

Women and Equalities Committee

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

Wednesday 13 February 2019

Ordered by the House of Commons to be published on 13 February 2019.

[Watch the meeting](#)

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

Questions 169–299

Witnesses

[I:](#) Myfanwy Barrett, Managing Director, Corporate Services, House of Commons; Saira Salimi, Speaker's Counsel, House of Commons; Rupert McNeil, Government Chief People Officer, Civil Service.

[II:](#) Sarah Jones, Group General Counsel, BBC; Anna Purchas, Head of People, KPMG; Larissa Reed, Executive Director, Neighbourhoods, Communities and Housing, Brighton and Hove City Council; John Rumney, Solicitor, South Tyneside City Council.

Written evidence from witnesses:

- [BBC](#)
- [Brighton and Hove City Council](#)

Examination of witnesses

Witnesses: Myfanwy Barrett, Saira Salimi and Rupert McNeil.

Q169 **Chair:** Can I start by welcoming our witnesses this morning, everyone who is watching in the gallery, and anybody who is watching online as well? This is an evidence session for our inquiry into the use of non-disclosure agreements in discrimination cases. We have two panels today; both will focus on employers and their experience of using non-disclosure or settlement agreements, as well as their views on potential changes or safeguards to prevent their misuse in the future.

I have had some heated conversations about whether or not an NDA is really an NDA. As people commonly call all of these things NDAs, can you forgive us if we just say "NDA" when actually you professionals would probably prefer us to say "gagging clauses", "settlement agreements" or "compromise agreements"? It is just easier to use that catch-all term, if that is okay.

Before we start with our questions, could I ask the witnesses to say their name and what they do?

Rupert McNeil: I am Rupert McNeil. I am the Government Chief People Officer based in the Cabinet Office.

Myfanwy Barrett: I am Myfanwy Barrett. I am the Managing Director of Corporate Services for the House of Commons and I am responsible for HR.

Saira Salimi: I am Saira Salimi, Speaker's Counsel of the House of Commons, and I run the legal team here.

Q170 **Jess Phillips:** My questions are mainly for Rupert. We asked you to provide figures on the use of confidentiality clauses in the civil service in the past five years, and you have handed them to us this morning. Do you want to talk through the headline figures? This actually only goes back over the past three years, not five years, but in the past three years, there have been six examples where confidentiality clauses have been used in Government Departments. That is it.

Rupert McNeil: Let me describe how we have used it. Just by way of background, we have been and are very committed to being the most inclusive employer in the UK. That is one of the things that is in our workforce plan, as well as making sure that any aspects of bullying, harassment and discrimination are eliminated wherever they might occur. NDAs and settlement agreements, and how we treat those, are a very important part of our overall culture for doing that.

There was a very helpful report from the National Audit Office in 2013. Up until that point, we had not really been tracking this in the way we that are now.



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Q171 **Jess Phillips:** Sorry, say that again. You were not tracking it before.

Rupert McNeil: We were not tracking it before the NAO report. In 2015, we brought in a very tightly prescribed policy, which is that any clause of that type had to go to the Minister in the Department and, if it met certain other criteria, it had to go to a Minister in the Cabinet Office for sign-off. We have just written out to and checked with Departments, in terms of what the practice has actually been.

We can break it down into two sets: Government Departments and arm's-length bodies. Where it related to civil servants in Government Departments, in that period from 2015 when we started tracking and we asked Departments for their position, there was one Department that had a confidentiality clause relating to discrimination, and one arm's-length body.

Jess Phillips: That is one in those three years.

Rupert McNeil: One in a Government Department, and one in an arm's-length body.

Q172 **Jess Phillips:** You currently have, in the civil service alone, the full-time equivalent of 250,000 staff.

Rupert McNeil: Yes, and 150,000 exits in that period.

Jess Phillips: 150,000 exits. Okay, and there was only one case that had a confidentiality clause.

Rupert McNeil: One has been reported to us, and it occurred just after we introduced the guidance, so it was a question, bluntly, of a template not being updated in that period. We are actually really pleased with the level of compliance.

Q173 **Jess Phillips:** If I were to be sexually harassed, let us say, at HMRC and I were to leave under that cloud, I would not be asked to sign anything. The standard in the civil service is that I could then go on and say anything I liked about that.

Rupert McNeil: The standard is very high. We say in our guidance very explicitly the circumstances where they should not be used. We do not have a blanket ban on them being used because in some cases they protect parties, and of course we have the overarching provision of the Official Secrets Act and other things. However, in the case that you described, that is not something that we would expect. We are very clear in the guidance that it in no way blocks public interest disclosures, anyone's whistleblowing rights or anything similar.

Q174 **Jess Phillips:** Yes, but that could be in a non-disclosure agreement. That does not mean you have not signed one.

Rupert McNeil: Exactly, but I would say in those cases that we would not see a need for that to be signed as part of the facts that you described.



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Jess Phillips: Okay. It just seems vanishingly few, and that is not necessarily my experience of people I know who work in the civil service: that it is all completely hunky-dory.

Q175 **Chair:** Can I ask a slightly different question? Of those 150,000 exits, do you keep a record of why people left?

Rupert McNeil: We do—

Chair: You do, so the answer is “yes”.

Rupert McNeil: The answer is “yes” for the Senior Civil Service. We are actually looking at the moment at how we will track that across the whole system.

Q176 **Chair:** Of those 150,000 people who left, how many left because of allegations of discrimination?

Rupert McNeil: We do not have data as to how many left because of allegations of discrimination. I would hope that nobody left because of an allegation of discrimination.

Jess Phillips: I would hope to be a size 10 but I just keep eating cake. Hope is not good enough, is it?

Q177 **Chair:** When you are employing so many people, even if you are the best employer in the world, you will have people who allege that they have been subject to discrimination. We know that more than 50,000 women a year in this country leave jobs because they feel discriminated against because they are pregnant. You do not know why people leave your organisation.

Rupert McNeil: At a departmental level, it is always good practice to have exit interviews and to track that. I do not have data at the central level at the moment, beyond the Senior Civil Service, as to the reasons why people have left.

Q178 **Chair:** Who knows why the 150,000 people have left?

Rupert McNeil: 150,000 covers large numbers. It covers people who have left through restructurings.

Q179 **Chair:** No, I just want to know who knows the answer to the question.

Rupert McNeil: The answer will be known to a Department, to the extent that they track it.

Q180 **Chair:** You do not know how many of those 150,000 may have made allegations, rightly or wrongly, of discrimination. Even though people are not being silenced through the use of a non-disclosure agreement, you do not know how many people have left your organisation because of discrimination.

Rupert McNeil: Again, I would say that we would hope that people would not be leaving because of discrimination, and I have no reason to



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believe that they are. Can I take it back a step? By the time we get to the actual exit from an organisation, that is the very end of the process. We have taken many steps to make sure that people feel they can speak up.

Q181 **Chair:** Sorry; we do not need to get into that, with the greatest respect. We have a lot to get through. I just wanted to know whether you knew why these people had left, and you are telling me that you do not. Can we find that out? Can we ask somebody else?

Rupert McNeil: We have various sources of data that we can use, so I am very happy to write to you about that.

Jess Phillips: Thank you. We understand it is a big amount of people.

Rupert McNeil: Yes, and there are many reasons within that.

Q182 **Chair:** It is just that we have found it quite difficult to get figures out of you so far, so it would be good to get those in quite a timely manner.

Rupert McNeil: With respect, which figures have you had difficulty getting?

Chair: We have only just had the figures on how many non-disclosure agreements, and we asked for them about three weeks ago. It does not now seem that there is a huge number.

Jess Phillips: We thought that the delay might be because of huge numbers, but one is easy to count.

Rupert McNeil: No, could I just explain? The delay is because we wanted to go out to Departments and check that we had the correct numbers.

Q183 **Jess Phillips:** What was the change? In 2015, what was the reason for issuing the guidance that you have already spoken about and what effect has that had on settlement agreements?

Rupert McNeil: We think it has had a very good effect, as the numbers demonstrate, with a good understanding of what the procedure would be, particularly in the ministerial Departments. The guidance follows, as I have mentioned, from the 2013 NAO report, which is still a very good and helpful report for any employer. You have several things. There is Cabinet Office guidance. In addition to the Cabinet Office guidance, within that there is standard wording. It is not completely prescribed but it could be amended with legal advice if there is a particular need to do it. There is also a very clear, upfront statement about the circumstances where it would be completely unacceptable to use it, which would include situations like the ones we have described.

Q184 **Jess Phillips:** Long before we were all talking about non-disclosure agreements, it seems that the civil service recognised that they were pernicious and would not want to use them. That seems to be the case from what you are saying.



Rupert McNeil: Again, the National Audit Office report was very good about it and, as they say, there are some circumstances where it might be appropriate to have one to protect both sides and as part of getting closure. We pride ourselves, I hope, on aspiring to being a best-in-class employer in the UK. In doing that, we have rolled out this procedure and it shows that they are not a particularly useful tool.

Q185 **Jess Phillips:** Do you know how many people in the civil service have taken their employer to tribunal?

Rupert McNeil: I do not know that, but I can certainly write to you about that.

Jess Phillips: Okay, as well as what the tribunal cases were regarding.

Rupert McNeil: Yes.

Q186 **Jess Phillips:** Maria has already covered off the reason for settlement agreements and figures around knowing why people left the civil service. That would be good as well. The Cabinet Office guidance on the use of confidentiality clauses states that they should not be included in a settlement agreement as a matter of course, but does not give any guidance on what would be the appropriate circumstances in which to use one. Is any additional guidance available?

Rupert McNeil: Yes, it is. Within the actual guidance, we say where it absolutely should not be used. We are very explicit about that. We continue to improve this. In the past 12 months, we have continued to upgrade and improve our investigation capability across the civil service between Departments and the bullying, harassment and discrimination guidance, which is very important. That is all dealing remedially with problems but most of our effort is actually on things like encouraging flexible working, looking at the elimination of things like micro-behaviours in the way in which people are interacting with colleagues, and basically raising the bar about how people should create an inclusive workplace.

Jess Phillips: Okay, but there is not any guidance specifically on the use of NDAs or settlement agreements in case of—

Rupert McNeil: The circumstances in which it would be acceptable to use them are so limited.

Q187 **Jess Phillips:** Explain to me the exact circumstances.

Rupert McNeil: Since 2015, there was one case in a Government Department, which I explained in terms of the use of the template—which would not happen now—and one in the case of an arm's-length body. In the case of the arm's-length body, that was a pay dispute that covered about 76 individuals. It did not in any way constrain them from saying that there had been a dispute. It did not constrain them from saying that there had been an agreement but the parties agreed not to disclose the size of the settlement. That is an example in practice of what has happened in the one case where it has been there.



Q188 **Jess Phillips:** What monitoring, if any, is there that these cases, or the system, are used appropriately?

Rupert McNeil: We do it in several ways. One is, as we have just done, checking with Departments in terms of what they have done, and with arm's-length bodies, to the extent that they are following the guidance. There is the general deployment of policies across the civil service on HR, which we constantly do. We are also making it very clear in those circumstances that it is very important to take legal advice from the Government's legal department supporting those Departments.

Q189 **Jess Phillips:** I just find it strikingly unlikely that there is so little discrimination.

Rupert McNeil: I did not say that.

Chair: You did. When I asked how many of the exits were related to discrimination, you said that there were not any.

Rupert McNeil: I do not think that is what I said.

Q190 **Chair:** Sorry, did I misunderstand you?

Jess Phillips: We may have misunderstood.

Rupert McNeil: I think you did misunderstand.

Q191 **Chair:** How many of those 150,000 exits?

Rupert McNeil: I do not believe that, of those 150,000 exits, we would look at those and say that they are because we have discriminated. It would be unacceptable for any employer to say that, frankly, in the UK or anywhere. That is not to say it does not happen. We are very concerned to make sure that bullying, harassment and discrimination, where it occurs in the civil service, is eliminated. We have, for example from our People Survey, data that says that a percentage of colleagues do experience bullying, harassment and discrimination.

Q192 **Chair:** What percentage is that?

Rupert McNeil: I will write to you with the detail on the percentage. It is in the public domain. The percentage who report bullying, harassment and discrimination varies but it is in the region of between 10% and 15%. From our perspective, and the perspective of the civil service and its leadership, that is too high.

Jess Phillips: It is not good enough.

Rupert McNeil: We had a very helpful piece of work that the Committee heard from Sue Owen and Andrew Kean in my team last year about the review that we did into this, which gave us more insight into what people were reporting as that, and it broke down into several categories, including abusive behaviour and abrasive behaviour. That was one aspect of it. That has prompted us to make the changes that I mentioned earlier. We have improved our investigation capability. We have produced



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bullying, harassment and discrimination toolkits for all line managers. We have particularly emphasised Speak Up. We are keen to do two things. One is to make sure that everybody feels that they can, using a variety of channels, raise a concern about what they are experiencing, and also that, if they see it happening to other people, which we ask about in the survey, they will also say the same thing.

Q193 Chair: Given that you run an organisation with 250,000 people, which has to be the largest organisation outside of the NHS, and you are running it without the use of NDAs, albeit you want to be best in class, would you say, given how NDAs are causing quite considerable problems for some groups in other organisations, that the Government should be advocating that we do not use NDAs at all? You actually are a great model for how they do not have to be used. Should that be Government policy?

Rupert McNeil: BEIS will be consulting on that.

Chair: I am just asking for your point of view.

Rupert McNeil: Speaking for the civil service as a large employer, with 450,000 individuals or so, if you want to create an inclusive culture and you want to create a safe workplace for people, I do not think they are a particularly helpful tool.

Chair: You have proved that you do not need to use them.

Jess Phillips: It is a good example.

Q194 Vicky Ford: My questions are to Myfanwy and Saira. You have given us the figures and the information about NDAs in the House of Commons, and we are going to publish them. You say that, since 2015, the clauses have been considered on a case-by-case basis in line with Cabinet Office guidance. What criteria do you use to know which is appropriate? Is there any difference in the approach that you would use in a bullying case versus a discrimination case?

Myfanwy Barrett: As we said in our advance note, in 2015, we started to look on a case-by-case basis at whether to include the confidentiality clause, and that would have been discussed with the other party to the agreement. In most cases, it was the other person who expressed a preference to have the confidentiality clause to protect them, and we would have agreed to that. Also, as we said in the note, since July 2018 we recognised that we were being too cautious about this and we changed our position to be that the default was that we would not use a confidentiality agreement. The agreements we have entered into since then have not included a confidentiality clause.

We have not used them in any way to stop anybody from making a complaint of either bullying or harassment, and we have used them in line with the Law Society practice note that came out earlier in the year that described a general confidentiality clause as opposed to anything that was very specifically about bullying or harassment.



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Q195 **Vicky Ford:** Can you also cover discrimination? Bullying and harassment—do you treat that as something different?

Saira Salimi: I can come in on the discrimination point. We have had no settlement agreements in cases where bullying and harassment was alleged in the period for which we have figures.

Chair: That is since 2012.

Saira Salimi: Yes. We have had cases in which there were allegations of discrimination that the House would not necessarily accept were true, although of course I cannot go into the detail of every case. As far as I am aware, since 2015 there has only been one case in which an allegation of discrimination was settled, and there was a confidentiality agreement in that case but it was at the individual's specific request.

Q196 **Chair:** Who decides whether or not a case is a case of discrimination or just a case of poor performance?

Myfanwy Barrett: As I am sure the Committee is aware, often these agreements are the end of a very long process of dialogue with the individual and that can sometimes include a breakdown in relationship with the manager or a performance management process or a capability process. Sometimes there may be other complaints that have been investigated internally through our normal policies before we get to the point where we settle with somebody, so we cannot really say. We do not keep data about the reason for the exit. We reach this point after a long process with somebody.

Q197 **Chair:** It is fair to say that you could have an allegation of discrimination that then ends up being a settlement that is more general than that.

Saira Salimi: That is exactly right, yes.

Myfanwy Barrett: In the particular case that Saira was referring to, there had been various internal investigations under our processes before we got to a tribunal stage, which then eventually was settled before the full hearing.

Q198 **Vicky Ford:** Has the fact that you have not been having confidentiality clauses since July last year affected the number of cases going to tribunal?

Saira Salimi: It is probably too early to say, especially since there have been a number of tribunal claims that have been entirely unrelated to any of the matters that have been newsworthy in the last year or two. They do not include allegations of discrimination or harassment necessarily, but they are difficult cases that would always have gone to tribunal. It is really hard to answer your question at this stage; it will need a little more time before we can come to any conclusion on that.

Q199 **Vicky Ford:** Would you expect it to?



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Saira Salimi: On balance, yes, I would. If an individual cannot settle a case at an early stage with a confidentiality clause, there may be less incentive for them not to put a tribunal claim in. There is a greater incentive for them to put in a tribunal claim.

Q200 **Vicky Ford:** In previous years, a high use of NDAs has been recorded when there have been voluntary exit schemes. What will be the approach to using NDAs in settlements under such schemes in the future? Does that make sense?

Myfanwy Barrett: Yes, I have got that, thank you. Over this period where we have provided the data, we have had three voluntary exit schemes, where we have advertised a window of opportunity for people to apply to go under a voluntary scheme and there is a business case made that assesses the potential benefits of that exit against the cost. In the past, most of those voluntary exits do not involve a formal settlement agreement, but some of them do where there are other factors in the case, such as the things I was referring to earlier, or sometimes where it has been agreed by both parties that the person can go, but on a different date to the advertised date for the scheme. We do use them occasionally in that way. In the future, our default position will be not to have the confidentiality clause and, if there is a particular request to use one, it would have to be agreed by our accounting officer specifically.

Vicky Ford: Could you say that again? I am not sure I followed that.

Myfanwy Barrett: As I say, our default position now is that we do not use a confidentiality clause. Since we have changed our approach, we have not used them. However, we would still consider a request from the individual, if they had a specific reason why they wanted it in there. Under our rules now, any such request would have to be expressly agreed by the accounting officer.

Q201 **Vicky Ford:** If I am the person who is leaving the employer, why would I want to bind myself to a confidentiality agreement?

Saira Salimi: You may well wish to bind the employer.

Vicky Ford: I might want to bind the employer. Okay. Thank you.

Myfanwy Barrett: We would require that person to have full legal advice and consult their union and so on.

Vicky Ford: Okay, so that is the NDA going both ways.

Saira Salimi: Exactly.

Vicky Ford: Thank you. Sorry. It is quite complicated.

Q202 **Jess Phillips:** Can I just clarify something? When we are talking about the House of Commons, you are not talking about cases of our staff in this.

Myfanwy Barrett: Correct.



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Q203 **Jess Phillips:** Who is responsible for that, when it is our staff? I know of lots of NDAs.

Myfanwy Barrett: As you know, MPs are individual employers and employ about four or five staff each. If they were going to enter into an agreement with a member of their staff, it would be for them as the employer.

Q204 **Jess Phillips:** I do not know, so this is showing that I have never done it, clearly, but do we not seek advice from House of Commons HR?

Saira Salimi: That is correct but it is advice only. The House of Commons HR has very much less involvement in cases involving Members' staff.

Q205 **Jess Phillips:** We have insurance for payouts and things, and that insurance is covered by the IPSA standards, not the House of Commons, is it?

Myfanwy Barrett: The employment practice insurance policy is provided by the House as a blanket policy for all Members.

Q206 **Jess Phillips:** So that would pay a settlement for a member of my staff, for example.

Myfanwy Barrett: Yes, depending on the circumstances.

Jess Phillips: I think they are all alright.

Q207 **Chair:** Can I ask a question about the data? Parliament might expect you to hold data over the length of a Parliament. That is the sort of currency we work in. Why have you decided to only retain data since 2013? Who made that decision?

Myfanwy Barrett: We had a very big replacement of all our systems in 2012, so a lot of our HR information is better since 2012. I do not know for certain whether we have information about how many settlements we did in the years earlier than the information we supplied to you, but I think you specifically asked for five years, and we previously have been asked to answer a PQ and an FOI request that went back.

Chair: So you might have the data. It is not that you do not have the data.

Myfanwy Barrett: I am not certain, I am afraid. I will have to check that.

Q208 **Eddie Hughes:** We have heard that non-derogatory clauses are commonly used alongside, or in place of, confidentiality clauses. Are non-derogatory clauses used by the civil service or the House of Commons and, if so, what guidance applies to their use?

Rupert McNeil: We include that within the category of confidentiality clauses. We can see some value in non-derogatory comments going into



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those clauses if they are being used. However, as I have described, there are not many examples of them being used in the civil service.

Q209 **Eddie Hughes:** Could they have the effect of making people think that they cannot say anything about their case to anybody?

Rupert McNeil: My experience of non-derogatory clauses outside Government is, to pick up a point that Saira made, that it is actually binding the employer. That is a valuable role that they play: to make sure that the employer is not making derogatory remarks about the individuals. That is one of the situations where an individual might make a request to have that in their agreement. As I explained, it is not part of our normal way of operating.

Q210 **Eddie Hughes:** It has been suggested that having standard clauses could help to reduce the use of unnecessary confidentiality clauses and legal costs for preparing and advising on NDAs. Would having standard clauses be welcome?

Rupert McNeil: In terms of the civil service, we have definitely seen, given the very low numbers that we have talked about since 2015, that it is actually very helpful and it shows very clear and prescribed sets of circumstances or conditions for using such clauses, NDAs or different components of them, a clear approach for sign-off and then a clear approach for the sort of template wording that should be used.

Q211 **Eddie Hughes:** That would then clearly set out the type of disclosures that the agreement cannot prevent.

Rupert McNeil: Absolutely. It is very important that at every stage of the process, and even before, every employee needs to be very confident that they know they can speak up, they know the channels they can use and when you come to the very end of the process, if you do have such an agreement, that it is very explicit about what is covered.

Q212 **Eddie Hughes:** Again, I appreciate we are talking about small numbers. Cabinet Office guidance sets out that ministerial oversight is required for confidentiality clauses in settlement agreements of high-value cases, or in cases that are potentially contentious or likely to have high visibility. What oversight is there of the use of those agreements in lower-value and less contentious cases?

Rupert McNeil: That is a very good question. There are two legs of the control. One is that any NDA in this context would have to be signed off by the Minister for the Department, and the accounting officer is responsible for that as they are for other policies. This is an additional check, which also applies to the Senior Civil Service, who are viewed as a common cadre across Government. Basically, the Minister of the Department would have to sign it off as well.

Q213 **Eddie Hughes:** Regardless of the value or other implications.



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Rupert McNeil: Absolutely, yes. We are very reassured by the fact that there are those two controls.

Q214 **Eddie Hughes:** The EHRC has suggested that the use of NDAs should be approved at board level to ensure that they are not used improperly to cover up misconduct or protect repeat offenders, and to make sure that lessons are learned. What do you think about that suggestion? Is that appropriate at board level?

Saira Salimi: In the House of Commons, they are already approved by the accounting officer, so it is effectively at board level.

Myfanwy Barrett: Yes.

Eddie Hughes: The checks are already in place then.

Rupert McNeil: If you take the example of the way the civil service policy works and the guidance works, the most senior individuals have to sign it off, who are the Minister and the accounting officer.

Q215 **Eddie Hughes:** It has been suggested that employers should have to report annually on the number of NDAs they agree to a central register and that those with high numbers of NDAs should be referred to a body such as the EHRC for investigation. Do you think that is a good idea?

Myfanwy Barrett: In the House of Commons, we are reporting regularly to our own Audit Committee about the use of exit agreements generally and any confidentiality clauses specifically. We have agreed with the Audit Committee that that will become an annual report. That is not automatically published but, if there were a reporting regime, I am sure we would be happy to participate in it.

Q216 **Eddie Hughes:** Why is it not automatically published? It seems like one of those "why not?" sorts of questions.

Myfanwy Barrett: As we said earlier, we have had quite a lot of Parliamentary Questions and Freedom of Information requests in this area, so we have, by that means, published information. However, our Audit Committee papers are not generally published.

Rupert McNeil: At the civil service, we are committed to publishing them. We are gathering the data, which is what we are doing, and we are looking at some issues around GDPR and making sure that we find the best way to do that and tracking it in our systems. From our perspective, we think that transparency is a good thing.

Q217 **Eddie Hughes:** Maternity Action has suggested that one way to tackle pregnancy and maternity discrimination would be to require employers to report on maternity retention rates. What do you think about that idea?

Rupert McNeil: It is interesting. That recommendation is not something that we would track within our current systems. However, it is linked to the other question about tracking. One wants to know as much as possible.



Q218 Eddie Hughes: You say that is not something that you track within your current systems. If a woman gets pregnant and does not stay in the job, surely that is a really easy piece of information to track.

Rupert McNeil: It is a really interesting question, and we have been talking about that in terms of how we would actually get the data and make sure that it was answering the problem that we would be looking for. I should say, first of all, that it would be great data to track, because we should be tracking all reasons why people are leaving and understand them, looking for the root causes. The interesting thing here, which we have been debating internally as professionals, is that we do not just want to find out if someone has not wanted to come back or has come back to a different situation, but it is about also looking at whether they have suffered any detriment in their career after they have returned. I am as interested in the person that actually left two years later.

That comes back to the point about the importance of capturing, in an insightful way, all departures and why people have left. It is an interesting idea. One of the great things that we all have now as HR professionals is that we are increasingly getting access to better and better data. It is becoming cheaper and easier to analyse it, and these are the sorts of things we should be tracking.

Q219 Sarah Champion: But you are not at the moment.

Rupert McNeil: I will go back and check and come back with the reasons for leaving, but I do not believe, when we were looking at it, that we have a way of answering that question at the level that it needs to be answered at, which is around the point of what impact it had on someone's career. Having said that, one reason why we want to know is we are actively attracting women returners back in. Flexible working is one of our selling points for people coming in. We have job shares. We have two Director-General job shares in the Department for Transport. We are pushing the positive aspects of that but we also want to track whether there are any unintended consequences or issues that we have not seen.

Q220 Chair: It is really important for us to get to the bottom of why people are leaving, because you have so many people—250,000 people—working for you. It was only last year that your own research showed that three-quarters of staff had experienced harassment, bullying or misconduct during their career, but only about a third had reported it. Do you worry, if you are having those 150,000 people leaving and you, as the head, are not aware of why they are leaving, that there could be some links to discrimination in there? In your response earlier, you did not seem to be very concerned about that.

Rupert McNeil: I am sorry if I was not clear, and I will revert with the precise data on it. We have a lot of data on what was driving those 150,000 exits. In fact, this relates to the whole question of churn and turnover and people moving between Departments.



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Q221 **Chair:** I am not so interested in that; I am interested in whether or not people are leaving because of discrimination. Given that three-quarters of your staff have said they have experienced harassment, bullying or misconduct, I am surprised that you would immediately say that that was not a huge issue, even though you do not have the figures in front of you.

Rupert McNeil: It is a really interesting question about what would drive someone out of the organisation versus moving to another role or actually going into mediation on a particular issue or bringing a grievance or any of those other issues. What I would very much like to do is to write to you with quite a granular breakdown of our current picture of why people are leaving.

Q222 **Chair:** Within that could you also include the number who go to mediation and the number who go into grievance procedures and tribunal?

Rupert McNeil: I would be delighted to, absolutely. One of the great stories within UK employers, and certainly within the civil service, is the success of mediation as a way of dealing with issues early on. It is a really important part of the process.

Q223 **Sarah Champion:** My questions are just for Myfanwy and Rupert. Rupert, I have to say that I am listening intently to what you are saying, and I am sorry but if you read the transcript, you are contradicting yourself or not giving clear answers.

Rupert McNeil: On which, sorry?

Sarah Champion: If I could finish my question, you will get that.

Rupert McNeil: Sorry, of course.

Sarah Champion: This will be another interesting question as well. What I am looking for is interesting answers from you. Do you believe that your policies and the framework that your staff operate within, specifically looking at preventing discrimination, bullying and harassment, are fit for purpose? How do you know that they are fit for purpose?

Rupert McNeil: Apologies if I have not been clear on that. Let me try to answer that question as clearly as possible. If we take the raw fact of the percentage of people who, in our anonymous annual People Survey, report that they have experienced bullying, harassment and/or discrimination, those numbers are definitely higher than we would want. There is a lot of resolve to get them lower.

The approach to getting them lower is to understand what the issues actually are. One of the ways in which we did that last year, which was extremely helpful, was the piece of work that Sue Owen led, which was another more targeted survey. From that, we took a number of very specific actions around, as I said, looking at our investigations and improving our investigation capability, looking at what guidance would be



given to line managers and also emphasising the ability of people to speak up and not just report what happened to themselves but actually, as our survey reports, where they see it happening to others. We are evaluating how effective that is and we will know that when we look at the 2019 survey results.

Sarah Champion: As part of that process, the logical conclusion for that is the conclusion. I would then be looking at the reasons for people leaving and the number of grievances that are brought forward.

Rupert McNeil: Absolutely.

Q224 **Sarah Champion:** You are doing that, so I would have thought that you would have said, "Yes, of all the 150,000 people that left, 10% of them were alleging discrimination", or, when Eddie is asking you about maternity, you would say, "Yes, it is a good question and here is the answer to it. We have drilled down all of these processes and we are really closely monitoring if that could be a reason that people are leaving". Is it that you are unclear in your answers, or is it that you are not looking at those exit interviews and learning?

Rupert McNeil: Apologies; I hope that I am not being unclear in my answers, so let me just clarify. We are constantly looking at ways of improving the data that we have on all aspects of the experience that employees in the civil service have. That is why, as I acknowledged Mr Hughes' point, that question about maternity retention rates is a really interesting one and one that we are actively looking at now that that has been prompted by that suggestion.

We have a range of different sources of data. The reality is that, across the 450,000 individuals that we have in the civil service, we have a number of different enterprise reporting systems. At the moment, although it is in our plan to change this over the next few years, we do not actually have common data templates in all of those systems. That is an issue that is very common for many employers. We have a number of ways of tracking that. We have an analysis and insight team who look at the data, and that is the data that I will share back with you on reasons for exit. We have data from the People Survey, which is probably our most helpful source because it is anonymous, and we use that for many other purposes to track it. That gets us down to teams of perhaps about 10 individuals, so we can get quite granular with it.

Q225 **Sarah Champion:** When people leave, do they have a form that they fill in?

Rupert McNeil: That is a very good point. Of course, the People Survey only tracks people who are currently employed.

Sarah Champion: Exactly.



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Rupert McNeil: What we have seen is that the area where we—and, frankly, all employers—could probably improve is in the area of tracking, in an insightful way, exit interviews.

Sarah Champion: Yes, this is the nub of my point.

Rupert McNeil: It is a very good point. What I would say is that that is an area where we would definitely want to improve.

Q226 **Sarah Champion:** Do you do it now?

Rupert McNeil: Yes, our focus at the moment has been on the Senior Civil Service, because that is a cadre that we at the centre can track.

Sarah Champion: Yes, you said at the beginning you had that data.

Rupert McNeil: Yes, which is really important. It has been very helpful to us to see why people leave.

Q227 **Sarah Champion:** If it is very helpful, why have you not rolled it out across all Departments?

Rupert McNeil: That is really because of systems and because of this issue of making sure that we have common data templates. I would like us to be able to have exit interview data across the whole system. It is actually a plumbing question, as much as anything else, as to how we would track it.

Q228 **Sarah Champion:** You are the gaffer. If you say you want this, it is going to happen. Is it just because there is not the money in place? What is the stumbling block? Is this something that we should be raising with the Minister?

Rupert McNeil: We would expect local HR teams and local management to be understanding why people are leaving. That is a separate question, which does happen as part of good practice. The issue really, because we are a set of employers, is how we actually track that in a consistent way across the whole system and collect it.

Sarah Champion: That is indeed the issue that I am trying to get the answer to.

Rupert McNeil: That is something that we would very much want to do, and it is in our plan to make sure that, as far as possible, we can integrate all this different data.

Q229 **Sarah Champion:** So it is in your plan to do that.

Rupert McNeil: Yes.

Q230 **Sarah Champion:** I will just give you a breather and turn to Myfanwy. What oversight do you personally have on cases where there are allegations of discrimination or bullying and harassment?

Myfanwy Barrett: I am sure that members of the Committee will be aware that in 2017 there was a cross-party working group looking into



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the whole issue of bullying and harassment in the wake of national and international concern. As a result of that working group, which is chaired by the Leader of the House, a completely new system, called the Independent Complaints and Grievance Scheme, was established last summer. This is, as it says, an independent service that is available to staff of the Houses of Parliament and Members' staff and others to make any complaints about bullying or harassment. Then there are lots of support services available and then an investigation service if the matter goes forward to an investigation, and various policies were agreed to support that.

Q231 **Sarah Champion:** What oversight do you personally have?

Myfanwy Barrett: That is my point; this is an independent service. We get reports back from that service about the take-up and the number of contacts that have been made, the number of investigations that are going on and so on. My HR team interacts with those services because sometimes the people running those services need to ask questions or get advice about the employment arrangements or who all the parties are in a particular situation. If an investigation is completed, the report comes back to the relevant person to apply the recommendations in the report. If it is about somebody who is employed by the House, it would come back to us as the employer to take the relevant action. If it is about someone who works for an MP, it would come to the MP as the employer. In some cases, the matter would go to the Standards Committee.

Q232 **Sarah Champion:** For those people who are employed by the House, do you get a report? Does it land on your desk or does it land on someone else's desk?

Myfanwy Barrett: It would depend. If it was House staff making a complaint about another member of House staff, it would depend on the seniority of the people, because essentially it is the line manager who would have to apply the relevant sanction. However, that would be with support from my HR team as the professional advisers to the manager.

Q233 **Sarah Champion:** Who is responsible for spotting patterns? Say if a particular line manager or a particular Department kept on having discrimination cases brought against them, how would that be spotted?

Myfanwy Barrett: One of the benefits of these new systems is that there is much better recording and reporting of all of the complaints and the activity. It is specifically designed such that, if the same person's name keeps coming up, we will get a report back on that. Even if the individual complaints are relatively small things, if cumulatively there is clearly an issue with a particular person, we will get a report back. That has not happened so far, but these services were implemented last summer.

Q234 **Sarah Champion:** Again, is it you who gets the report back, or would that go to different line managers, so the pattern might not actually be spotted?



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Myfanwy Barrett: That would have to be reported into my HR team, who are the interface with these independent services. As I say, we have not had that scenario yet.

Q235 **Sarah Champion:** Rupert, what happens in your situation? What oversight do you have? Do you know if there are discrimination cases that keep on coming or people leaving because of discrimination? How would you see that pattern emerging?

Rupert McNeil: Again, I would hope that no one would be leaving because of discrimination. The way we do that is that the HR director for the Department would be tracking practice in that Department and then, at a central level as far as possible—and we are in the process of improving this—we want to drill into that data and understand what is happening, and particularly what is happening in Departments where, as we do have, the practice is very good and where we have very low rates of BHD that, in some cases, are down to zero and how we actually extrapolate that practice across other Departments. That is actually one of the advantages of the introduction of functions across Government: that we are now able to look rather more easily across particular issues like that, whether it is HR or other areas.

Q236 **Sarah Champion:** My final question is this. Do both of you think it would be helpful if you reported discrimination, bullying and harassment cases to an external body so that those patterns could be seen and collated in one place?

Myfanwy Barrett: As I say, we are getting data that we are publishing for the take-up of the Independent Complaints and Grievance Scheme on a quarterly basis. We are already publishing that. We could readily provide that to an external body.

Q237 **Sarah Champion:** Do you find it helpful?

Myfanwy Barrett: Yes, certainly. As we have said, it is early days. Certainly, the encouraging thing at the moment is that the take-up is going steadily up, which is what we want. As I say, we record the number of contacts with the services, the number of individual people making contacts—some people have multiple exchanges with the services—and the number of actual investigations. As time goes on, we will get more information about the outcome of investigations and so on.

Rupert McNeil: The more opportunities that we have to really benchmark and to compare and understand why these things happen, what techniques work and the way in which practices in workplaces in the UK have evolved and improved—and it continues to evolve and improve—the better. Again, there is the example of mediation, which is a very radical and positive change. The way you discover that is by comparing yourself to other organisations and being as transparent as you can.

Q238 **Chair:** I almost feel like the Committee is wasting its time doing something on NDAs because it is all rosy in the garden. Do you think that



you are typical of what is going on outside your organisations? Are you concerned about non-disclosure agreements and the way they are used? My impression is that you are not using them and therefore any idea that it is a problem is a thing of the past.

Rupert McNeil: When the NAO report came out, Chair, in 2013, it showed that we had an issue in terms of what we did not know about our system. We definitely knew what we did not want to happen, which was these being used inappropriately. It has been a good example of how, with resolve, across quite a large system—because the civil service is an organisation of organisations—we can actually, notwithstanding that it is quite decentralised, get to a place where people are not using them.

Myfanwy Barrett: I do not really feel qualified to comment on what other organisations are doing. Obviously, from your inquiries so far and your earlier reports, you have found evidence of misuse of these agreements in various places. It can only be a good thing to try to ensure they are used properly and effectively in future.

Q239 **Jess Phillips:** Just to close off, both of your organisations work with very powerful people—some of the most powerful people in the country. Do you feel confident that somebody who is sexually harassed or sexually abused by a Minister or a senior Member of Parliament would be able to come forward and would not be silenced? Let us say it is your Minister who gets to sign off the thing.

Rupert McNeil: That is a worst-case scenario, and we are looking at ways of making sure that does not happen.

Q240 **Jess Phillips:** It is not a worst-case scenario in my world; it is the scenario.

Rupert McNeil: Sorry, the scenario. Sorry, let me rephrase that. We should look at these sorts of scenarios and we want to work out how we can prevent them occurring.

Q241 **Jess Phillips:** Do you feel that somebody would not be silenced in those circumstances? A member of your junior staff comes forward and has a complaint against a very powerful man in Parliament. Do you think that that person is going to get a fair hearing anywhere other than the media?

Rupert McNeil: I would say that we are putting in place the processes to give people every channel to raise that and, as I have said before, to make sure that that burden does not just fall on to the individual but also on the people around them to raise the concern. That is why we are so conscious to push this point about Speak Up.

If we go down to the data, which I will be sending you, in the People Survey, one of the things that we would like to change is where people observe it or experience it and do not report it, regardless of seniority. That is a gap that we need to close. Everybody who experiences this and everybody who sees it should be encouraged and feeling, as part of the



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culture that they want to create in the organisation, that it is unacceptable and that they want to report it.

Q242 **Chair:** You do not have those processes in place now. You said you were in the process of putting them in place.

Rupert McNeil: We have our Speak Up processes, including whistleblowing.

Q243 **Chair:** Is that in place at the moment?

Rupert McNeil: That is in place, absolutely. We have rolled out the bullying and harassment training and toolkits to line managers. We have a range of actions like that including a whole set, which we believe are helping.

Q244 **Chair:** What are you putting in place that you were referring to earlier that is not yet there?

Rupert McNeil: We need to look at the data to see whether it is actually working. As I have said, in the People Survey we are still seeing a gap between the number of people who experience it and the number of people who report it. That is a gap that we need to close.

Q245 **Chair:** Both of your organisations are really good organisations to work for in terms of being a good career. This is slightly off the topic of non-disclosure agreements but to what extent do you think people just put up with that behaviour? Do you think that they do? The research from your organisation suggests that people do not report these things. Let us give you a chance to think. Do you think that people in the House of Commons just put up with this behaviour because they have become resigned to the fact that that is part of working life? Sorry, when I say "this behaviour", I mean discrimination.

Myfanwy Barrett: To go back to the question that Jess Phillips asked a moment ago, we have our new independent services up and running but they have not been fully put to the test yet because we have not yet had the sort of case you are describing with a very high-profile Member. The Cox report, which came out last autumn, said that there was an issue about the ultimate decision-making process for an issue with a Member being via the Standards Committee and the issue of MPs on that committee making judgements about the behaviour of other MPs. That matter is still being discussed and worked through. We are waiting for the report of the Gemma White inquiry, which is coming out in March or April and which is a further examination of issues for Members and their staff. That will put further light on this subject.

Another key thing that came out of the Cox report was about the culture of the House and this idea of a culture of deference.

Q246 **Chair:** I think she actually referred to the culture at the top of the organisation not being conducive to change.



Myfanwy Barrett: Yes, and lots of activities are happening in the House service to try to respond to the Cox report. We have just appointed an independent person to be the cultural transformation director to help us to really address these issues about the culture and deference and behaviours. We are just about to roll out a big training programme on bullying and harassment to Members and staff in the next few weeks. We are very actively responding to the Cox report, but it of course highlighted serious issues in our organisation and behaviours.

Chair: Thank you very much for your time today. I look forward to getting the information. Thank you very much.

Examination of Witnesses

Witnesses: Sarah Jones, Anna Purchas, Larissa Reed and John Rumney.

Q247 **Chair:** Can I thank you on behalf of the Committee for taking the time to come here in front of us today, particularly since we invited some employers who did not want to come in front of us? Thank you for doing that, and for being able to be open about what you are doing within your organisations. We are incredibly grateful because our inquiry will be the richer for it. Thank you very much.

We have our usual process here of asking questions, but before we start doing that, could you just say your name and the organisation you represent?

Anna Purchas: I am Anna Purchas, head of people at KPMG.

Sarah Jones: Hello, my name is Sarah Jones. I am the general counsel at the BBC.

Larissa Reed: My name is Larissa Reed. I am the executive director of neighbourhoods, communities and housing for Brighton and Hove City Council.

John Rumney: I am John Rumney. I am a solicitor at South Tyneside Council.

Q248 **Sarah Champion:** Thank you all for submitting written evidence on your use of NDAs. I wonder if you could just rattle through the summary of how and why you use them.

Anna Purchas: There are 16,000 of us at KPMG, partners and staff, and it is very good to be here to share our experience with you, and of course to follow the recommendations of the Committee.

We use settlement agreements, or agreements including confidentiality clauses, in three instances at KPMG. The first is that all our employees have a contract of employment, and that does include confidentiality



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clauses. That is important. Our employees come into contact with confidential data around clients, for example, and that is important for us.

The second instance is non-disclosure agreements. We use those when our staff are going to get access to particularly confidential data around a client matter.

The third instance is settlement agreements. These do include mutual clauses of confidentiality. We use settlement agreements at the end of a person's employment with KPMG, and they are an important tool in our HR toolbox to do that.

Q249 Sarah Champion: Would you use them in cases where there was alleged discrimination and harassment, or do you not make a distinction?

Anna Purchas: The vast majority of our settlement agreements relate to cases where we have had a restructuring in our organisation or cases of underperformance. Typically through our performance management processes, we might identify somebody who is not performing as well as they have done in the past or in comparison to their peers and we would talk to them to find out what was up. It might be that there is a personal matter that we can help them with. It might be that there is a development point and they go on to an improvement plan and we help them get back up to the standard they usually are.

Sometimes they say, "Actually, I do not want to be at KPMG anymore. I do not want to be an accountant. I want to do something else". Then we might go into a protected conversation with them and explore the right way to finish their career with KPMG, and that will involve a settlement agreement with mutual clauses around confidentiality and non-disparagement. That is important because the person would want to leave understanding that their line manager would not be talking about them and their performance in an inappropriate way after they had left.

Sarah Jones: I am going to reiterate a little bit how we categorise NDAs just to give clarity to what I will come on to say, so bear with me on that. Thank you. When we are talking about NDAs, as Anna says, we may be talking about the usual business confidentiality, which may well be in an employment of contract of some kind. We also refer to them in relation to the circumstances leading up to a settlement agreement or the fact of negotiations and terms of a settlement agreement. They have been used more generally to talk about a general restriction on derogatory or disparaging statements, also known as gagging clauses, which can appear in contracts of employment or in settlement agreements.

It is now official BBC policy not to use NDAs over the circumstances leading up to a settlement agreement or the fact of negotiation and terms of any settlement agreement, including discrimination cases. The only exception to that would require some level of board-level director approval. The reason we adopted that policy is this. We had not used



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NDAs in equal pay or pay-related sex discrimination cases in relation to settlement agreements for three years. We felt it was working so we decided to adopt that approach more formally. Any exception from it would require exceptional circumstances and, as I have said, director-level approval. No such exceptions have been sought since the policy was adopted.

We ended the use of gagging clauses—clauses prohibiting employees from making general derogatory or disparaging statements about the BBC—in 2013, and removed them from employment contracts and settlement agreements at that point.

We do continue to use confidentiality clauses in relation to both some sensitive issues and in relation to somebody's ongoing work at the BBC as an employee, as you would expect.

Q250 Sarah Champion: Thank you. You gave the example of cases of sexual harassment or gender pay discrimination. Would you also be excluding other forms of discrimination, such as maternity discrimination?

Sarah Jones: Our policy is across the board. It relates to every form of discrimination. In practice, we had not used confidentiality clauses over circumstances leading up to settlement since December 2016 with the exception of two TUPE settlements where there was a third party involved, which were nothing to do with harassment. When we looked at those statistics, we decided to formalise the policy.

Q251 Sarah Champion: Larissa, may I ask you about your use of NDAs, specifically looking at discrimination, harassment and bullying cases?

Larissa Reed: We have not had the use of any settlement agreement for harassment or bullying cases where that is the primary cause. We have had redundancy situations where somebody, following the restructure, has said that they felt they were discriminated against. We have a situation where we have a panel that consider the use of any settlement agreement, and that has got the section 151 officer or representative, the monitoring officer and the head of HR. If there is any case of any sort of discrimination or anyone has said that there is discrimination, that is reported to the executive leadership team—anonymised—so we are able to look into that. Because there has to be a business case and the person who is subject of this agreement has the option, either through a workplace representative, the numerous workplace forums or through their trade union, to actually present and say, "Actually, it is not this; it is this", we know then that it is out in the open before an agreement is settled.

What we do not know is where people feel that it is not worth it, so they go through a redundancy and maybe have an agreement. We do not now use settlement agreements for redundancy. We did, but we would not have known then whether that was the case when they left the organisation never having said how they felt.



Q252 **Sarah Champion:** Brighton and Hove has been a leading light in the way that it is handling this. How do you monitor your effectiveness on the changes that you have made?

Larissa Reed: We have reports coming in to the executive leadership team. Any complaint that has any of the protected characteristics is reported and has senior HR oversight. I am part of the executive leadership team and we have executive leadership team champions for all of the workers' fora. It is no surprise that I am the champion for the women's forum, and I know that people come to the forum as a safe place. As the executive leadership team champion, I am able to take forward things that do not feel right. Because of the seniority of the people on the compensation panel and because they come from different parts, it would be very difficult to have something slip through the net, as well as because of the reporting we do. Yes, it is kind of you to say that we are a leading light but I always think that we still have more to do.

Sarah Champion: That is why you are leading, because you understand that.

Larissa Reed: One case is too many.

Q253 **Sarah Champion:** John, can I ask you the same question?

John Rumney: Yes. The council has confidentiality clauses in all of its contracts of employment. That is mainly to do with the sensitive information that a lot of council workers will get, such as social work.

In terms of ending employment, settlement agreements are used. They do contain the confidentiality clause but, in all cases, it is confined to the terms of that settlement agreement itself. There is no prohibition on an employee who has left the organisation disclosing how they felt about how they were treated. We have had one settlement agreement in the last five years where that confidentiality clause was expanded but it was really just to repeat what was already in that employee's contract of employment as a reminder not to disclose confidential sensitive information that they were likely to have gained during their employment.

Q254 **Sarah Champion:** Can I come back to Anna? You said that in certain circumstances you will have confidentiality clauses in there and you will also have non-derogatory clauses in there. How do you ensure that the employee understands what the limits are on that? We have heard a lot of evidence of people being terrified to even report to family members. How do you explain to workers what the limits of those clauses are?

Anna Purchas: We have really clear processes when we are thinking of using a settlement agreement. First of all, the majority of my HR function cannot issue a settlement agreement; it is just a small team of my professional lawyers who have the authority to do that in certain circumstances. If we are in a situation where we are using a settlement agreement, the employee has funding from us to contribute towards the



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costs and has, through that, independent legal advice to help them understand the terms of the agreement and what they are signing up to. That is really important and we would never enter into a settlement agreement if we were not entirely comfortable that the employee had had that independent advice.

Q255 Sarah Champion: Have you had any kickback that makes you think that employees did not understand?

Anna Purchas: In my experience as head of people, no, I have not had that. We do obviously monitor the number of settlement agreements that we issue. I have a pack that goes to my board regularly of information around staff leaving the firm. Over the last few weeks, partly in thinking about this Committee, we have added in additional disclosure around the number of settlement agreements issued, if any, and we will be reporting that on a quarterly basis. I know my board will hold me to account for that.

Q256 Sarah Champion: My final question is this. All of you use quite a light touch when it comes to NDAs. Have any of you found that that has in any way made it more difficult for you to settle cases? Has using a light-touch approach to NDAs in any way hampered your ability to settle cases?

John Rumney: I do not think that it has. The reluctance on the part of the employee to take advantage of the fact that they are not restricted in what they can say may be down to them wanting to protect their own reputation and the fact that they know that it is reciprocal in that, if they were to make disclosures to any outside bodies, the council would have an opportunity to respond.

I would just come back on the point that Anna made about contributing to the employees receiving advice before a settlement agreement is completed. In my previous life working as a solicitor in private practice, when an employee came to me to get advice on a settlement agreement, I found that their mind had already been made up. Mentally, they had moved on from that possibly unpleasant situation at work. They were not necessarily interested in the advice I would give them. They needed to get it signed by me because that concluded the process.

Larissa Reed: If somebody does not want the non-disclosure part of that settlement agreement, we will always look at that. We have never had somebody who did not want it, and that is partly because of that feeling of protection both ways: that we might go to their future employer and say something, although the law would stop us doing that. We have not found that it has stopped us. However, for people who are not happy with it, if you are exiting the organisation through anything other than choice, you have the right to go to a member appeal. The fact that we have other things that are safeguards means the people who are going through that process are the people who are happy to do so, and there is the opportunity for them to say they are not happy in quite a few fora. It has not caused us any problems at all.



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Sarah Jones: No, not so far. You could imagine a situation in which you are not just looking at the relationship between the employee and the employer but you may also be looking at the relationship between employees. I could imagine a situation in which allegations have been made against somebody where, if there is an individual responding, that might potentially raise concerns about a lack of confidentiality. Somebody makes an allegation about their manager. The manager says, "That really is not what happened. What happened was this". You investigate it, and the manager says, "This is all very well, but you are going to allow that employee to go out and say what they will, and the BBC is not going to respond because we do not respond, by and large, to individuals. Who is going to respond to my behalf in that situation?" I could see that happening. It has not happened so far, and we would look at that if it came up.

Sarah Champion: Anna?

Anna Purchas: No.

Q257 **Jess Phillips:** My questions are specifically about the BBC. You said in your written evidence, and you have also said here today, that the BBC announced an end to the practice of using gagging clauses in 2013 and states that confidentiality clauses have not been used when settling equal pay or pay-related sex discrimination cases in the past three years, except in some exceptions. You have already said that that exception has never been used. You said earlier that since you changed those exceptions, that exception, going to a board level, has never been triggered.

Sarah Jones: What I said was that more recently we have extended that as a matter of policy, but we put a provision in that, if there was an exception to it, if you wanted to make an exception to it, we would have to go to board level to do it. That is relatively recent. What I also said was in the last two years there had not been settlement agreements stopping people talking about the circumstances leading up to the settlement, with the exception of the two TUPE cases I mentioned, which were nothing to do with discrimination of any kind. Sorry, it is quite complicated.

Q258 **Jess Phillips:** I understand. It suggests that the BBC has continued to use gagging clauses after 2013 in some cases. Would you agree with that statement?

Sarah Jones: No. It depends what you mean by "gagging clauses", which is why, right at the outset, I thought it would be helpful to try to distinguish between different kinds of confidentiality. It is really common in contracts of employment to have a broad, "You cannot say anything derogatory about the employee at all". It is common in some places to have those in settlement agreements too. That broad kind of clause has not been used since 2013.



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Q259 **Jess Phillips:** Would you stop the women involved in the equal pay cases talking about them?

Sarah Jones: No.

Q260 **Jess Phillips:** In the settlements.

Sarah Jones: No.

Q261 **Jess Phillips:** Do you consider the settlements that have been made in the equal pay claims at the BBC—the most famous one being the Carrie Gracie one—were settlements made on the grounds of discrimination?

Sarah Jones: I will not talk about an individual, but if a case is made on the basis of equal pay, then it follows that that is a gender-based reason, and I would describe that as pay-related discrimination in the sense of equal pay. It does not follow that all of the settlements we have made with people who have made complaints about their pay fall into that category, because pay can be unfair as between a man and a woman or, of course, a woman and a man, for reasons that are not related to gender but that nonetheless we think we need to correct.

We have made adjustments in those cases. We would describe those as paying people unfairly, perhaps for historic reasons of some kind but not gender-related, and they may take a different view. They may say, "I do not agree with your categorisation". They are perfectly at liberty to say that, because we have not put any clauses to stop people talking about those arrangements or agreements in the last three years. If somebody came up to us and said, "This is more than three years ago; can I talk about it?" the answer would be, "Let me look at it, but almost certainly yes".

Q262 **Chair:** Why do you think people feel they cannot talk about these things?

Sarah Jones: First of all, a lot of people clearly feel they can talk about it,⁴ because there has been a lot in the press where people have spoken. It is the case that, if people have an ongoing relationship with the BBC as presenters, we would not expect them to talk about it while they were presenting a programme, because we have duties of impartiality and our editorial policy guidelines would apply to those presenters in the same way they would any particular interest.

Q263 **Jess Phillips:** Do you think that you would have to get on somebody who was pro-unfair pay?

Sarah Jones: No. A presenter should not be talking about their personal experiences in their capacity as a presenter, but they might very well be asked to come on as a contributor, and they could certainly talk to another television programme about it or talk to a journalist who would write about it. We are talking about BBC output, which is really quite specific. My experience—and I do not think it is unfair—is that those people have had a voice elsewhere when they have wanted one, but not when they are sitting presenting our programmes. That is true.



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Q264 **Jess Phillips:** It has been suggested by BBC women that the BBC continues to use strict confidentiality clauses to silence complainants on matters that go beyond protecting trade secrets. How do you respond to this suggestion?

Sarah Jones: I have described what our settlement agreements do in quite a lot of detail this morning. I absolutely stand by what I have said on that, and if anyone has a concern that something has happened that is not in accordance with that, I would absolutely look at it and address it if that is the case.

Q265 **Jess Phillips:** In any settlement agreement at the BBC, apart from in these extreme exceptions, which would go to board level, generally if you were sexually harassed at the BBC—I recently gave a speech there and was told of two cases while I was there—or if felt bullied or harassed or felt that you were marginalised for any reason, you would be more than happy for them to go out and speak about that.

Sarah Jones: It certainly would not be the subject of a confidentiality clause in a settlement agreement.

Jess Phillips: Okay, good. I am very pleased to hear it.

Q266 **Eddie Hughes:** I am going to talk about schools instead, for both councils. You have informed us that relatively high proportions of your settlement agreements relate to schools. Do you have any concerns about the high use of such agreements by schools? For example, do they make it easy for head teachers to get rid of teachers, and could they be used to circumvent proper disciplinary or other procedures?

Larissa Reed: The issue that we have is that, under the local management of schools, the governing body decides what to do, and although we are the employer we have to abide by that school's decision. What we try to do is influence and offer support and spend a lot of time with head teachers talking about why they want to do this and other options, but ultimately there is a mismatch there, because if you come to work at Brighton and Hove City Council as a teacher or as a housing officer, potentially there could be a difference in the process that you go through. It is something that does cause us some concern.

Q267 **Eddie Hughes:** You say school or housing, but in 2017 it was 25 out of 29. Is that right?

Larissa Reed: Yes. What I am saying is that it is different. People might think that they work for the city council as a teacher or as a non-teacher, but actually it is different and that is something that we do think would be good for this Committee to look at, because as the employer we can strongly advise and we can strongly influence and give all the reasons but, ultimately, under the local management of schools, we cannot say, "No". The legislation says that the school governors determine the appointment and dismissal of staff at maintained schools and the local authority has to implement the decision.



Q268 Eddie Hughes: I accept they have to implement the decision, but given the fact that you have said you have close, detailed conversations with the governors and so on, then do you feel that there is a chance that the head teachers could be using that approach in order to dismiss teachers and circumvent other processes?

Larissa Reed: We found no evidence that it has, but your question is "Could it?" and the answer is "Yes".

John Rumney: From my perspective, it has been noticed that about 85% of the settlement agreements that I prepared in the last five years related to employees in schools. My understanding of the reason behind that is that, in circumstances where a head teacher has a poorly performing teacher, the mechanism for supporting them to improve their performance can take a very long time. They would have an informal period of support, followed by a more formal period where they would be monitored and supported, and then, if they did not make the grade, notice would be served, and that would take an academic term. It would expire at the end of that term.

If a head teacher is faced with an employee who is not performing, they would need to consider the pupils who that teacher is in charge of perhaps suffering for an entire academic year before a more able or better performing teacher could be put in place. On the one hand, it looks like an easy way out—we will offer them a settlement agreement and we can replace them quickly—but teachers themselves may not want any formal monitoring period appearing on any reference or in their employment history, so if they are faced with an informal performance improvement plan, let us call it, then quite often they would approach the head teacher and say, "Look, it is not working out. I do not want formal performance management on my record; I am prepared to leave". It is advantageous for that teacher to start afresh elsewhere, having perhaps learned the lessons from where they have been.

Q269 Eddie Hughes: It is that last caveat that was really troubling me: the idea that we would then effectively move a teacher on, you said, so that those students do not have to have the poor-performing teacher for an extended period of time. All you do is move that problem, surely, to another school.

John Rumney: You do. I have spoken to a head teacher about that practice, and we talked about the recycling of teachers who maybe were not up to the mark. As an alternative to staying put and being performance managed to achieve an improvement, these teachers may well have learned the lessons already: start afresh knowing what is expected of them at their new environment. To a certain extent, the teachers will have learned. They may well be better equipped to start afresh elsewhere, but it does mean that the pupils who may have suffered do not suffer for as long.

Q270 Eddie Hughes: That covers the circumstance under which it might relate



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to poor performance, but let us say it related to something else—to some form of harassment. Are there any safeguards in place that would stop a teacher being moved on, let us say, for those reasons, and it would be covered by an NDA and both parties seek to close it down because, actually, “It is easier, it is not my problem then and I can move it on to another school; it is their problem then”.

John Rumney: As Larissa said, there is not a great deal the council can do.

Q271 **Eddie Hughes:** Except for the fact that you are closely involved with the school in those conversations.

John Rumney: If a complaint of discrimination was received, then most of the schools would receive HR advice and guidance from the council. Some schools are not required to do that; they can source their own HR guidance. If they did, then it is the council’s policy to have those complaints investigated. Whether the school acted or not, that would be the advice that was given.

Larissa Reed: Our concern is that if you are coming in at the end, at the discussion point, and you are told it is poor performance and there is not a performance management panel or that person has not been supported to improve their performance, it could—and, as I say, we found no evidence that it has—mask some other form of reasoning, because there has not been a process where someone has—

Eddie Hughes: There is no evidence to demonstrate that.

Larissa Reed: No. It is quite easy then, and that is our concern. As has been said, we can only advise. I have had personally one experience where a member of school staff has come to the women’s network for support, and we were able to provide the support through us and through the union to help that person. But it is something that they have chosen to do, whereas in the other parts of the council, if it was poor performance, we would not just be able to do a settlement agreement on poor performance. We would have had to have demonstrated that we have managed that performance to the best of our ability and there really is unlikely to be any improvement, because what we feel is, if you do not support someone to improve that performance, they can take that performance elsewhere, and they will never get that support to improve. At Brighton and Hove, we feel very passionately about developing all of our staff.

Eddie Hughes: That head teacher autonomy feels a bit scary, given the stats.

Q272 **Chair:** I just wanted to move on to some of the things that we have been talked to about, in terms of practical ways we can move forward. The Equality and Human Rights Commission has suggested that the use of NDAs should be approved at board director level. We have talked a little bit about this this morning, but I was really interested in getting your



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direct response to that, so that you made sure that they are not being used improperly and not being used as a way to cover up discrimination by calling it poor performance, for instance. What do you think about that, Anna, in the context of your organisation?

Anna Purchas: We would never use a settlement agreement in place of an investigation or instead of following disciplinary procedures that come out of any investigation. If anybody raises a complaint at KPMG, they can do that in three ways. They can talk to their line manager or HR. They can use our independent whistleblowing hotline, which can be anonymous. They can use our “speak up” values helpline, which is a way of calling, if you want to discuss something, to say, “I do not know what to do next”. We have trained people who manage that.

Q273 **Chair:** I am specifically talking about oversight at a very senior level. You are a partnership, so your key people are owners of the firm, so you have quite a lot of very powerful people within your organisation. Would oversight by the board not help make sure they are not abused?

Anna Purchas: What we have introduced is that the board has full disclosure on a quarterly basis of all settlement agreements that we are using, if any. They hold me to account for those.

Q274 **Chair:** Every quarter the partnership will see every single agreement that has included some sort of confidentiality gagging clause.

Anna Purchas: The board has full disclosure of the settlement agreements that we have used in that quarter, if any.

Q275 **Chair:** What do you mean by “full disclosure”? Sorry, I do not understand that term.

Anna Purchas: The numbers and the reasons behind them.

Q276 **Chair:** They will see all of the information.

Anna Purchas: Yes.

Q277 **Chair:** They will be able to pick up on repeat offenders—people who have repeatedly had allegations made against them that have led to people exiting the business.

Anna Purchas: If we did have any repeat offenders—and we have not had any in my experience as head of people—I would certainly be identifying that; my small employment law team would be identifying that first. It would not need to get up to board level.

Q278 **Chair:** You would have caught it.

Anna Purchas: Absolutely.

Q279 **Chair:** Do you think that perhaps some more of your competitors should be adopting the approach that you have, given what we read in the newspapers?



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Anna Purchas: I cannot comment on what my colleagues at other firms should do.

Q280 **Chair:** Do you think what you do is a usual practice?

Anna Purchas: It is a very appropriate practice, and I want KPMG to be at the forefront of best practice.

Q281 **Chair:** Do you think what you do is usual or unusual in accountancy fields?

Anna Purchas: I cannot say. I have always worked at KPMG, so I cannot say.

Q282 **Chair:** Sarah, how about you? Are all your NDAs or confidentiality clauses taken up to your board?

Sarah Jones: All settlement agreements go up to senior management, RemCo, which I sit on alongside the HR director and the deputy director general. Before they are signed, the mandate is agreed on the basis of the circumstances.

Q283 **Chair:** Does that include non-derogatory clauses as well, or is that just in everybody's contract?

Sarah Jones: As I discussed at the outset, we have not used a clause that prevents somebody talking about the circumstances leading up to their settlement agreement since December 2016.

Q284 **Chair:** But a non-derogatory clause is different, is it not?

Sarah Jones: They have not been included in contracts or settlement agreements since 2013.

Larissa Reed: We have the compensation panel, which first of all looks to see whether a settlement agreement or a mutual termination agreement, which has many more rights for the member of staff, is the appropriate way. Any settlement agreement is shared with the chief executive, and then we have reports, not on the individual, coming to the executive leadership team. Any complaint of discrimination, whether it leads to anything, is shared with the executive leadership team, and what that then does is enables us to cross-reference, potentially, something that happened a year ago and then whether something is going to happen in a year's time. Our HR colleagues do that. There is senior oversight.

Q285 **Chair:** You changed your practices as a result of identifying, back in 2013, that you had a real problem in terms of a very high number in comparison with other authorities. What was driving that high number before that has now changed?

Larissa Reed: The use of agreements for everybody that went for voluntary severance. If somebody went for voluntary severance, they automatically had a settlement agreement. We felt that was unnecessary,



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and so that was one of the reasons that it was stopped. We also had a number of pay issues that we were using those for, and that was felt to be inappropriate also.

Q286 **Chair:** It was unnecessary overuse.

Larissa Reed: Yes.

Q287 **Chair:** Still your figures are around 30 or 40 a year. I am going to be really unfair and ask whether you are surprised that an organisation as big as the civil service, with 250,000 people—I presume you do not have a 250,000 people.

Larissa Reed: We do not.

Q288 **Chair:** You are probably about 1% the size of that.

Larissa Reed: We have about 7,000 employees, including schools.

Q289 **Chair:** I do not know which figures to use here, but you have a comparable sort of level of use of NDAs to the civil service.

Larissa Reed: Yes.

Chair: As your little council in Brighton and Hove, as wonderful as it might be.

Larissa Reed: A very large council.

Chair: You are a unitary, are you not? So yes, you are.

Larissa Reed: The thing that surprised me when I first started was that you presume that settlement agreements happen for people who leave the organisation, and when we have done things we have settlement agreements and people stay within the organisation; they do not exit. What we are doing as an organisation now is looking to see why we have this. What we want is for staff to feel protected. Especially if they are still within the organisation, we want them to feel that they have that piece of paper, so they can say, "No, this is what it was". We also need to continue to challenge about the appropriateness of using them, and certainly we would be open to any advice and guidance that the Committee could give us.

Q290 **Chair:** John, what about you in terms of reporting to the board?

John Rumney: Yes, we are small, by any definition. All the settlement agreements come through myself or my colleague, so we would notice any trends. On top of that, there is heavy trade union involvement in the council, so, again, if there were any particular patches where there were recurrent problems, they would be flagged up. We are intending to report to the six-monthly corporate assurance board meeting the number of settlement agreements concluded in that six-month period, together with the categorisation: what was the basis for that agreement coming into existence?

Q291 **Chair:** We are desperately running out of time, and I just want to get a



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nod or a shake of the head on a couple of ideas. Should employers have to report the number of NDAs that they have agreed on an annual basis, centrally, so that people who are not like you—you are really thinking about this and trying to do the right thing or even have duties put upon you by others—stop misusing them or overusing them?

John Rumney: Yes, helpful.

Q292 **Chair:** I have two nods here. How about this end of the table, because you have competitive advantage, potentially? Just go to your clients to say, “We are doing a really good job”. Is that something that is useful?

Larissa Reed: Transparency is always useful. You would have to recognise that the number of settlement agreements you use does vary, for example, due to the number of restructurings you have had in a year. There are some drivers like that, which, without providing explanation, might make the information not quite as useful as it might seem at first.

Q293 **Chair:** Do you think you, as a commercial employer, have different pressures in terms of your clients’ expectations versus somebody who is in the public sector, in terms of confidentiality and therefore maybe using NDAs in that way?

Anna Purchas: Certainly we do around client data and access to confidential data, but that would not normally be dealt through a settlement agreement. That would be dealt through in other ways.

Q294 **Chair:** Potentially, as long as you could put a footnote to it to say, “We have had a restructuring”, you could make that information transparently available.

Anna Purchas: You could share the numbers that were in relation to restructuring, yes.

Q295 **Chair:** How about the BBC?

Sarah Jones: The question is whether it is useful. It is interesting but it is not the most useful information, because what you really want to know is what kind of NDA you are talking about. If what you are trying to do is change the culture of an organisation—and I hasten to say I that I am not talking about the BBC—in which people are using NDAs instead of investigating and addressing harassment and discrimination, counting the number of NDAs will not achieve that. All that will do is identify the number of agreements in which there were NDAs, which might indicate it but might very well not, because it would be standard practice to include an ongoing obligation in relation to confidential information that you have acquired during your work at an organisation to extend beyond that. Probably most settlement agreements say, “Please keep confidential information you have had that is confidential”.

Q296 **Chair:** What about if it was an agreement that was specifically drawn up that related to discrimination?



Sarah Jones: That is a more interesting question and probably a more informative one.

Q297 **Chair:** Okay, so you are not saying “no” to that. We know there are a significant number of women leaving work because they get pregnant and feel they have no option but to leave work, which may not be formalised as discrimination because an investigation may not take place. Again, you are good employers; you want to showcase yourselves. Should we get all employers to report maternity retention rates, so that we can see how many women are actually coming back to work—I know accountancy firms work really hard on this—so that you can actually show the success that you are having and perhaps encourage others to do better?

John Rumney: It may identify trends. The information would need to be precise, and there can be many reasons why women may not return to work or may return to work for a short period and then leave. Provided the information was precise enough, then certainly it would identify problems.

Larissa Reed: We are very pleased that we only had 3.3% of people on maternity leave leave in 2018. With all of these things, we would also be really keen to do some work around protected characteristics because that would give us trends. It could be women on non-disclosure agreements: are there more women? Are there more people with disabilities? We would be really keen to be able to do that, but we would want it also to shine a light on other areas, so it is not just a blunt tool.

Sarah Jones: It would be a very interesting idea. The relevant statistic, if I may say so, is not women returning to work, because many women return to work in order to get paid for their accrued holiday. The statistic of how many people come back from maternity leave does not really give you the information that will be useful. The information that will be useful would be how many women come back from maternity leave and are still working with you a year on. That is a question that would be very interesting and actually an important question to look at, because you could potentially improve matters by doing that.

Anna Purchas: Yes, I completely agree. It would be very interesting to disclose maternity leave retention after a year, and probably paternity leave and shared parental leave as well.

Q298 **Chair:** We will use your advocacy for those in our report, I am sure. I have a final question: what kind of support do employers need to make sure that, if they do use confidentiality clauses, they do so responsibly and they think about it as much as all of you have? Would you welcome some standard words setting out types of disclosure that confidentiality and non-derogatory clauses cannot prevent, or a template? Just quick-fire, what do you think would be useful to help more employers do the right things?



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Sarah Jones: Standard wording would be really useful. I have seen the SRA has put out some standard clauses, and we are definitely going to go to have a look at those. Probably less legalese and a bit more plain English is what is required.

Q299 **Chair:** Anna, do you have any other ideas?

Anna Purchas: I agree. I am a large employer and have the benefit of a large HR team. Clarity for smaller businesses would be a very good idea.

Larissa Reed: We need more guidance on or more information for small organisations on the use of alternatives like mutual termination agreements, which in a lot of cases have the same benefit for the member of staff but also give them the rights that they may lose under the settlement agreement.

John Rumney: I would agree with all of those suggestions. In addition, I am aware the Law Society or the Solicitors Regulation Authority are looking at putting some standard advice to be handed to employees when they take advice on the settlement agreement itself. That would go some way to ensuring that they are fully aware of what they are signing and what its restrictions are.

Chair: You have all given us some fantastic food for thought here. It is obvious you have thought about this a lot and it has been incredibly helpful to hear from you. I know that coming in front of a select committee is not the way most people would like to spend their Wednesday mornings, and I hope, whilst we have been robust with our questioning, that we have not been too robust. Certainly we have learned a lot from your experience and are very pleased to have done so. Thank you very much.