be standard if you saw—

Baroness Kennedy: It would be standard, absolutely.

Q129 **Jess Phillips:** As a lawyer, if you were signing something and somebody had been groped, sexually harassed—

Baroness Kennedy: I do want to just say so that it is clear: there are very high ethical standards maintained in the legal profession in this country.

Jess Phillips: Of course.

Baroness Kennedy: This is not being said as an “of course”. As you have heard, I am involved with bar associations around the world and we are looked at as being the gold standard, if you like. Lawyers are taken very seriously because of the weight of the education system for lawyers. It is taken very seriously, the business of in any way enhancing the possibilities for crime. That is fine. I think there is just a sort of blurring here and in effect it is not so blurred. There is not a requirement that you report something that is beginning to look like a pattern in a particular person in a workplace who is discriminating on payment, on the way that they treat pregnant women, the way that they deal with sexual harassment allegations against a particular individual who is an asset to a company and therefore it is much better to protect him than some young employee. That area does not require reporting and nor is it seen as being about, if you like, colluding in the breaking of law. I do not think lawyers see—

Q130 **Jess Phillips:** If it were a criminal threshold in an employment case, would you have the same duty as you would with money laundering?

Baroness Kennedy: I have been in circumstances where I have had to say to a criminal client, “What you have just told me means that I cannot act for you,” and I have gone to the Bar Council for guidance as to what to do then.

Q131 **Jess Phillips:** That is in a criminal case, but if somebody came to you, Jane, you are acting for the employer, and the employee says, “This person raped me,” or, “This person groped me, pushed me up against—that is why I can’t work with him and it has made my life a misery since,” because that reaches a criminal threshold, would you react in the same way that you would react to money laundering?

Jane Mann: I am not under an obligation to report it myself.

Q132 **Jess Phillips:** Of course. I am not suggesting that you would have.



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Jane Mann: I am receiving information confidentially from a client. Obviously I would be horrified and I would work with the client to advise the client what to do, because there is no general duty to report a crime, but obviously if something like that has happened on the employer's premises, one would be looking to take appropriate action and to advise the client as to what action to take, which could be supporting the woman to make a complaint of rape, because they have to be the one who makes the complaint.

Obviously, any confidentiality clause that is there to apparently cover up something that serious would be invalid in any case because you can report a crime and matters like that can be disclosed in the public interest. Of course, if there is a criminal trial pending, you have issues about prejudicing a criminal trial. Also, an allegation of rape is unproven and there are issues of reputation around the alleged perpetrator to consider as well. That is not a situation where you just put an NDA in place.

Q133 **Jess Phillips:** In money laundering, do you advise the client what to do or do you just go and report it?

Jane Mann: We have a duty of reporting ourselves, because that is a specific duty placed on—

Q134 **Jess Phillips:** You do not have that in an allegation of rape?

Jane Mann: No, we do not. We do not. The questions you are asking are very interesting to consider afterwards.

Jess Phillips: It is a regulatory framework.

Q135 **Sarah Champion:** This question is directed mainly to Julie and Kiran. It is about the employees. I know you have said, and previous panels have said, that NDAs are pretty much standard in employment cases, but do you ever have cases where it is the employee who is pushing you to get that clause in? Can you give examples of when that might be, Julie?

Julie Morris: Yes. There is definitely a minority of cases where the employee is pushing for it from the get-go, but there are often cases, particularly where you have, say, an employee who has had a consensual relationship with someone more senior in the workplace and that has ended in difficult circumstances. In those circumstances, often the individual just wants to reach a settlement, but they want the confidentiality, particularly if they are going to stay within the organisation, and they want the allegations to be resolved confidentially.

Certainly if they are staying within the organisation, they want there to be confidentiality, and particularly where they are concerned about getting another job. That would be where I would say that they are particularly concerned to get the confidentiality, because they are very concerned that if someone mentions it or it is talked about, it will prevent them from getting another job, particularly when they do not quite know



how the reference—the reality is that if references are just the written references, the factual references, and there is no other conversation taking place between employers, then the information should not get out. Because often a boss will call a boss and have a conversation about this individual, they will find out, “Oh, she raised an allegation.” It is in those circumstances that they are particularly concerned to get confidentiality clauses included.

Kiran Daurka: I agree to an extent, but I have never had a situation where an employee has had to push for it, because she is going to get it anyway. There is not going to be a circumstance where the employer is going to say, “No, you are not going to get confidentiality.” If your client says, “I want confidentiality,” the response is normally, “They are going to ask for it anyway, so don’t worry. You are going to get it.”

Julie Morris: In a way, it weakens your bargaining position if you are trying to negotiate a settlement if the individual is saying, “I want confidentiality,” because that is the thing that the employer is often paying a settlement for.

Q136 **Sarah Champion:** Looking at breaches of the confidentiality agreement on either side, how would you find out if that is being breached and then what enforcement is there around it? Julie, you are shaking your head.

Julie Morris: It is quite hard to find out. Even if you can find out, it is very hard to prove, because often, if anything is said, it is said orally and then there is very little proof. I have seen people send threatening letters saying, “I understand you have been breaching the agreement” but I have never seen anyone pursue a case to recover compensation for a breach either way.

The other thing I would say is that while the clause is usually mutual, there is an absolute obligation on the employee not to disclose the obligations, but the obligation on the employer is usually much more limited. It will say, “The employer will use reasonable endeavours to ensure that its staff or its senior directors do not talk about the allegations” because the employer will say, “We, as a body, cannot control our employees, so we can only take steps” and all the employer will do is say to these individuals, “You cannot talk about these allegations” as a warning notice. Beyond that there is very little that the employer does to ensure that there is confidentiality.

Baroness Kennedy: I do want to alert the Committee to the fact that on Monday night a new organisation of women, the Centre for Women’s Justice, had a meeting on the whole business of using libel to silence women. The circumstances of these cases—and they are going through the courts—are usually of rich men using it where they think there is going to be a breach, or where a woman has spoken out and they want to silence it. They use first of all a letter. Women describe the fear that goes through you and how you feel sick when you get a letter through the post that says, “I understand that you have said such and such



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happened and this is a letter before action." We should expect that we will see more of that, the use of libel and defamation law in this area.

Women are becoming much more alert, for example, to environments in the workplace and so on, or that they are replacing somebody and they might want to know, so they can of course use social media to contact people. One of the women who is being sued for libel, it was because she had alerted—

Q137 **Chair:** If it is before the courts, we may not want to go into any detail.

Baroness Kennedy: I will not go into it. It is about people communicating even with each other through social media about what has happened to them in a workplace or with a particular person. There are difficulties that we could be seeing coming down the line in relation to other areas of law being used in order to make sure that there is non-disclosure.

Kiran Daurka: It is quite difficult to police these and to detect a breach of these agreements. Occasionally you will get a client come back to you and say, "I am not sure what is happening here," but it is very difficult to evidence that someone has said something.

The bigger difficulty for me is the clawback clauses that appear in these agreements, because they are often potentially unenforceable. It says something like, "If you do breach this agreement, then you are going to have to pay back all of this and any costs. You will be indemnified for any legal costs incurred if we have to sue you for breach". It is a massive deterrent to individuals. It has a real impact, that particular clause, more than anything, even though potentially it is not enforceable. You can say to your client, "I am not sure if it is enforceable. It has not really been tested and you do not want to be the one testing it". You have tried to have it removed, but it is standard. It is not going to come out of there. I think the clawback is a real silencer.

Q138 **Sarah Champion:** Is that one way?

Kiran Daurka: Yes. It is one way.

Q139 **Sarah Champion:** Have you ever tried to push it back the other way?

Kiran Daurka: We have, but they will come back with, "We can then use our reasonable endeavours and we have limited responsibility". The employer has much less obligation. It is far less onerous on them.

Q140 **Sarah Champion:** Building on that and building on the points that the Baroness made about the power imbalance, we have had people who have said that they did not want to sign this agreement, but there was literally no option for them. Should lawyers be pushing harder on the part of the employee to not have confidentiality agreements?

Kiran Daurka: Yes, we do, and then it is a choice for the client. The client then has the choice. If they are not budging on this, then you have



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the choice of walking away with nothing or litigating. It is not a great choice to make. Often they will say, "I am being pushed into it. I feel it is under duress, but I will sign it".

Q141 **Sarah Champion:** Jane, a particular question to you. What are the barriers from an employer's point of view of settling discrimination cases without an NDA in place?

Jane Mann: From which viewpoint? The employer's viewpoint?

Q142 **Sarah Champion:** From the employer's point of view. What are the risks that they are exposing themselves to?

Jane Mann: They are exposing themselves to reputational damage, so they would be very concerned to have confidentiality. I am not making a judgment on whether they are right or wrong, but in terms of what typically happens it is very important to employers that they know they can draw a line under the case in two respects. First of all, they are not going to get sued. Secondly, they are not going to have the matter spoken about publicly. It would be a barrier to settlement if the employer felt that the individual would be free to talk to the media afterwards about the case because, as someone has already said, that is often the deal. That is what the employer feels they are getting in exchange—

Q143 **Sarah Champion:** Can you see any situation where they might accept it?

Jane Mann: No disclosure—settling without an NDA?

Sarah Champion: Yes.

Jane Mann: The situation would be, "Mea culpa. We have carried out a full investigation into this individual's conduct. We have carried out a fair disciplinary. We have arrived at the following findings. We do not agree with this. X is no longer with us and we want to make a very strong statement that this is wholly unacceptable. We have now offered redress to the individual concerned and we have reached a settlement rather than going to court. We are reviewing our policies and procedures for the future". That is the type of situation where an employer might do that. If an employer is going to have a policy not to do NDAs in settlement agreements, that is going to be their approach—totally open and explaining to everybody what they have done.

The problem with that is the greyness around a lot of these situations and other people's rights to privacy and other people's rights not to be accused in public of things where they do not have an opportunity to defend themselves properly. There are always two sides to a situation. You have the victim, who has brought a complaint, but you have other people who stand accused of very serious wrongdoing, whose reputations and careers are also at stake. If you have no NDAs, you have to think about the knock-on effects on those others within the organisation.

Baroness Kennedy: It seems to me that the Committee is looking at this in the context of the wider problem. It is perfectly understandable



that people, if they reach a settlement, would want confidentiality because they are trying to protect reputation. We also know that one of the great things about the scandals that have gone through our system and been exposed in recent years is that they have always been about trying to protect reputational damage. Institutions have been trying to protect the institution and the damage to their reputation, whether it is the BBC, the Catholic Church, Parliament or whatever. We know that reputation is always used as the argument for doing this and people can get crushed under it.

For me, confidentiality on its own should not be automatically seen as something that you write out. Confidentiality has to be something that, for example, women themselves and any victims may want. I want to make sure that we are including men who are bullied in the workplace and so on too.

What we want are opportunities to see where there is a practice that is generalised—this business of seeing patterns and so on. Because of the confidentiality, we do not get a sense of that problem and the bigger picture does not emerge. We have to be looking for ways in which we can make more transparent what is going on so that we see where those things are.

That is why I think that somehow you have to lodge your NDA somewhere, and where there was a confidentiality agreement that people know that they can take advice. We have to find out which regulator could take on that regulatory function. It could be the Equality and Human Rights Commission or it could be the Victims Commissioner or you could create somebody new or whatever. I do think there has to be somewhere that people can go if they feel that they are being strong-armed, where they can lodge something, so that if in the future a pattern emerges, the patterns can be seen by those who are looking to prevent the social damage that is caused by these things. It is hard for you.

Julie Morris: We saw a case just very recently where there was a limited NDA that allowed the individual to talk about the allegations, but not publish them on social media or in the press. We are starting to see agreements have more of a carve-out. I am not a fan of banning NDAs entirely, but it is about what the exceptions are and whether the exceptions are clearly stated.

Kiran Daurka: NDAs are an end product. For me the real problem is employers just do not have an overview. They do not join up their thinking or process or what is happening within the culture of an organisation. Things are very much dealt with in isolation and there is no one big piece of information that says, "This has happened".

Before the statutory questionnaires were repealed, the question was always asked, for example, "Has a grievance been raised about disability discrimination in the last three years?" I would like to say those questionnaires helped us find out more information. In fact, they did not,



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and what it did show is that employers did not know or they were still covering up what grievances were coming through to them because they just lacked any kind of oversight as to what was happening.

Q144 **Chair:** What they did was to fill in, "Unknown"?

Kiran Daurka: Yes, or they would say, "One" and my client would say, "I know there were at least three. I know three people who have issued a grievance on this point, so there can't just be one". Then you go into this rabbit hole of, "Are we going to try to uncover this? Do they have the answer? Where is this information?" Often things are dealt with informally, so there has never been a formalisation of what grievance has been raised. There just is not any one person who has controlling oversight over what is happening within an organisation. That is what needs to change. I am not sure if registering NDAs with the EHRC or some body is going to help us.

Q145 **Sarah Champion:** That was one of the recommendations. It might not.

Julie Morris: The problem with NDAs is they very rarely talk about whether they relate to a sexual harassment allegation or whether they are a collective redundancy. They are pretty neutral. They do not talk about what they are about. There would be thousands of settlement agreements and you would not be able to pull out the ones that relate to sexual harassment. The things that I think need to be identified are the complaints of harassment or the outcomes of the grievances. What has happened within that process is what there needs to be oversight of, as opposed to the NDAs themselves.

Chair: Sorry, say that again.

Julie Morris: NDAs themselves are pretty neutral. They do not talk about the fact that they relate to sexual harassment allegations. They just say, "You are waiving this claim". By looking at all the NDAs, you would not really be able to tell anything. The oversight needs to be of the complaints process, the grievance process, what the outcomes are and what the company or organisation is doing about complaints of discrimination and whether a board director has that as part of their health and safety obligations to be involved in an annual review of what is taking place within the organisation.

Kiran Daurka: Just picking up on something Julie said, I do not think I have ever had a client whose grievance was upheld on harassment or discrimination.

Baroness Kennedy: Internally?

Kiran Daurka: Internally.

Baroness Kennedy: Wow.

Jane Mann: I am not in favour of registering NDAs, for the reasons that Julie has given. I think it would be a tick-box exercise and it would reveal



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very little useful information. As I mentioned at the beginning of my evidence, confidentiality clauses in general are extremely widespread for lots of good reasons. What we are talking about here is confidentiality that covers discrimination claims as a very particular concern.

What I do share with my fellow witnesses is a concern about culture and systemic discrimination. The focus of the Committee has been on the serial offender, which in my experience, in my practice, is quite an unusual situation and obviously extreme. It is quite an unusual case and obviously I shared everyone's concerns about it. In my experience what is very common is culture. Discriminatory behaviour comes in many shapes and forms and on all the protected characteristics and it can run right across an organisation. Also a lot of discriminatory behaviour is unconscious. People are unaware of it. What you see very typically and commonly is behaviours going on in organisations as a matter of culture that people do not realise at all are discriminatory and they give rise to lots of cases and lots of cases are settled. What one is looking to do is to address those sorts of issues and I do not think reporting NDAs is going to do it.

Q146 Sarah Champion: University College London is no longer using NDAs for sexual misconduct or harassment cases. Would that be an approach to try to filter these cases out?

Jane Mann: Obviously, I am not advising them, but if I was, I would be asking them all sorts of questions about that policy and exactly how it was going to apply in various different situations. It would be very interesting to ask them in a year's time how they are getting on. I can see that in the "mea culpa" instance that I talked about earlier, "Hands up, we did wrong. Thorough investigation, fair conclusions, individual is gone, correctly and rightly, is paying the price, victim is still there." Fine, but in all the grey situations, for example, if an individual has left and it has happened because the relationship has broken down, there were not in fact any findings of sexual harassment, the allegation was made, investigated and not found true, the individual is out there without an NDA.

What protection and rights does the person who stood accused of that have? The employer is holding personal data, witness statements, the grievance and complaints. Is the individual who is out there free to talk about all of that and defame and damage the character of the individual who was found not to have done anything wrong? There is no NDA in place. The employer has a responsibility to maintain confidentiality and personal data of other employees, so what duty does the employer have to secure appropriate confidentiality undertakings from people who have information? It is a very complicated situation.

Sarah Champion: That is very interesting. Thank you.

Q147 Eddie Hughes: It might seem like a slightly unusual question, given the panel, but do you think employers and employees have sufficient access



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to good legal advice with regard to NDAs?

Kiran Daurka: It is difficult because part of it is to do with legal fees. While there is a contribution often paid towards legal fees, it is only going to be enough to cover a very basic piece of advice to say, "This is what this means" and not to negotiate anything or to provide them with advice as to whether they are receiving a good deal. The advice they are going to receive from most lawyers with the contribution is likely to be very minimal. We know that with the lack of resources and the closures of law centres, there is less free advice or low-cost advice available. The contribution is often too low to provide any meaningful input into a settlement agreement.

Baroness Kennedy: Absolutely. Because of the legal resources available to women—particularly on this example, this maternity issue—in small businesses up and down the country women are experiencing what has been described by Kiran. They do not feel that they can take on a legal case, particularly at that time with what is happening in their lives. They are trying to get back to work, but they also have a new baby and it is very difficult. We have completely destroyed a system of legal assistance in this country that was invaluable and I am afraid we are in a pretty powerless state at the moment.

Q148 **Eddie Hughes:** What could be done then?

Baroness Kennedy: I would like to see a re-energising of law centres, community centres and legal resource places being funded by the state, because you need to have that so that people who are not well-off can in any way assert their rights. We do not have it at the moment. It is very difficult.

Q149 **Eddie Hughes:** My understanding from the papers is that a typical contribution from the employer might be £250. I cannot imagine £250 would buy us very much time from this panel. It probably would not get us a phone call.

Kiran Daurka: I would like it to be a compulsory minimum requirement that if there is not going to be, for example, an NDA included, but there are going to be additional clauses added in such as confidentiality, non-derogatory, then an additional contribution should be required to allow somebody to negotiate that further or to advise further.

Q150 **Eddie Hughes:** Would it be appropriate then that the employer makes a contribution sufficient to allow broader legal advice? At the moment, I understand that explanation of the terms of the agreement, effectively, is all that is covered, but there is no idea about whether the employee would have a good case to take alternative legal action. Should there be an obligation on the employer to make more of a contribution, particularly given the fact that their financial resources that they will be applying to the case I guess will be disproportionately greater?



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Baroness Kennedy: In some circumstances they are disproportionately greater, but not in all. I think that you would find a lot of resistance in trying to introduce that into the system, but I certainly think it is worth looking at a higher contribution. At the moment it is very difficult for women in these situations to access the right kind of legal advice. They are very lucky if they get someone like Kiran. I am telling you it is really hard, and there are absolutely areas in the country that are barren where it would be very hard to get a lawyer.

Julie Morris: I would add to that the decimation of legal aid and the law centres. I see clients who can afford to pay for me or my colleagues, who have a lower hourly rate. These individuals are inherently wealthier than a lot of individuals across the country, who are not able to afford advice at all. For those individuals who cannot afford advice at all and cannot get legal aid, the only access to legal advice they can get is what the employer is prepared to fund when they are presented with their settlement agreement, which is often £250. Like you say, the employer tends to think that all it has to pay for is advice on the terms and the effect of the agreement because that is what the lawyer is obliged to advise on in order for the settlement agreement to be binding.

Q151 **Eddie Hughes:** Even that contribution is not a legal requirement.

Julie Morris: No. The employer does not actually have to contribute anything, but there are very few that offer less than £250. I would say in London it is normally about £500, but even then you are only really getting advice on, "This is what the agreement means". You are not getting advice on a negotiation of the agreement.

Eddie Hughes: Jane, do you have any thoughts?

Jane Mann: I share everyone's concern about the difficulty that individuals have affording good-quality advice in these matters.

Q152 **Eddie Hughes:** Would one answer be to oblige the employer to make more of a contribution, or at least to make a contribution?

Jane Mann: I understand where that point is coming from and I have some sympathy with it, but I am also instinctively against regulating a legal marketplace in that fashion. I think employers would be very concerned about having a mandatory duty to pay for legal advice, particularly if they themselves felt aggrieved about the way they had been treated by the particular employee.

Q153 **Eddie Hughes:** As a taxpayer, though, I feel slightly aggrieved at the idea of my tax being used fight a case against an employer who may have had multiple non-disclosure agreements because they are not treating pregnant women very fairly. That is not a good use of my tax money in that case, surely.

Baroness Kennedy: That was the old-fashioned reason why we had trade unions.



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Eddie Hughes: My God, no. Let's not go there. Can we move on, Chair?

Baroness Kennedy: Remember those old-fashioned things?

Kiran Daurka: One potential solution is that there is just a standard template settlement agreement that everybody has to use and therefore there is less input required from lawyers because there is not much scope to negotiate. There may be some scope to negotiate. Then any contribution that is made is really on advising someone whether they are getting a good deal or not.

Jane Mann: I am completely opposed to that.

Chair: Maybe pay more if you make it more complicated. Maybe you have more payment for legal advice. Sorry, Eddie. I know Angela has to depart for another obligation and I forgot to bring her in earlier.

Q154 **Angela Crawley:** I want to pick up on the point that was made earlier. Jane, you were explaining that there are obviously further complications in the process to protect employers, but specifically when you are dealing with a client who has come to you and the case merits it, is there an occasion where you have said you would advise against signing an NDA? Do you have any examples of where you have said, "I would not sign this NDA and the reasons are—"?

Jane Mann: I cannot immediately recall an example, but the reason I am opposed to a standard template is because there are so many circumstances in which employment may be coming to an end and agreements are being negotiated and you need to allow the parties to reach their own agreement. I cannot immediately recall one, but it is not in all situations that you necessarily want confidentiality. It is not always the front and centre of every negotiation.

Q155 **Angela Crawley:** Kiran, I think you have a different view on that.

Kiran Daurka: Yes. I think we should have standard ones. Even if there are a variety, we always see the same standard wording. It is very rarely tailored for a specific situation. I have advised somebody not to sign an NDA, particularly where there have already been findings of an employment tribunal in their case and they are still being limited as to what they can talk about. In those situations I have said, "I do not see how you can sign it because it is a matter of public record that you have a decision against the employer".

Q156 **Tonia Antoniazzi:** In the past year, have you observed any differences in the approach that lawyers and employers take to using NDAs when settling discrimination cases? I know—Julie, you spoke about it earlier—that you have seen a change. Is that across the board?

Julie Morris: Yes, certainly. I took a straw poll of all my lawyers in the department yesterday and there is a sense that the NDAs that are coming across are more fairly drafted. Again, I am not saying this is everybody across the board, but the feedback I got was that, for



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example, there is only confidentiality on going to the media, as opposed to full confidentiality, in one particular case against a large bank. I have not seen in the last year some of the more extreme clauses that we might have seen in the past and that would include things like telling the employee they have to withdraw their allegations as part of the settlement or limiting what they can say to a doctor.

Baroness Kennedy: Withdrawing the allegation, absolutely.

Julie Morris: Withdrawing the allegation, and then also putting in place restrictions on what you can do if you are approached by another employee and asked if you have experienced discrimination, to try to get the individual to not—

Baroness Kennedy: To go into a silo—

Julie Morris: Yes, to go into a silo, to help the employer to stop the individual from having to disclose those allegations. I have not seen anything like that in the—

Q157 **Eddie Hughes:** That is heartening, isn't it?

Baroness Kennedy: I have attended now a rather large number of meetings with women, and indeed generally with lawyers who are in the employment field—listening, because it is not my area of law—and learning about all of this stuff, because Zelda Perkins came to me for advice. I would say that people are on the back foot. Lawyers at the moment are thinking, "This is an issue that is now in the public domain". It is being debated. They are aware of the fact that Parliament has discussed it and so on. There is a general sensitivity about it and a sense that we have to be very careful that we do not find ourselves under scrutiny over this. I think people are being cautious about what they are seeking to put into—

Julie Morris: The warning notice was—

Q158 **Chair:** Have you observed some self-regulation?

Baroness Kennedy: When things suddenly are in the headlines and are part of public debate, people then think, "How is this going to play for us?" I think the legal profession is to some extent doing that.

Jane Mann: Can I make a comment? To me, Harvey Weinstein was a seminal moment. It was the moment at which the penny dropped and so many people in society and employers understood properly for the first time the injustices perpetrated against women at work. I think that was the starting point for all manner of changes in perception around the seriousness of these issues.

So far as our own profession is concerned, the SRA issuing the warning notice, which is clarification of existing guidance and rules to solicitors, has, I believe, focused minds on what is appropriate and not appropriate



in the negotiation and drafting of these types of settlement agreements and the behaviour of solicitors in relation to these negotiations. I think there is a sea change at the moment, not just in our profession in the way our regulator and we ourselves look at it, but across the business world and across society. I think that is giving rise to a lot of soul-searching and I think that soul-searching is going to be the source of a lot of good change. It is not just to do with how you regulate and what laws you pass. It is also about how people view these issues and how those laws are applied in practice.

Baroness Kennedy: I do not want to take up more time, but I just wanted to say that the International Bar Association is about to publish—or we published in May—the biggest piece of research that has been done inside the legal professions globally. This has happened in many different countries and it is going to be revelatory about the extent to which there has been bullying, sexual harassment and discrimination inside the legal profession. I think that the legal profession itself has to get its own house in order if it is going to be dealing with the outer world of clients and so forth, but it has been a problem inside the legal profession.

The fact that this is now being discussed within the legal profession as to what happens in its own back yard is really important and it is one of the things that is sensitising people to the issues. That will be published in May and it is the biggest piece of global research that has been done for any sector. It will be interesting for you to see the extent to which people make complaints of bullying, discrimination and all these issues that you are looking at. If the legal profession is sensitised to this stuff about what happens at home, it will start looking at the clients that it has and what its obligations are in the way that it relates to its clients.

Q159 Jess Phillips: In our report on sexual harassment in the workplace last year, we raised concerns about the use of NDAs in sexual harassment cases and called on the Government to clean up the use of non-disclosure agreements. It seems like some of that might have happened. In their response, they recognised those concerns and agreed to consult on how best to do this. What kinds of practical changes would you hope to see the Government taking?

Chair: Before you answer that, could I point out—I know you all know this, but just to remind you—that it is not only legal professionals who draw up confidentiality clauses? It is also HR professionals and trade unions. Would you think about that in your responses?

Jess Phillips: What the Government should change.

Kiran Daurka: I have touched on it. I would like to see standardised agreements across the board. I think that would take out a lot of the problems.

Also—we have all briefly touched on this outside this—we would like the Equality and Human Rights Commission to have more power and become a regulatory body in terms of whistleblowing so that it is a prescribed



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person under section 43F, so people can go to it and tell it that they have had to sign something or they have raised an allegation. It would be a good single place to provide that information because there is obviously the power to then ask any prescribed person to provide an annual report as to the types of disclosures that they are receiving. That could be then used to find out whether there is an increase or a decrease in harassment cases.

Q160 **Jess Phillips:** Giving the EHRC a regulatory power in this?

Baroness Kennedy: I feel very strongly about what has happened to the Equality and Human Rights Commission. I feel that it has been almost emasculated. It is a strong word for a feminist like me to use. This is a body that does not have proper resource and the last time it had any kind of inquiry was something like 10 years ago. We discussed this outside. There was one into the financial sector and it was in 2008. I am not aware of any proper investigation conducted by the ECHR since then. I think it is a body that should be used more effectively in dealing with these sorts of things.

I am persuaded, hearing from Jane, that having some sort of reporting of all NDAs is not going to work because it would turn into a box-ticking exercise. I can see that that is absolutely right, but I definitely think there is some role that you could perhaps recommend for the Equality and Human Rights Commission to play as a regulator here.

Jane Mann: I am very much in favour of beefing up the Equality and Human Rights Commission in some sense. I am very much in favour of your recommendation that has been taken up by Government that they consult on a new statutory code of practice and that could include guidance to employers on the use of non-disclosure agreements.

I have already made my point about the warning notice and guidance in that notice to individuals as to what they can report and to whom. I am very interested in the governance of companies and employers and what responsibilities they will shoulder for culture change.

One of the aspects of the FRC's corporate governance code is the responsibility placed on boards to have oversight of culture and that includes diversity. I am interested in what reports should be made by the HR team to the board annually on the use of non-disclosure agreements, what reports are made about steps to introduce culture change and to report on diversity and the management of claims and complaints internally.

Now that the penny has dropped and there is a groundswell of interest in bringing about change, a lot of this change can be driven by employers, with guidance from, for example, the Equality and Human Rights Commission. You cannot bring about all of the meaningful change by changing the law. We have had the Sex Discrimination Act in force for a very long time. It is only when people understand properly how



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discrimination works and how it impacts on people that you get the momentum to bring about real, meaningful change. I am not in favour of a standard agreement, but I do think that the whistleblowing legislation should be changed to allow for reporting to the Equality and Human Rights Commission of concerns.

Can I just mention that one of the difficulties that runs right through the discussion about this area is the categorisation of the nature of the wrong? At the far end of the spectrum it is a criminal offence, but there is this fuzzy zone, which we are all very concerned about, of behaviours that are not criminal. Also there is a lack of clarity as to whether disclosing them—

Q161 **Jess Phillips:** They are illegal, though.

Jane Mann: They are in breach of the Equality Act and they are in breach of employment terms and conditions, but they are not criminal. They are wrongful and they can be repeated. They go to culture. They can impact on people very badly at work. They are increasingly regarded as reprehensible, but they are in this grey zone, so they are not clearly covered by the whistleblowing legislation and they are not clearly criminal offences that can be reported. They are not clearly matters that can be disclosed in the public interest and override express confidentiality clauses. They are not clearly matters where you can set aside legal privilege. You have to grapple with this greyness and that is something I think we could look at in the consultation exercise.

Julie Morris: I have a similar point. I agree with the code of practice and the code of practice could contain an appendix template settlement agreement. I do not think it should be, "This is what you have to use" but there could be clear guidance that this is a fair settlement agreement that balances the interests of both parties. While employers might want to come up with their own, that would help with the negotiation of a different, longer settlement agreement because the employee's solicitor would be referring back to it, "This is a normal agreement" and it gives you a stronger position to negotiate along those lines.

There should be guidance on what is an appropriate NDA and what the appropriate exceptions to an NDA are, and that should be explained within the code of practice. That should be easily accessible to employees who maybe cannot get legal advice, but they can clearly find that guidance if they are looking for further advice on their agreement.

I agree about EHRC becoming a prescribed body under the whistleblowing legislation. I think the HSE is at the moment, but I have never seen the HSE take a particular interest in discrimination cases.

Q162 **Chair:** It has told us that sexual harassment is nothing to do with it.

Jess Phillips: It is not its job.



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Julie Morris: You could argue that it should be. Anyway, I think the EHRC is a more appropriate prescribed body. Obviously, any other regulated industries are going to go to their own regulators, so the EHRC would capture anyone who is not regulated within those bodies, but it then has to have funding that enables it to conduct investigations. Ten years ago, we could go to the EHRC and ask it to fund cases and it would regularly agree, but now it very rarely has any funding to fund cases. I see a situation where employees could settle their case, but if they did not want to agree to a NDA they would go straight to the regulator, and if the regulator saw patterns of concern then it could investigate, and it had proper teeth and proper ability to put penalties on the employer.

Q163 **Jess Phillips:** One of the suggestions that has been made by Maternity Action is a requirement put on employers to report on maternity retention rates. What would be your view on that?

Kiran Daurka: I totally agree. They have been pushing for it for a very long time and absolutely it is a good thing to do. It not only deals with maternity, but of course progression of women who have had children, what has happened to them since they have come back from maternity leave and where the dropout is.

Baroness Kennedy: I like that.

Jane Mann: Yes, I am completely in favour.

Q164 **Jess Phillips:** It is a yes from the panel. It is like "X Factor". Maternity Action, YESS and Farore Law have suggested that increasing access to tribunals would make it more difficult for NDAs to be abused. Do you agree with that?

Julie Morris: I do not think it is an access issue; it is what the potential reward is for going to tribunal, the award and the ability to get costs. I was coming up with an idea that you have something like you do in PI now, qualified one-way cost shifting, where if your claim of harassment is upheld then there is a presumption that you would get your legal costs back. You would have to think about how that might apply to a small employer, for example, who might feel aggrieved by that. There is some suggestion that if the employee is going to go all the way to tribunal the fact that they can expect to get their legal costs back would give them much more of an appetite to fight and not have to take a settlement because they cannot afford to fight.

Q165 **Jess Phillips:** It is specifically around the money?

Julie Morris: Yes.

Q166 **Jess Phillips:** Does everybody agree with that?

Baroness Kennedy: Yes.

Julie Morris: Although on a separate note, a longer period to lodge a claim, particularly when you are on maternity leave, would also be—



Jess Phillips: To be honest, those wheels may be—

Jane Mann: Outside, Julie and I discussed the idea of the costs regime changing. I am quite attracted to the profession and to, hopefully, a beefed up Equality and Human Rights Commission taking a look at that, because the imbalance is a massive issue, but also you do have to have regard to the interests of the employers. It is not unknown for individuals to bring cases without merit against employers and to put the employers to an immense amount of expense and trouble. These cases are hugely long, complicated and expensive, which is a problem for both sides.

In the profession, I am very interested in exploring different ways of resolving these disputes. Farore Law came up with the idea of the without prejudice meeting before going to a full trial. I think the climate is right to look at some of these dispute mechanisms, particularly now that employers get it a bit more. In the past, you could be met with people dying in a ditch because they did not get the point at all, they did not understand how they could possibly have discriminated against anybody, it was a matter of personal reputation and they were going to fight it all the way, ears closed and they would not listen. Now I think there is really much more of an understanding of how discrimination occurs, probably a better climate for alternative dispute resolution.

Jess Phillips: That is interesting.

Q167 **Chair:** Finally, closing on the issue of whistleblowing, which we have talked a little bit about already, it has been suggested the Government should review the effectiveness of whistleblowing legislation. We have already talked about potential changes with regards to the EHRC. Is there anything else that you want to cover on that about how we can strengthen the ability of people not to feel as if they are silenced—going back to the silencing of women comment—but still protecting the important commercial factors that are facing organisations and companies?

Kiran Daurka: We do need to look at the whistleblowing legislation. For example, a job applicant is going to be covered under the Equality Act and has protection against harassment, but is unable to make a qualifying disclosure because job applicants are not covered under the Employment Rights Act for whistleblowing stuff. We are not moving in parallel, so there needs to be a review of what is happening under the Equality Act and where there are protections and where we are missing that same protection for protected disclosures.

As I have just touched on, under section 43F(a) of the Employment Rights Act, there is provision to allow the Secretary of State to publish regulations and to ask prescribed persons to publish an annual report as to the type of disclosures they are receiving. If the Equality and Human Rights Commission becomes a prescribed person and people are able to go and register their harassment protected disclosure with them, then they are able to report on that annually.



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Q168 **Chair:** Those are the main areas you think we either need to enact or strengthen. Does anybody else have any comments on that?

Julie Morris: I do agree with those points.

Baroness Kennedy: I do agree with those points, but there is another thing, which is that whistleblowing policy usually exists and is clear in bigger companies; in small companies it is just not there. We can imagine it is there, but if you went to small companies it does not exist and employees do not know who you go to. That was one of the reasons I was wondering whether you could not have some kind of hotline that people could use, who are not in the kind of workplace where there is going to be an independent person that you can rely upon not immediately telling everybody what your complaint is. I do not know how you resolve that, but it is not working in the small and medium-sized workplace.

Chair: Thank you so much. We are privileged to have had the benefit of your experience today. For us, this is a very important area of our work and to have your expert input is invaluable. Thank you.