

Women and Equalities Committee

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

Wednesday 6 March 2019

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Members present: Mrs Maria Miller (Chair); Tonia Antoniazzi; Philip Davies; Vicky Ford; Eddie Hughes; Jess Phillips; Mr Gavin Shuker.

Questions 300–409

Witnesses

I: Debbie Alder, Director General for Human Resources, Department for Work and Pensions; Sue Coe, Senior Policy Officer, Equality and Strategy, Trades Union Congress; Jayne Phillips, Head of Employment Rights Unit, National Education Union; Ben Willmott, Head of Public Policy, Chartered Institute of Personnel and Development.

II: Emma Codd, Managing Partner for Talent, Deloitte; Tracy Vegro, Executive Director, Strategy and Resources, Financial Reporting Council; Professor Richard Moorhead, Professor of Law and Professional Ethics, University College London.

Written evidence from witnesses:

- [Department for Work and Pensions](#)
- [Deloitte](#)
- [National Education Union](#)
- [Trades Union Congress](#)

Examination of witnesses

Witnesses: Debbie Alder, Sue Coe, Jayne Phillips and Ben Willmott.

Q300 **Chair:** I would like to welcome our witnesses and everybody who is sitting in the Gallery, as well as people who might be watching online today. Today we are hearing evidence as part of our ongoing inquiry into the important issue of non-disclosure agreements in discrimination cases. This evidence session is an opportunity to hear from those with expertise in good practice with regards to human resources and corporate management, as well as a specialist adviser in the second session, who will talk more about the ethics and the legal side of things. Can I thank witnesses for being here today? I know how much it takes out of your diary and we are immensely grateful for you doing that. Before we start with our questioning, perhaps you can say your name and the organisation you represent.

Ben Willmott: Ben Willmott. I head up the public policy team at the Chartered Institute of Personnel and Development, which is the professional institute for HR and people development in the UK. We have 150,000 members.

Jayne Phillips: I am Jayne Phillips. I am the head of the employment rights unit at the National Education Union.

Sue Coe: My name is Sue Coe. I am the senior policy officer at the TUC.

Debbie Alder: Good morning. I am Debbie Alder. I am the director general of human resources at the Department for Work and Pensions. We employ 83,000 civil servants.

Chair: Again, I reiterate how grateful we are for your time this morning.

Q301 **Eddie Hughes:** Good morning. Why are confidentiality clauses typically included in settlement agreements, and do you have any concerns about the way they are used?

Debbie Alder: I might start at one end of the spectrum. I think you heard from a colleague of mine, Rupert McNeil, a few weeks ago. It is in an absolute minority of cases in the civil service that we have them. Since 2015, the DWP does not use confidentiality clauses. I am sure that my colleagues, as witnesses, will want to come in on that. Having worked in the private sector and then the civil service, one thing that I would pull out as different in the civil service is that there are other things in existence, such as the Official Secrets Act and the civil service management code, which pick up things about confidential information and how freely you would share it.

Sue Coe: I would preface my comments with the fact that we have not had the chance to undertake as detailed a consultation with affiliate



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unions as we would want to, and we would really welcome the chance to submit more information in writing.

From the consultation that we have carried out, drawing on what you said, there is just such a vast difference between sectors. We have unions that represent the civil service, where there is a vanishingly small number. In other sectors, we have heard that they are not always used for a purpose; they are used as standard and they are there in every settlement agreement, with no exceptions. Particularly in the retail sector, we are seeing that people are routinely subjected to terms and conditions that restrict them, during employment, from discussing their terms and conditions of employment. We are really seeing that they are used as standard across the board in some sectors.

Q302 **Chair:** Do you have any concerns about that?

Sue Coe: Yes, we do. Although, as we will probably get on to later, we do not support the outright banning of confidentiality clauses because they are sometimes used at the request of members, when we look at Me Too, that comes from a culture in which there is no discussion of discrimination or harassment that has taken place, and the blanket use of confidentiality agreements just adds to that culture.

Q303 **Eddie Hughes:** It seemed to be a little more fundamental than that. You were saying it was even restricting people from discussing their terms and conditions.

Sue Coe: Yes, that is what we have heard in terms of the retail sector. Equity has told us about the use of up-front non-disclosure agreements rather than confidentiality clauses.

Jayne Phillips: I would certainly agree. In our experience, pretty much every single settlement agreement that we see will have a confidentiality clause in it. Historically, they were there to stop employees discussing the amount of money they were getting under the settlement agreement. Understandably, employers did not want the employee or the exemployee to go to other people and say, "I left and I got £10,000," or whatever. They have evolved over time.

Q304 **Eddie Hughes:** Do you think it is mindful of the fact that those settlements were proportionally generous? For the sake of argument, let us say that somebody who got £5.57 would not want to shout about that, but if they got £10,000 for what seemed, on the surface, to be a relatively insignificant infringement or violation, or something like that, then of course, people might think, "This sounds like a lucrative business. Maybe I should make a complaint myself."

Jayne Phillips: Yes. We do not necessarily have a problem with a restriction on a discussion around how much money somebody has received; it is that as they have evolved they have become much more widespread. They are stopping people discussing what has happened in the lead-up to that settlement agreement. They are stopping people



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discussing the fact that there is a settlement agreement in place. That is where our concerns lie: that they are so restrictive now. They are not serving the purpose that they were set out to.

Ben Willmott: We have some data. There is a survey by XperthHR, from 2017 where 80% of employers said that they had signed at least one settlement agreement during the previous 12 months, and of those, 90% had said they had used confidentiality clauses within those settlement agreements. It is a very widespread practice.

One of the issues is that the terms of confidentiality will cover things such as intellectual property and confidential company information. There might be a non-disparagement clause and there may be something around the amount of the settlement. The concerns are where these clauses are used to prevent individuals from talking about issues in relation to discrimination and harassment, where their interests are not being served by that, and where it is preventing them from legitimately disclosing that in the public interest, where that is the case.

There is an issue around the guidance available to employers around where confidentiality agreements can and should be used and where they cannot and should not. We are developing guidance at the moment on that. We certainly think that there is a case for ACAS to expand its guidance on the use of confidentiality clauses in its guidance on the settlement agreements, so that they are not always used as a default and that there are clearer principles around their ethical and responsible use.

Q305 **Eddie Hughes:** Jayne, it has been suggested that NDAs can make it too easy for head teachers to get rid of teachers. What do you think about that?

Jayne Phillips: There is some truth in that, but it is not just restricted to the education sector.

Q306 **Eddie Hughes:** Let us focus on the education sector. That is true, so what do you think?

Jayne Phillips: One of the key problems that we face is the power balance that is there when one of our members has a settlement agreement put before them. That power balance comes from the fact that there is no legal obligation to provide a reference. If you go to an employment tribunal and win, the tribunal cannot order that you are given a reference. One of the key factors for a lot of our members when they are looking at whether they should sign up to that settlement agreement with that confidentiality clause is that they are trading their confidentiality for the fact that they will get a reference and they know they will get a reference. That power balance really has a significant impact on what that member decides to do.

Q307 **Eddie Hughes:** Where does the responsibility lie for making sure that they are used responsibly?



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Jayne Phillips: That is a very good question. Unions do have to play a part in that, but even with the union involved the power balance is not equal. The union's presence does not make it a level playing field, and part of that is the issue around references. One of the ways to make the use of confidentiality agreements and settlement agreements less attractive to the employer is for there to be a legal obligation on employers to provide references when they are asked to do so, because that is what most people want. When they are leaving their employment, they want to know that they can get another job, and that is very difficult for them to do if they do not have a reference.

Q308 **Eddie Hughes:** What role are the unions playing in terms of negotiating settlement agreements and confidentiality clauses in discrimination cases?

Jayne Phillips: We will always do our best to reduce the restrictions on a confidentiality clause. Ultimately, we are guided by our members and each case has to be looked at on a case-by-case basis. If we have somebody who really does not want to sign a confidentiality clause, we then have to decide whether or not we support them in taking that forward. In a case of discrimination, there are obviously other issues to bring forth; the fact of making those allegations public can be quite powerful. It is a case-by-case basis.

Q309 **Eddie Hughes:** Just so I am clear, under what circumstances do you think it would be justified to not support them if they did not want to sign a confidentiality agreement?

Jayne Phillips: It does depend on the case. If we had a straightforward unfair dismissal case, for example, with a good offer of settlement, then we may look to withdraw at that point, because not only have we got our own expenses of going to the tribunal, but we also have to remember that we could be at risk in terms of costs from the employer if we pursue a case in the face of what was a reasonable offer.

Discrimination is very different because, for some people, the ability to talk about it in public, in terms of talking about it in the employment tribunal, and to have a finding by a tribunal that you have been discriminated against or that you have been the victim of sexual harassment is very powerful and can be hugely beneficial to certain individuals. Other individuals just want to forget about it and get what they can and move on. It has to be on a case-by-case basis.

Q310 **Eddie Hughes:** Do you have any thoughts, Sue?

Sue Coe: Just to echo what Jayne was saying, we have heard from the unions that we have spoken to that they try when their members want it and push back to either get confidentiality clauses removed or to get them limited to the terms of settlement. It is always acting in a member's interest, because in fact quite often unions would want to publicise cases because they want those facts to be out there and they have a role in making that public, but they are always looking at what is in the interest



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of the member. We have heard from a number of unions, including the FDA, that in those cases where there is discrimination, quite often their senior members do not want confidentiality of the facts of the case.

Q311 Jess Phillips: Specifically to Debbie, as you said, we have already heard evidence about how things are handled in the civil service. The DWP evidence states that it has not used NDAs since 2015, which you have already alluded to. I just want to probe a little bit further as to what you mean by NDAs in that context.

Debbie Alder: I know one of the lines of inquiry of this Committee is about the balance of HR professionals and legal professionals drawing up agreements. In the civil service, the Government Legal Department handle all of those settlement agreements, whether that is a COT3 before an employment tribunal through to these tiny handful of non-disclosure agreements. The DWP has not used any legal clause that says, "You cannot go and do the following."

Q312 Jess Phillips: Do you still use confidentiality clauses around the terms of the settlement, so your £5.57 versus your £10,000?

Debbie Alder: No, we do not. There will occasionally be a story in the press that says, "DWP has paid X amount on a settlement."

Q313 Jess Phillips: You do not even do that?

Debbie Alder: No. There are a couple of things I would say. What we are striving to do, as are most employers, is to have the whole range of things in place before you get to that part. We have a confidential bullying, harassment and discrimination line that takes 700 calls a year. We have a mediation service, an employee advice provider that is external and strong trade union representation. It is trying to make sure that there are multiple routes for people to use. We have widened our definition of who they can talk to in confidence so that it feels less restricted.

The only thing that we try to make sure people are very clear about in our guidance is defamation of others. We have a duty of care to both parties in an alleged discrimination situation and we need to make sure that as an employer we are trying to deal with it through all the available routes available, not on social media.

Q314 Jess Phillips: In an example where a woman who is working at a job centre in Birmingham takes a sexual harassment claim against a visiting executive from Caxton House, she goes through all of these processes, such as mediation and everything that you mentioned—which is gold standard, I have to say—and she then decides that she cannot work there anymore, and you settle an agreement with her, would it be considered defamation for her to then speak publicly about the fact that somebody had sexually harassed her?

Debbie Alder: I am not giving evidence as a lawyer.



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Jess Phillips: I am not receiving it as a lawyer.

Debbie Alder: If you are naming an individual, where it is not proven, you are entering a different set of legal risk as an individual.

Q315 **Jess Phillips:** I do not disagree with you, and legally that is something that neither of us would know. That is fair. How would you stop that without telling them to do it?

Debbie Alder: I go back to the proactive piece here. In our guidance on our intranet, in terms of the guidance that would be given in that situation, that individual would get the support of the HR team when they go through the grievance or disciplinary process. We are and have invested in the training for the managers who are hearing those appeals, so that they can understand the issues that they are weighing up. At each stage you get that wraparound.

Our guidance is really clear: "Use this pretty broad network of people. It could be a colleague; it could be a trade union rep; it could be somebody in another Government Department; it could be somebody who is a loved one at home." We encourage people to share because we know that helps, but we do say, "Do not go and put this on social media."

Q316 **Jess Phillips:** Okay. I totally understand that—trial by social media and all of that—but presumably a settlement is not an agreement that it did not happen. The trouble is—and it is the same with all violence against women and girls—the idea that if something is not proven, it is not proven. In this instance that we are talking about, if you decide that this woman wishes to leave because that is the best thing for her and you decide to settle, there could be this idea that that means that it has not happened and therefore there is a defamation. Do you see the grey area I am talking about?

Debbie Alder: Absolutely. The only bit I am talking about is naming an individual.

Jess Phillips: So you could say, "A high-level ranking officer of the DWP"?

Debbie Alder: We have whistleblowing routes. Some of our mediation cases on discrimination actually come through the whistleblowing route in the first instance. We explain that if somebody wants to remain confidential that could make it harder to resolve their case.

Q317 **Jess Phillips:** Presumably, in this action there would be action against a person who could potentially be defamed?

Debbie Alder: Yes. I cannot give you a split, but of our grievances we see an equitable balance of those that are upheld and those that are not.

Q318 **Jess Phillips:** For example, in a sexual harassment case, if somebody had one upheld and you paid them money, you would consider taking action against a person?



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Debbie Alder: Yes, if it has been proven.

Q319 **Jess Phillips:** Do you think that the fact that your approach to NDAs—which I have to say is relatively admirable and not necessarily what we are seeing in the private sector or in other sectors—has stopped a number of cases going to tribunal, or has the approach affected the Department's willingness to settle cases where discrimination is alleged?

Debbie Alder: Employment tribunals ticked up when the fees for employment tribunals disappeared. We have about 100 employment tribunals every year.

Q320 **Jess Phillips:** Is that fairly standard across the years—100 tribunals?

Debbie Alder: Yes. We have about 100 employment tribunals every year.

Jess Phillips: Yes, put the word "employment" in. We are talking about the DWP.

Debbie Alder: I am sorry. Could you repeat your question?

Q321 **Jess Phillips:** Has it gone up or down since this new approach? Is it standard?

Debbie Alder: It is hard to say that it is related. The main tick up was when the fees structure was changed.

Jess Phillips: Of course, so that is an external factor.

Debbie Alder: Yes, absolutely.

Q322 **Jess Phillips:** You do not think you have seen any change in the number of people who either go to tribunal or bring discrimination cases since the change to your new approach?

Debbie Alder: No. What I would say is that since we have had a confidential bullying, harassment and discrimination helpline, which is since 2015, we have had about 700 calls every year.

Jess Phillips: That seems quite high.

Q323 **Chair:** Can I just ask a quick supplementary? Obviously, you are a huge organisation.

Debbie Alder: We have 83,000 people.

Q324 **Chair:** You have 83,000 people. To what extent can you solve your problem by moving people around your organisation?

Debbie Alder: That is a really good question. Sometimes that is the outcome. We have a really highly skilled mediation team. This is what I mean. NDAs are the last recourse of anybody. Whether people go directly to mediation, go through the confidential helpline and get some advice and signposting, or they end up going through a formal approach, one of the outcomes, if it is a situation where dismissal is not the outcome, is that you try to find a space for both employees to continue. In a large



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organisation, that is a possibility. That is the same in many disciplinary situations. Also, because we are part of the federation of the civil service, we might also see whether there is something suitable in a location that works for individuals but—

Q325 **Chair:** Since you have banned the use of NDAs, have there been more people who have been dealt with in that way or fewer?

Debbie Alder: I am not aware of that.

Chair: Is it possible for us to have that information? You can understand why we might be curious as to whether or not one solves the problem by simply moving people to another office rather than actually exiting them from the business.

Debbie Alder: I will endeavour to write back to the Committee on this. The reason why I am hesitant in saying that we can give you numbers is that sometimes that may happen and it is more likely to happen before it even enters any kind of formal situation, and we just would not have that data to track it.

Q326 **Chair:** Do you monitor that, though? There might be trends of people exiting.

Jess Phillips: Yes, they could be leaving specific teams.

Chair: The fact you do not have that data suggests to me that you might have an opportunity to monitor that in the future.

Debbie Alder: I love your optimism in our data systems.

Chair: I used to be a Minister in your Department; it is an excellent Department.

Debbie Alder: With 83,000 people, we are hiring between 6,500 and 8,500 people every year. We are rebalancing people from one product line to another, and they are moving offices all the time. Pinning down the reasons for people to move is difficult. They might have got married, changed location or just wanted to move.

Q327 **Chair:** Yes, but you would know whether or not those people were part of a disciplinary process or a complaints process.

Debbie Alder: Yes.

Chair: Okay, could you come back to us to confirm whether or not you are able to give us that data? It would be quite useful to know that.

Debbie Alder: This is for disciplinary cases where we have moved somebody?

Chair: Yes, where it is to do with allegations around discrimination and that individual is then moved.

Q328 **Jess Phillips:** Presumably on move you do a bit of an exit interview from Department. The person who ran my job centre recently has now moved;



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that was a good move for her. Do you do exit interviews as to why people are moving, so you could find out whether there was one bad area where nobody could bear to work with Alan or whoever?

Debbie Alder: Yes, but not naming Alan on social media, clearly.

Jess Phillips: No, Alan is an entirely nebulous and made-up person.

Debbie Alder: In terms of exit interviews, we do them when people leave us as an employer.

Jess Phillips: You do it then, but not on move?

Debbie Alder: No, not on move.

Q329 **Jess Phillips:** Thank you, Debbie. To everybody else, how do you respond to suggestions that banning the use of NDAs would deter employers from settling discrimination cases? We have some quite clear evidence from Debbie that it has remained relatively unbalanced with external factors affecting it up and down.

Ben Willmott: One of the key concerns that came out of our consultation with members was that, because these issues are quite often one person's word against another, the individual themselves may not want to report it in the first case. That could be for a variety of reasons including culture, which Debbie has already touched on. If they do want to report it, they may not necessarily want to go through a formal process of investigation and a grievance. If you ban the ability for individuals in those circumstances not to make a complaint or raise an issue, the danger is that those issues remain underground.

Q330 **Jess Phillips:** Let me push back on that a little bit. I totally hear your argument, and it is a well laid argument by activist groups, unions and employers. I have spent a lot of my career trying to improve the reporting systems in sexual violence, for example. Confidence in the system is part of the problem, along with trust and the balance of power, as you have said. If we made a really good system that sent the really strong message, "You are not going to have to sign away your confidentiality," might that not bring forward some better results? It will take a long time, and I understand that.

Ben Willmott: We should absolutely be aspiring to that. From an employer perspective, the culture issue is key. Do you have the right values and behavioural standards? Crucially, do you invest in training your line managers and supporting your line managers? If you do not have an employment relationship based on trust, people will not want to disclose; they will not trust the process. I completely agree with that.

Our members had mixed views on this, but the weight of evidence was that, even if you are the best employer ever and you do everything right, there will be issues where victims of harassment and discrimination will still feel that they cannot, for a variety of reasons, go through a formal investigation.



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Q331 **Jess Phillips:** I totally agree with you. It is a bit like hard-to-reach communities. People always tell me that women who have suffered domestic violence find it really hard to come forward. I have literally never found that to be the case. People come forward to me in Sainsbury's, because I have made it clear that I will listen to them and believe them. If the nation, the state, makes it completely clear that you will be listened to if you come forward, and that you are not going to be silenced like in all these terrible cases, Jayne, could that make a difference?

Jayne Phillips: It could. There would probably initially be some kickback from employers, who would say, "We are not settling." After a few kickings, to use the technical term, in the tribunal, they might start to think, "First of all, we need to deal with the culture, because we cannot keep ending up in the tribunal. Secondly, maybe we should go back to looking at settlement agreements as a way of avoiding anybody having to go to the employment tribunal."

Jess Phillips: This would be with no confidentiality?

Jayne Phillips: Yes, with no confidentiality.

Q332 **Jess Phillips:** It immediately switches the power. Sue, what are your thoughts?

Sue Coe: I agree with what Jayne has said. It is a cultural change that we need. We have seen what can happen in terms of numbers in the civil service where there is the will and the scrutiny, and if you start from the point of having to justify the use of NDAs rather than automatically using them. We would want to see policies retained at the member's choice, but we desperately need culture change in terms of the deadening effect that confidentiality clauses have on people being able to speak.

Q333 **Jess Phillips:** Would any of you ever suggest that a settlement agreement should be made in the case of rape? I mean if that was our police force's response because it helped people come forward. This is a scenario in which we have decided, as a nation, to do that because it is really hard to go through the courts. Would you suggest that the way to deal with this and to help more people come forward and get closure is to have some sort of quiet settlement agreement?

Ben Willmott: That is obviously dealt with by the criminal process and the CPS.

Jess Phillips: It is a broad philosophical question.

Ben Willmott: No, basically.

Q334 **Jess Phillips:** The answer is no across the board. Slater and Gordon have suggested that the use of more egregious clauses such as requiring an employee to withdraw allegations should not be permitted and only used in exceptional circumstances, such as where there is an admission that such allegations are untrue. That is what they said. Do you agree?



Ben Willmott: Our view is that there should be much better guidance around the sorts of clauses that should be used within settlement agreements. For example, you should never have a clause that could prevent someone from talking to a mentalhealth councillor or a therapist, for example. This is where we need more guidance to say what is legitimate in terms of protecting individuals' interests and particularly around public-interest disclosure. There is a real vacuum of guidance in terms of the principles around the sorts of clauses or provisions within a confidentiality clause that should and should not be used.

Jayne Phillips: I have not seen that many where people have been asked to withdraw the allegation. What we do see on a regular basis is "without any admission of liability". It is saying, "We are not going to admit to anything." That is not helpful. It is not helpful for the employee or the employer. There does need to be some restriction on settlement agreements and the clauses that are contained within them. The other concern we have is, if you ban confidentiality clauses, all that will happen is the nonderogatory clauses get beefed up. It is just confidentiality by the backdoor, or even the front door.

Sue Coe: We completely agree with all of that. At the risk of lining up with all the non-lawyers in the room, it has been suggested that clever lawyers will find ways, if particular clauses are banned, of beefing up other clauses.

Q335 **Jess Phillips:** Why are the clauses always on the side of the powerful, in this instance? Why is it not lawyers for victims putting in clauses that say things like, "We stand by everything that we said," or, "There is a problem." You are seeing now that I really am not a lawyer. It always seems that way around.

Sue Coe: It is a very lawyer-driven process, is it not? We would like to see explicit statements in settlement agreements around employees not being limited from seeking therapeutic support or legal advice and also clear statements explaining exactly what the scope is in clear terms. This is part of a wider cultural picture, where we know that four-fifths of women who experience sexual harassment will not come forward and report it. In terms of other discrimination, figures on pregnancy and maternity discrimination—

Jess Phillips: We are not just talking about sexual harassment here; we are talking about all discrimination. Disability discrimination seems to be one of the major ones.

Q336 **Chair:** Given that quantity of women will not come forward to make allegations around sexual harassment, why are we protecting the current system?

Sue Coe: I would not protect the current system. We have called for a preventive duty. This action on NDAs has to sit within wider cultural change. It cannot drive change on its own, because it is the apex of a pyramid of discrimination. We need to shift that culture with a



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preventative duty. We need a code of practice from the EHRC that hangs off that, which not only specifies the preventive steps but also can provide some clarity around the circumstances in which non-disclosure agreements can be used.

Q337 Jess Phillips: This is conjecture, but the main reason, I think, people do not come forward is because they think, "What is the point?" It is not necessarily that they are cowed or scared. They think, "What is the point?" In almost every single complaint I have ever taken about a non-disclosure agreement or about sexual harassment at work, it is not actually the perpetration of the issue that has been the problem; it is what has happened to them when they have tried to raise it. That seems to be the crux of the problem, and that is an apex. There does seem to be a huge pushback in trying to change that.

Debbie Alder: Can I just offer one observation? The wording around the actual agreements is normally lawyer to lawyer. We are reflecting, even in this conversation, that that can feel slightly impenetrable even to HR practitioners.

Jess Phillips: Yes, or to us.

Debbie Alder: Yes, to us, who are non-lawyers but who are informed. This could be one of the lines of inquiry for the Committee to look at. If you do have them in exceptional circumstances, do you have standard wording that is clear and that you can help support, as an employer or a local solicitor or whatever, and explain in a consistent way?

Ben Willmott: Can I add to that? We think that when legal advisers are giving advice on settlement agreements, they should also specifically be required to give advice on the terms of a confidentiality clause within that. We also think they should be asked to sign a statement certifying that they have given advice on the settlement agreement and the terms of the confidentiality clause. The other thing is that we think there is a case for advice to be given by legally qualified advisers who are subject to oversight from a body such as the SRA, which can ultimately disqualify them from practice if they are found to have breached their professional standards. There are things around legal advice that could happen to make things more rigorous.

The other thing is sign-off and governance, but maybe we will come on to that later, in terms of who is signing these off. What level of responsibility and what level of oversight is there within an organisation?

Chair: Hold your horses on that one. We will be coming to it shortly.

Q338 Tonia Antoniazzi: My questions are about the employer handling of discrimination complaints. I wanted to ask this. Can poor practice in the handing of discrimination complaints increase the use of settlement agreements and non-disclosure agreements?



Ben Willmott: Yes, absolutely. Our professional standards require that any allegation of harassment or discrimination is treated with the utmost seriousness. We have a code of conduct that we hold members to account to if they are found to have breached that. However, this goes to that wider issue. In terms of whether action is taken, the complicating issues are culture, context and leadership. Will a business or an organisation invest in its people managers? Do they train their people managers? Do they support their people managers to behave in the right way? If they do not, there will not be the trust. Whether a complaint is about sexual harassment, discrimination or a mental health problem, an individual will not disclose if they do not trust the culture of the organisation.

This is why you have these problems in organisations where you do not have HR at director level and you have a chief executive who is driven purely by financial outcomes, who is not investing in the people management side of the organisation. You will have these problems in those sorts of businesses. People will not disclose, because they will not trust that they will get a fair hearing. You need to look at it in the round, but we should absolutely be ensuring that there is better professionalisation around people management within organisations.

Jayne Phillips: What concerns me is that it is almost inevitable that the person who has made the complaint is the person who ends up leaving that employment. That is what we experience on a regular basis. That does not make sense. If you are the victim of harassment or the victim of any kind of discrimination, why do you have to leave your job as a result? That is often because the whole situation has been badly handled by the employer. Sometimes there is a problem that HR will go on the defensive immediately when faced with a complaint, and not have that balanced view and not be there to look after the employee as equally as they are looking after the employer. The upshot is that, yes, poor handling does lead to more and more settlement agreements.

Ben Willmott: As the professional institute for HR, we have recently revised our professional standards framework to put a much greater emphasis on ethical behaviour and decision-making, highlighting the importance of good work, people being of fundamental importance to organisations and reinforcing the standards we expect in terms of a CIPD-qualified HR practitioner who can fairly represent the interests of both individuals involved in such an issue and the interests of the organisation. Professional practice around HR and people is absolutely crucial.

Q339 **Tonia Antoniazzi:** We have received evidence that discrimination complaints are rarely upheld by employers. Is this your experience and, if so, what is the impact of this? Has anybody experienced that?

Jayne Phillips: Yes, that is absolutely the case. Even with your trade union there presenting the case for you, even if there seems to be, in our view, pretty clear evidence that some form of discrimination has taken



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place, the outcome of the grievance is that the grievance is not upheld. That is regularly the outcome; it is more likely than not.

Sue Coe: Research on this has shown very low levels of satisfaction in terms of people who have come forward, particularly with complaints around sexual harassment.

Ben Willmott: I do not dispute that there are organisations where good practice is not being followed. The data does not show the organisations where there is good practice. I am not disputing that there are examples of poor practice, and of course we should be absolutely trying to improve practice. However, I would probably dispute that poor practice is commonplace. The complicating issues around culture, leadership and values mean that sometimes HR can be put in an invidious position. If an organisation is not investing sufficiently to train or support line managers, for example, or in the right policies and procedures, that is where you get these types of problems happening.

Sue Coe: That is where we come back to the preventive duty. That is what we need: something that focuses employers' minds on what needs to be done to prevent harassment and discrimination happening. We also need to invest in those preventive mechanisms. Unless we move in that direction, we will still be talking about these cultures where complaints are dealt with poorly and that not only affecting the individual but everybody else in the workplace who can see how those complaints are being dealt with and will be put off from making their own.

Ben Willmott: Better enforcement is absolutely critical.

Debbie Alder: The one point I would add is about the role of leadership. I am a head of HR, but I am also an executive on the executive team. To Jess's point earlier, in sharing our stories about our own experience as senior leaders, you can really give weight to the kind of values and culture you are trying to set. I am hardly unique as a senior woman who has experienced harassment in their career. If you share those stories, it does at least help shift this and people will feel they can speak up.

Q340 **Tonia Antoniazzi:** Talking about additional scrutiny, then, the CIPD evidence states that some of its members would welcome additional scrutiny. What is additional scrutiny? What does it look like? You have spoken a bit about that, Ben.

Ben Willmott: We think there is a stronger role for the EHRC. They should have more resources and powers to enforce the existing provisions of the Equality Act in relation to workplace practices.

Q341 **Chair:** Like what?

Ben Willmott: It might be being able to investigate a complaint proactively.

Q342 **Chair:** Does it not already have those powers?



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Ben Willmott: If you look at the Health and Safety Executive, for example, it can issue improvement notices and ultimately take enforcement action. That is what we want to see.

Q343 **Chair:** You think there is a deficiency in the powers of the EHRC rather than the EHRC is not using the powers it has?

Ben Willmott: There is a case for more resources to enable the EHRC to be more on the front foot when it comes to preventing breaches of the Equality Act such as harassment and discrimination.

Q344 **Chair:** It has not asked us for those resources as a Committee. What would those resources look like?

Ben Willmott: If you were going to look at this in a serious way, you would look at inspection powers.

Q345 **Chair:** It has extensive inspection powers.

Ben Willmott: Does it have the resources to go into businesses and inspect them? Let me take the example of the Health and Safety Executive. In theory, it has a power to enforce the duty for employers to conduct risk assessment for work-related stress and the causes of work-related stress, which in theory includes poor workplace relations and bullying, for example. That duty is not enforced at the moment for various reasons.

When it started issuing some improvement notices in 2003, I spoke to a HR director of the NHS trust in mid-Dorset. He had just received an improvement notice, and he said he saw it as a massive opportunity to deal with the culture in the organisation. What that improvement notice led to was a fundamental action plan to review the culture. It identified a bullying culture among consultants and a lack of resources among the nursing staff. What we are saying is, if you have those sorts of theoretical powers but they are not being used, I am not sure that a new duty is necessarily helpful. We should have better enforcement of existing regulation.

Chair: There is not a member of this Committee who would disagree with you on that, but we are not privy to the sorts of plans you have talked about for the EHRC.

Ben Willmott: If there were to be better scrutiny to prevent these sorts of issues, that is the sort of thing you might look at.

Q346 **Chair:** To press you on this, is the EHRC failing in its position at the moment by not using its enforcement powers?

Ben Willmott: Targeted enforcement action can have a disproportionate effect and encourage others. If it has the ability to do that, that can be a good shot across the bow for poor employers that are not taking these sorts of issues seriously. The area of oversight and enforcement is one that should be given more focus.



Sue Coe: If I may come in here, in terms of a preventive duty, if you had a duty where a failure to take specified preventive steps was in itself a breach of the Equality Act, that would free up the EHRC's hand in terms of not having to wait for individual complaints to come forward, when we know there are so many barriers to those. This would be something that would really tip the balance in terms of shifting those cultures and freeing up the EHRC's hand to take action.

Q347 **Tonia Antoniazzi:** This question is quite interesting. Should employers be required to keep records of the number and outcome of discrimination complaints and report them to an external body? If so, how might it work in practice? What could be the potential unintended consequences? Debbie, you touched on reporting earlier, did you not? You did not particularly have a system in place.

Debbie Alder: I am not best placed on NDAs, because we are not a mass user. I have some sympathy here, because it is the narrative around it that would be important for any statistics that are used. If I go back to a slightly broader definition of settlement agreements, there are many entirely legitimate employee-led reasons, rather than employer-led reasons, to reach a settlement agreement. A bald number without that context could potentially be unhelpful, but generally, as a direction of travel, transparency is a good way to show up as an employer, and it becomes kind of self-regulatory.

Tonia Antoniazzi: There could be categories of discrimination as well.

Sue Coe: You can see from the gender pay gap reporting the transformative impact of transparency. We need to build on that, particularly around looking broadly across discrimination, at things like retention rates of pregnant women and new mothers. It would be very interesting if there were transparency on issues like that, which cut into the heart of the drivers of the gender pay gap. There is something about transparency to the external world. When we talked to some of our members around whether internal transparency and reporting up to boards might be effective, there was some scepticism there as to whether that would drive the level of change and the level of reduction in confidentiality clauses that we have seen, for example, in the civil service.

Ben Willmott: Transparency is crucially important on this agenda. Our view is that there needs to be more holistic workplace reporting. There is lots of rifleshot reporting. There is obviously the gender pay gap reporting, which has potentially been transformational in some areas. You have the ethnicity pay gap reporting, and the suggestion that there should be reporting around maternity and retention rates. That is all good, but the problem is, in isolation, none of them gives you an overall picture of an organisation's culture.

CIPD's view is that there should be a much more holistic workforce reporting standard that looks at a whole range of workforce metrics,



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including reasons for absence, absence levels, reasons for leaving the organisation, disputes in the workplace, staff satisfaction data and the narrative around that to give it context. That should be reported annually in the annual report, so you then start getting much more transparency around how organisations really do invest in, manage and develop their people. If we are looking at reporting, we should take a step back and ask, "How do we do this in a holistic way that provides more meaning and more insight?"

Q348 Tonia Antoniazzi: How helpful is the ACAS code of practice on disciplinary and grievance procedures in promoting good practice? I know you spoke about it right at the beginning of the session.

Ben Willmott: We are broadly happy with ACAS guidance generally, and certainly around the disciplinary and grievance code. The area of guidance I was referring to was the guidance they have on settlement agreements. There is a bit of a gap. They refer to some practice around the use of confidentiality clauses, but it is relatively brief. CIPD is currently developing guidance for our members on the appropriate and ethical use of confidentiality clauses. We would absolutely support ACAS if they developed guidance in that area, and we would be looking to align our guidance with their guidance on settlement. That is the area where we think there is potentially a gap.

Jayne Phillips: Can I just come in on that? The ACAS code of practice is very good, but it does not deal with the particular sensitivities around dealing with discrimination complaints. That is where it perhaps falls short, because it will remind the employer, when faced with a complaint of discrimination, that a person might find it difficult to speak about it and that they might want to speak to somebody independent, but, at the same time, it will also give the employee some reassurance that is how their complaint is going to be dealt with. That is where ACAS's code of practice does currently fail a little bit.

Sue Coe: There is a real hole to be filled here in terms of the code of practice on harassment, which has been much talked about in the EHRC. That would be a really important addition to the existing guidance. I realise that it may take a while for this code of practice to come about, because it may be dependent on any legislation that is forthcoming. We would want to see the EHRC come forward with guidance in the interim.

Q349 Tonia Antoniazzi: Sue, would it be helpful to have a duty on employers to prevent discrimination?

Sue Coe: Yes. As I have said on multiple occasions, this is core to shifting the culture. The scale of what we have seen in Me Too demands a response that is proportionate to it. Making changes to non-disclosure agreements is helpful and it needs to happen, but the scale of Me Too and the scale of what we have seen rolling through industry after industry demands a response that transforms those cultures. This is silencing so many people not only in terms of sexual harassment but



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across the board. We need that cultural shift. We need a bold step, like that duty, to shift thinking and shift practice.

Q350 Mr Shuker: To the extent that it is possible to generalise, at what level of organisations are NDAs signed off?

Ben Willmott: It depends on the size and structure of the organisation, but our view is that ideally it should be signed off by an HR director, if an HR director is represented at director level. If not, it should be another senior director. If there are non-executive directors, a non-executive director should have sign-off accountability as well, or at least oversight of any such settlement agreement or confidentiality clause.

In terms of whether that happens, we do not have the data to know what the processes are around sign-off. That is the area of practice that we would be looking to make recommendations on so there is a clearer understanding that this does need senior-level accountability and responsibility for any use of such agreements.

Debbie Alder: In the civil service, where they are used, in a minority of cases, it is an accounting officer sign-off and a ministerial sign-off. It just goes to this point about transparency. In the private sector, do you need a NED or somebody outside of the executive team in addition to the HR director? At its worst, you could imagine a situation where there is undue pressure on a member of the exec, which you would hope a non-exec would be able to provide some balance to.

Q351 Mr Shuker: One of the suggestions we have received is to make it very clear that the expectation is that board-level sign-off should be occurring, not least of all because it speaks to the culture of the organisation, where issues like that arise. How else might employers be held accountable for their use of non-disclosure agreements?

Ben Willmott: One area we have been looking at is the remuneration committee. We have done some research that suggests the remit of the RemCo should be broader and should include issues around workplace culture. When decisions around senior remuneration are made, they should take into account issues of culture and whether or not there have been allegations or the use of confidentiality clauses for these sorts of issues. The UK Corporate Governance Code has been revised to recommend that the RemCo has a wider remit to look at wider workforce issues when making recommendations on executive pay. That is another part of oversight and accountability that could be improved.

Jayne Phillips: I act for people who work in education, and one option in the education sector is to require employers to report to the Secretary of State. That could happen in all public sector organisations so there is that accountability at that high level.

Sue Coe: We have seen what impact the level of seniority of sign-off has had in the civil service. That is really what is needed.



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Q352 **Chair:** I have two very quick questions before the end. We have been given evidence that suggests that standard wording for non-disclosure clauses would be a good idea, but the Government, in the consultation they issued on Monday, have dismissed that. What would your views be?

Debbie Alder: I guess I have already expressed it, have I not? There is certainly a value in having a default standard agreement. I appreciate that, because every case is different, there might be the need to add or amend. However, we could de-mystify some of what goes on in the lawyer-to-lawyer space such that we can provide better support, whether you are coming from a trade union perspective or an employer perspective, because we are able to put it in plain English and make people better aware of—

Q353 **Chair:** Perhaps people who are employed for 30 years might have become acquainted with what that means over the lifetime of their career. Ben, you were nodding as well.

Ben Willmott: Yes, this is a response we got from members we consulted, as well as employment lawyers we have been talking to. They believe that some greater standardisation around the wording of confidentiality clauses would be helpful.

Q354 **Chair:** Your members who are employers are saying that they think it is a good idea to have standard wording?

Ben Willmott: Yes, absolutely.

Q355 **Chair:** So the Government might not be right on that?

Ben Willmott: We will be responding to the Government consultation on that and making our views clear.

Chair: That is excellent.

Jayne Phillips: I know Debbie has mentioned that each case is different, but my experience is that most employer solicitors provide us with a standard settlement agreement that often has the wrong gender or refers to the wrong person in it. There is no real problem with having a standard-wording approach. It could be helpful in terms of, as Debbie talks about, de-mystifying this whole process, which otherwise becomes a legal argument.

Sue Coe: I would just say that this is a point that we are going to be discussing in our more in-depth consultation with our affiliate unions. This is something we would really like to come back to the Committee on in writing.

Q356 **Chair:** That is very helpful. The final question from me is on whistleblowing. Do people really understand the concept of public interest in whistleblowing? If you are a pregnant woman who is being dismissed from your employment because you are pregnant and you may have received X-thousand pounds, would that woman understand that it would



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be in the public interest for her to then take action against her employer?

Sue Coe: No.

Debbie Alder: No.

Ben Willmott: No.

Q357 **Chair:** Again, I am not a lawyer, but it would be a prime facie example of somebody who would be acting in the public interest.

Jayne Phillips: There is an easy solution: to amend the legislation to say that, on discrimination and harassment, this is always in the public interest. We just need a line in the legislation to confirm that.

Q358 **Chair:** Does anybody else have a view?

Ben Willmott: We would not go quite that far. It is a grey area. This is certainly the feedback we have from members and the employment lawyers we have been speaking to. For example, there may be a case for the EHRC to provide some advice here. If there is a query regarding whether not a breach of the Equality Act is of sufficient severity to qualify as a public interest disclosure, the EHRC might be able to give you some initial guidance to help on that.

It is difficult. There seems to be some confusion over what type or what level of severity or how systemic an issue would have to be in order to fall under public interest disclosure. It is a grey area; it is confusing; it needs greater clarification and support for individuals.

Sue Coe: I would just say that we have discussed this with some members, and they lean very much towards Jayne's point in terms of how this is very much a grey area at the moment. People do not understand it. A level of clarification such as Jayne suggests could be really useful in making it very clear to everybody. Again, this is something that we will go back to our members on and give you some more information in writing.

Chair: Perhaps a bit of clarity on the whistleblowing legislation would be a good idea. There is general nodding there. That is brilliant. Thank you so much for your time, for the answers to our questions and for your expertise. We are really grateful to you. Thank you very much.

Examination of witnesses

Witnesses: Emma Codd, Tracy Vegro and Professor Richard Moorhead.

Q359 **Chair:** Thank you very much. We are now moving on to our second panel. Before we go on to questions, perhaps I could ask the three of you to say who you are and where you come from.



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Tracy Vegro: I am Tracy Vegro. I am one of the executive directors at the Financial Reporting Council. I have strategy and resources in my responsibilities. I am here in view of the FRC's responsibility for setting the Corporate Governance Code

Professor Moorhead: My name is Richard Moorhead. I am a professor of law and professional ethics at University College London. I am also one of the specialist advisers to the Committee.

Chair: We are grateful to you for that.

Professor Moorhead: It is my pleasure.

Emma Codd: My name is Emma Codd. I am managing partner for talent at the professional services firm Deloitte. I am effectively responsible for everything we do around the attraction and retention of our people.

Jess Phillips: That is a big job.

Chair: Our first set of questions is going to come from Jess. I am very mindful of the fact that we probably need to finish at about quarter to 12.

Jess Phillips: The Prime Minister does not wait usually.

Chair: If colleagues could bear that in mind, it would be helpful.

Q360 **Jess Phillips:** As I have already said, when lawyers are advising their clients regarding the drafting and use of non-disclosure agreements—this is specifically to you, Richard—what duties do they owe and to whom are these duties aligned? Is there any potential conflict?

Professor Moorhead: They owe a number of duties. One is to their client's best interests. Another is to act with integrity.

Q361 **Jess Phillips:** How do they decide their client's best interests?

Professor Moorhead: It is mainly in discussion with the client.

Q362 **Jess Phillips:** If you were a complete legal novice, let us say, is it that a client says, "I want to come out of this with this"?

Professor Moorhead: It would depend on the circumstances, but you would usually say, "This is the sort of thing you would expect in a case like yours," and that would give the client the lead. They have to act with integrity. They have to not allow their independence to be compromised. They have to behave in a way that maintains the trust that the public places in the profession. The final one, which is the one that is probably preeminent, is to uphold the rule of law and the administration of justice. They are the principles that govern how they are supposed to behave.

In broad terms from my experience in terms of researching lawyers, talking to lawyers and discussing NDAs with lawyers, as a generalisation—it is only a generalisation—I would say that not enough lawyers understand that they have to balance the public interest in the



administration of justice and the protection of the rule of law with their client's best interests. They tend to prioritise the client's best interest.

Q363 **Jess Phillips:** The balance is on the side of the client?

Professor Moorhead: It is a little bit out of kilter, yes.

Q364 **Jess Phillips:** Rather than the rule of law?

Professor Moorhead: Yes.

Q365 **Jess Phillips:** Okay, that seems quite fundamental. What ethical obligations do they have generally?

Professor Moorhead: In relation to NDAs, they have to get within reason what the client wants, but they also must not take advantage of their opponent, particularly in the situation where they are acting for an employer against an employee who may or may not be represented.

Jess Phillips: They must not take advantage?

Professor Moorhead: Yes, they must not take advantage of that person. That is probably the critical rule, if you like, in the code that is quite often invoked in these cases.

Q366 **Jess Phillips:** It could be that there is somebody who is vulnerable on the other side.

Professor Moorhead: Vulnerability would make it worse, but they do not necessarily have to be vulnerable. If you put a clause into a contract that is plainly unenforceable, I would regard that as taking advantage. It could also be behaving without integrity, et cetera.

Q367 **Jess Phillips:** Is there a need for better guidance on the use of potentially unenforceable clauses and the potential for NDAs to pervert the course of justice?

Professor Moorhead: The SRA issued a warning notice, which I know you have discussed. That is quite a good warning notice. There are some improvements that could be made to that and some areas that could be clarified, but it is broadly along the right lines.

Q368 **Jess Phillips:** Does it feel like an actual warning to them?

Professor Moorhead: Yes, I think so. The critical thing is not so much the guidance, although it could be improved and I have put some suggestions in my written evidence. The key issue is enforcement. We need to see the SRA enforcing against solicitors who have breached the rules.

Q369 **Jess Phillips:** Who should produce this guidance and what should it cover?

Professor Moorhead: The Bar Standards Board currently says that it will not produce guidance. It should probably be asked to revisit that decision. It is a slightly strange decision. The only other place this is dealt



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with is in relation to the courts, which decide what contracts are enforceable or unenforceable. The only way of changing their views around that is to legislate.

Jess Phillips: That is us.

Professor Moorhead: That is you guys, yes.

Q370 **Jess Phillips:** We should be writing those regulations. I would be delighted. I am not sure many lawyers would be delighted with what I came up with. Slater and Gordon, as I said in the previous session, have said that the use of more egregious clauses such as requiring an employee to withdraw the allegations should not be permitted and only used in the most exceptional circumstances. Do you agree with that?

Professor Moorhead: Yes, I do.

Jess Phillips: You are very quick on the answers. I like this.

Professor Moorhead: I can see you are short of time.

Jess Phillips: You agree, though?

Professor Moorhead: Yes, I do. I have seen a number of agreements with clauses like that and other kinds of clauses, some of them well known, where the clauses are deliberate attempts to stifle improperly the revealing of misconduct by employees in organisations. They are probably criminal, and they are probably in breach of professional rules on misconduct.

Q371 **Jess Phillips:** The issue that was raised in the previous panel was that even if we got rid of that, they would switch it around and say there was no liability or make it have different words.

Professor Moorhead: There are certain techniques for avoiding statutory obligations that are being deployed. They have not been tested. If they were tested, they would probably fail. There is a more fundamental issue: the behaviour is almost certainly professional misconduct and probably criminal misconduct.

Q372 **Chair:** To slightly unpack those last three sentences, can you say what you just said but say it in a less technical way?

Professor Moorhead: There is the law of perverting the course of justice, which is a well-established law that is fundamental to the running of the legal system. If you take a course of action that is likely to inhibit or shape the way somebody engages with, say, the criminal process, if you do something that is likely to prevent or discourage somebody from engaging with the police, for instance, and you do that intentionally, so you intend to do that, then that, according to the law, is a criminal offence.

Q373 **Chair:** So the person who wrote that contract will have been committing a criminal offence?



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Professor Moorhead: I think so, yes

Q374 **Jess Phillips:** If they have written, “You are not allowed to go to the police,” it seems like quite an open-and-shut case of what you are talking about. That is egregious, and we have now heard lots of times about that. However, there could be a case where an organisation makes somebody sign something that says, “I admit none of this ever happened.” Let us say there was a criminal threshold that had been met in the claims they were making and they went to the police. In a court of law, the document this woman had signed to say that none of this ever happened could be used against her. Would that count for what you are saying as well?

Professor Moorhead: If that is done with the intention to prevent the person from speaking to the police improperly—

Jess Phillips: That would be difficult to prove, though, arguably.

Professor Moorhead: I do not know that it would be difficult to prove. It would depend on how the evidence stacked up in court—so what the employee said, what the employer said and what the lawyers said.

Q375 **Jess Phillips:** It is not just an openandshut case of, “You cannot go to the police,” being written into your NDA. It is a broader spectrum of other egregious things that could be put in an NDA that would fall into what you are describing as something that could possibly be a criminal offence.

Professor Moorhead: Yes. Anything that is intended to prevent the person speaking to the police or perhaps to regulators, for instance, if it is done with the intention of doing that and it is likely to lead to that effect, then it is potentially a criminal offence.

Q376 **Jess Phillips:** Are there any obligations on lawyers to ensure that senior managers are alerted to the risks where NDAs are being used in a way that might be considered improper?

Professor Moorhead: Yes. The basic situation is that the lawyer ordinarily acts for the organisation; they usually act for the company, the Government Department or whoever it is, rather than the senior employees. Sometimes they act as well for the senior employees, so the chief exec or whoever it might be. In circumstances where they act for the organisation, they have to ensure the organisation knows all the material facts relevant to their case. If, in the course of a case, they come across serious misconduct, it would usually be materially relevant to that organisation. They would then be required to report that information to the client, and that would usually be the person who is best capable of dealing with that information properly, such as the board.

Q377 **Jess Phillips:** Do in-house lawyers have greater responsibility than externally engaged lawyers to alert senior managers?

Professor Moorhead: They may do; it will depend on the terms of their contract and their role within the organisations. They are usually a bit



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better placed, because they usually have better contact with the organisation. They usually understand better what is going on and they should have better communication routes. They are likely to have those requirements and also be better placed to make those kinds of conversations happen.

Q378 **Jess Phillips:** So inhouse lawyers are potentially more likely to see repetition of such things?

Professor Moorhead: Yes.

Jess Phillips: I do not know whether you have seen any examples where people have used lots of different lawyers to try to cover their tracks.

Chair: Can I take that question a tiny bit further? In your evidence you cite—I am trying desperately to find it quickly now—the Green case at paragraph 20. I am not sure you refer to it as the Green case. You talk about the fact that an internal lawyer who understood that something had happened more than once would have an obligation to take action. To be honest, in that paragraph I did not understand why there would be an obligation to act because something had happened more than once.

Q379 **Professor Moorhead:** I do not quite remember saying that exactly. It is the question of whether there is repeated behaviour. There is a professional obligation, which is the material information point. The client or the business needs to know if something is going on regularly that is a serious legal risk, if you like. There is also the more cultural question, which I would expect of good inhouse lawyers. A good inhouse lawyer would tell me if they had seen something going wrong in the business. I do not want to know whether it is factually true or not that a person has been harassed; I actually want to see whether we have a broader problem—that harassment within the business needs to be tackled more broadly.

Q380 **Chair:** Why is that something a professional lawyer would need to act on?

Professor Moorhead: It is about the material facts. They would need to be sure the business understood that they had these risks manifesting in the organisation.

Q381 **Jess Phillips:** Legally, there is no ethic that says they have to do that?

Professor Moorhead: They have to keep the client properly informed about this. The client is the business, so it comes from that obligation.

Chair: Repeated behaviour is the risk here?

Professor Moorhead: Yes.

Q382 **Jess Phillips:** Previously you said that clients' privilege was up here and the rule of law was down there, which I found quite alarming. In this, however, it seems that it is neither. Protecting your client seems to be by



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the wayside if you are not seeking patterns and looking at ways that these cases might be affected.

Professor Moorhead: Some lawyers take that view. Some lawyers take the view that the business wants them to look after the business's back. Sometimes it is as explicit as the chief executive's back. They think, "My job is to have the back of the CEO rather than to think about the business." That is wrong. It is wrong in law and as a matter of professional ethics. That is sometimes; I am not saying all lawyers are like this.

Jess Phillips: No. There are lots of brilliant lawyers in the world. There are absolutely lots of brilliant lawyers.

Professor Moorhead: Some of them have that view. It is partly because they take that view of the job and partly because that is the view the business gives them of what they want.

Q383 **Jess Phillips:** Have the Solicitors Regulation Authority, the Law Society and other relevant bodies done enough to raise awareness in the legal profession of good and poor practice in this area?

Professor Moorhead: The SRA is trying. It could do more, and it would recognise that. Enforcement is absolutely critical here. It has done good work around the warning notice. The Law Society has issued some guidance. I am not very impressed with the guidance. It is rather one-sided and weak. It should withdraw that or certainly revisit it. It tends to act as cheerleader for a certain view of what lawyers as businesses want, rather than more broadly in terms of the public interest, and that is a shame and to its long-term detriment. It could do more. The Bar Standards Board could revisit their decision. It is a mixed picture, I would say.

Q384 **Jess Phillips:** On the enforcement issue, do you expect or hope to see the SRA acting to see greater enforcement?

Professor Moorhead: I do not have any information on that. Given what it has said publicly, I would expect to see some cases coming through, but these things take quite a while, unfortunately.

Jess Phillips: Welcome to Parliament.

Q385 **Vicky Ford:** My questions are about the wording of NDAs and non-derogatory clauses. The first question is for Emma. In Deloitte's written evidence, it states that you use confidentiality and non-disparagement clauses in all settlement agreements to prevent discussion of "the dispute or the circumstances surrounding termination of employment" and "disparaging statements intended to impair the reputation of Deloitte or its staff". Why do you take a blanket approach rather than considering it on a case-by-case basis? What are you seeking to achieve by that wording?



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Emma Codd: First of all, just to set the scene in terms of the context of our settlement agreements, which I believe we also set out in our evidence, our settlement agreements, like those in many organisations, are very standard agreements. They are most typically and frequently used in situations like restructures, performance management cases or a buy-out situation of someone who is on long-term health absence, sick leave. They do have absolutely standard clauses in there, which we believe is best practice. They contain the relevant carve-outs. They are extremely open and, I would say, explicit that the clauses do not prohibit any individual signing them from disclosing to a spouse or partner. I would say the explicit carve-outs are a page long. You really cannot miss it. It is bullet-pointed all the way down one particular page. All our individuals take legal advice and obviously we pay for that legal advice.

In terms of the non-disparagement clause, given the circumstances in which we use these clauses, Deloitte would never use a settlement agreement to quell, quash, avoid taking action on or not investigate an allegation of sexual harassment or an allegation of any sort of bullying and harassment. We have worked really hard over the last four years to encourage our people to speak up. That would go counter to everything we stand for. The non-disparagement clauses are standardised clauses. I say this without being a lawyer, again, but they are a standard clause.

Effectively, it is there to benefit both parties. Given the situations in which settlement agreements are frequently used, which, for example, will be restructuring or where a performance management process has failed, the employee typically will have a concern in the back of their mind that they do not want to be badmouthed. They are mutual clauses. It is not just the media; it is the media or any other third party. For example, there could be a concern that somebody who they have worked with could potentially badmouth them to another employer or go on social media.

As far as we are concerned, these clauses are standard. As I have said before, we would never use a settlement agreement in a case of bullying and harassment. In addition, our people can negotiate those clauses, or obviously their legal advisers. We will often guide towards an appropriate legal adviser to make sure that we have quality in place as well.

Q386 **Vicky Ford:** They can negotiate and make them a bit more bespoke?

Emma Codd: Yes. I was talking to my legal team and my employee relations team about where we frequently get requests for any amendment. Again, looking at the cases they are used in, I cannot emphasise enough that these are where a performance management process may have gone wrong and somebody chooses that the right thing to do is to leave the firm. Where we are asked to amend those is typically around leave date. It is the specifics around that.

Q387 In terms of references, we give a standard reference, but, again, it might be that we could give a more significant reference. It is these sorts of



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points. It is rare—in fact, members of the team could not think of an instance—for us to be asked to amend the confidentiality clauses. I believe that is because the carveouts are so extensive.

Q388 Vicky Ford: To all of you, it has been suggested that having standard settlement agreements and confidentiality clauses could help reduce the legal costs of preparing and advising on such agreements. Would you welcome standard settlement agreements and confidentiality clauses? Would standard wording help to make it easier for those who are signing NDAs to understand the effect of the agreement? We have not heard from Tracy.

Tracy Vegro: I am another non-lawyer. As long as nobody is pressurised into doing anything that somehow would prohibit them from, in the real public interest, later disclosing something, I am all for anything that will help that principle. At the moment, there are too many pros and cons to everything. We need some clarity around how the individual is being protected without any detriment to the wider issues of other colleagues.

Professor Moorhead: Yes, standard wording could help. It could reset the balance back towards something that is much more modest and much more sensible in terms of the scope of NDAs. It could be properly drafted and tested with ordinary people to see whether they can actually understand it, which is a really important thing that has not been done. If there was one standard agreement, you could do that. It is worth investing some time and resources in that.

You could have a presumption that this is as far as you should go with an NDA. Only in quite strong circumstances, where the employee has advice that it is in their interests to go further, not just that it is possible, could you deviate from the standard. That might be a sensible way of dealing with some of the power imbalances.

Emma Codd: If it is possible to have standard wording, it absolutely would help. In my view, anything that would help to prevent the misuse of NDAs and confidentiality clauses is good. If that is with standard wording, we would support that. To echo some of the comments from the earlier session, it feels a little bit like putting a sticking plaster over quite a large cut. For me, it is the toxic cultures; it is getting to the stage where people feel able to raise issues and where settlement agreements are simply not misused. That is the critical element of this.

Q389 Chair: Richard Moorhead, why have the Government taken the stance in their consultation that they would not agree with what all three of you have said would be a sensible idea, standard wording?

Professor Moorhead: There are two reasons. They say they do not normally do this and they have not done it before. Actually, that is a good reason to try something new. They also think it might get out of date quickly. I do not think that is likely. It is quite easy to imagine mechanisms for dealing with that kind of problem. It is those two reasons.



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Chair: You are not convinced by those arguments?

Professor Moorhead: I am not convinced, no.

Q390 **Vicky Ford:** In terms of discrimination cases, some people suggest that where NDAs are available, because you can use an NDA, the employer is more likely to settle with an NDA rather than contest the case and have the transparency about discrimination. Is banning or restricting NDAs more likely to result in more cases being contested and fewer being settled?

Emma Codd: I can only comment from my own organisation's stance on this issue. Again, as an organisation, from 2014 we have been extremely clear that it is our role to encourage people to speak out, and we do not use NDAs in those circumstances. Sitting and looking at my own organisation, there could be a move where we were told to remove all confidentiality clauses, for example. I actually worry that this would be counter to what our people actually look for in terms of protection when it is an employee-led exit. From my own perspective, again, it is focusing far more on making sure they are not misused across the corporate world.

Professor Moorhead: My instinct is that it should make a bit of a difference. It should make it slightly more difficult for settlement to be reached, but you have heard evidence today and in the last session that suggested that where organisations have shifted towards not having NDAs it has not made much difference. That is really interesting.

Partly to pick up on a point Emma was making, the other part of the equation is that it will relate very strongly to the culture. Shifting towards a culture where NDAs are forbidden might well shift more organisations towards a more inclusive culture where these things are taken more seriously, and that might increase the level of settlement and indeed better dealing with harassment more generally. There might be a small difference but not a great one.

Tracy Vegro: Again, it is back to this point about the culture. NDAs can be being used legitimately to protect confidentiality. We are a regulator. If someone leaves our organisation, we do not want them going and using that information in an inappropriate manner. There could be a perfectly sensible reason. However, anything that comes back to any form of discrimination not being investigated properly is something that you would not want, even as an unintended consequence, to make worse. You have to be very careful in any change that you are not disadvantaging the individual.

I do not take away from anything anyone has said about culture, but we all know culture change takes rather a long time. It can change very quickly with different people, a different senior partner or a different CEO in an organisation. They might have a very different view on these kinds



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of things. We must have an inclusive culture where people speak up and talk about things.

Q391 **Vicky Ford:** Can you see circumstances in which the use of NDAs should be restricted or even banned?

Tracy Vegro: If you see a massive increase in the use of NDAs in a particular sector or if, as we have heard about, the good work that has been done in the civil service in terms of how to approach these things were to change for any reason, you would want to know. The problem is that there is very little ready data. While some organisations and some companies might make it a big selling point that in their culture they are tracking these things and understand it, it is not always the case. You would want to be clear on what the reasons were that there was an increase in their usage. If it was about a massive restructuring or something, that might be seen as much more legitimate. You would not want anyone to be disadvantaged by not having the ability to use one.

Emma Codd: I agree. I do worry. When it comes down to banning the use of NDAs as a whole, for me an NDA is a confidentiality clause within a very legitimate agreement that benefits both parties. For me, I would like to see organisations really focus on governance, focus on culture or focus on enabling people to speak up.

Q392 **Eddie Hughes:** Can we concentrate on governance, then, Tracy? What level of awareness do most boards have of the use of settlement agreements within their organisations generally? Are they aware of the amounts being paid under those agreements?

Tracy Vegro: If it is a very senior level departure, something like an executive director, I would be very surprised if that was not signed off by the remuneration committee, which is a sub-committee of the board, and possibly even the nominations committee. However, that is not something that is compelled in law. When the accounts are being audited, for example, it is not a current legal requirement that NDA sums are disclosed separately. They are not audited in that formal way. It is not a legal requirement that NDAs and the sums of those NDAs are signed off by the board.

Q393 **Eddie Hughes:** The implication is that, because it is not a legal requirement, it might not necessarily be the case that the board would be aware?

Tracy Vegro: No, they would not be aware of every single one. They might be aware of some. It would depend. Having said that, under the Corporate Governance Code we revised last year, we put in much more emphasis around NDAs being a possible indicator. Alongside the revised code that we published last summer, there is new guidance. One of the things we suggest is that for the board to be asking about NDAs and the sums involved would be a good indicator of the underlying culture. Of course, the new code puts much more emphasis on the board not just looking at the strategy of a company but at how the culture, values and



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behaviours are also supporting the long-term success and good reputation of that company.

Again, if you are in a senior role as legal counsel or in an HR department, you might see that the firm is having more activity around the reasons for people leaving. We routinely would suggest that all organisations do exit interviews and that people are not just moved around the organisation with no understanding of why that move is happening, if it is not just a normal promotion or something.

There are lots of principles in the Corporate Governance Code that will give you some indications about the underlying culture, but it is not fair to say it is audited in the same way as the other financial statements. It is a reporting principle or provision; it is not a legal requirement.

Q394 **Eddie Hughes:** I am feeling slightly uncomfortable about the next question, because you have touched on it. Do boards have any responsibilities to ensure that non-disclosure agreements are not used in a way that could be considered improper or unethical, given what you have said about the fact they might not be aware of them?

Tracy Vegro: If there was a suggestion that it was masking any kind of discrimination, there would be a responsibility on the HR director.

Q395 **Eddie Hughes:** This is discrimination or other improper behaviour?

Tracy Vegro: Yes, or other improper behaviour. Certainly in the professions that we regulate at the FRC, we are now looking at other areas around professional standards and behaviour that are not legitimate legal requirements, but, in the course of how you are testing what the culture in an organisation is like, you could still ask questions about some of those things. This goes back to the point I touched on earlier: if these are not legal requirements and if this data is not centrally held somewhere, it is very hard to track over time whether things are being used in an inappropriate way or hiding poor behaviours.

You need that level of transparency and consistency across all businesses. The code applies to 800 premium listed companies. It does not apply to very large private companies, where there have been instances of alleged improper use of NDAs recently. You have to set the parameters to be able to make informed judgments as a good board director and to ask the right kinds of questions.

Q396 **Eddie Hughes:** It feels a bit tenuous. I am surprised that this cannot track back in some way to those seven responsibilities under the Companies Act 2006. If we were talking about two or three years ago, I could completely understand that a board would say, "This information is not held or collated. It is not reported on, so do not blame me, mate." However, given the prevalence in the press and the media, it just seems crackers that a company or a board would not say, "Hang on a second. Do you think we might have a problem with this? Can somebody collate this information? This might come back to bite us at some point in the



future.” It could just be from a purely moral point of view; they might think, “Do you know what? It might be the right thing to do to track this sort of information.”

Tracy Vegro: That is why, again, in the good companies, the people who are really making this about their culture and doing it to attract the right kind of talent, you are seeing them do much more voluntarily on those lines. All I am saying is that it is not a legal requirement in the 2006 Companies Act in the way that other specific directors’ duties are in terms of conflicts of interest, putting the interests of the company at the forefront and so on. It is that next tier down. Again, it is about embracing this ethical question around how you want to be as a company, where you report back to shareholders and where things like the Stewardship Code, which we are consulting on at the moment, come into play, so that people are asking these questions publicly and it becomes very difficult for people to hide that kind of bad behaviour.

Q397 **Eddie Hughes:** Again, I would have imagined that is particularly because there are financial implications that might come.

Tracy Vegro: Yes, there might be a loss of reputation. If you are a company that has established that you are very good and you have these core values and then it is a complete myth, because three or four cases come to light, that can be very damaging.

Emma Codd: From our perspective, our ExCo, the executive committee, is effectively very similar to a corporate board. I sit on that. I have a full report on a monthly basis on every single matter that is being looked at. It may be an informal matter or a matter that is about to go formal. I get a monthly briefing from our respect and inclusion advisers, who are partners and directors who our people are able to go to in order to raise matters confidentially. Finally, our ethics partner provides our executive committee—that is, me —and also our UK oversight board with a briefing on a six-monthly basis where we go right down into the detail of the numbers of cases, the type of case, the resolution, the service line and the seniority. For me, the transparency has to be there.

The final thing we are currently doing is looking at disclosing, as our Netherlands firm has done, the number of bullying and harassment cases or similar that have been reported during a year. We are looking at reporting on those publicly within our annual report, our impact report every year, where it has been found that there is a case to answer. We are currently looking at that, because for us that is giving the fullest possible picture. In our view, transparency is the right thing to do on this.

Q398 **Eddie Hughes:** Tracy, is there a difference between the requirements for public and private companies?

Tracy Vegro: Yes, there is. The Corporate Governance Code is for the premium listed companies. That can be enforced through the listing rules and so on. For large private companies, there is a review by James Wates around various additional requirements on the largest private companies.



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There are also things like gender reporting, where there is a threshold of over 250 that applies to the public and the private sector. That is another tier down. Again, what Emma has set out is very good in terms of what you are doing at Deloitte. That is a partnership model. Again, there are different requirements.

Q399 **Chair:** In terms of public and private companies, are the rules around money laundering different for private and public companies?

Tracy Vegro: I do not know. I can certainly give an answer back to the Committee.

Q400 **Eddie Hughes:** Finally, under the current proposals for reform of the FRC, what role would it play in the future of overseeing good corporate governance in this area?

Tracy Vegro: We are obviously very welcoming of the report Sir John Kingman did, and we await the Government responding to that shortly. We think it is very important that we do have broader powers. I often have to explain how we can regulate this and regulate that, but we cannot do the entirety. Sir John Kingman has some very interesting recommendations around this, looking at financial reports and so on. That would give us more locus to be more open and transparent and to make greater requirements on what exactly is reported, how it is tracked and whether there are going to be additional responsibilities that we, the regulator, could place on those we regulate. Potentially, depending on what the Government decide to do and whether we get new powers, we could do an awful lot more in a more consistent fashion.

Q401 **Eddie Hughes:** It seems like there is a lot of "if" and "potentially".

Tracy Vegro: Of course, yes.

Eddie Hughes: Do you feel optimistic?

Tracy Vegro: It has had a particularly good welcome because so many different sectors have said, "Yes, it is quite right that, as the regulator, they should have more powers." People were probably quite surprised that we did not have some of the powers, and they assumed we did. It will enable us to move forward and transform ourselves into a much more consistent and holistic company regulator, which we need.

Q402 **Tonia Antoniazzi:** The EHRC has suggested that the use of NDAs should be approved at board level to ensure they are not used improperly to cover up misconduct or to protect repeat offenders and that lessons are learned. What is your response to this suggestion, Tracy?

Tracy Vegro: We think it is an interesting suggestion. It is not a current requirement but, if it were, the only issues we would have would be around who it applies to. Would we have a similar threshold to gender pay gap reporting? Would it be companies with over 250 employees, for example? We have to be clear about the threshold. Again, it is the kind of data that would really shift behaviour. People would be quite surprised, I



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suspect, by the different levels of usage. We are not against it, but we would have a few practical issues around how and how the definitions are defined.

Q403 **Tonia Antoniazzi:** Richard, do you agree that it is a good idea?

Professor Moorhead: I do; it may be that it is best tackled through the corporate governance mechanisms, given the different regimes for different kinds of companies and partnerships. For the agreements to be enforceable or valid, it may be that they have to be reported to the board and the lawyer has to take responsibility for doing that, for instance. That would be another way of skinning that particular cat.

Q404 **Tonia Antoniazzi:** Emma, you have talked about the culture change in the last four years and about the good practice that is going on at board level. Does Deloitte's board have any systems in place to ensure that NDAs are not being used to cover up discrimination or improper behaviour and that the lessons from such cases are learned?

Emma Codd: Yes. Again, I would say our equivalent to a corporate board would be our executive committee. We do also have an oversight board as well, which has independent non-exec directors. In terms of our settlement agreements—again, I come back to the point that they are agreements that are typically used in matters such as restructuring and performance management—I have a rolling monthly report where I see the outcome of every single matter. I can see it right the way from the start right the way through to resolution, so I have that awareness, as do our legal team and our employee relations team. Yes, as the executive member who is tasked with oversight of talent, I get that insight.

In terms of reporting, I will report any trends that I see. For me, it is less about the settlement agreements and more about the bullying and harassment cases and the general cases that are counter to our values. It is how we deal with those and therefore the reporting that goes to our ExCo and to our board on that, both from myself and our ethics partner, is thorough as well. Do we see any trends, if there are any trends? Yes, it is something that is part of my role.

Q405 **Tonia Antoniazzi:** Deloitte's evidence states that all settlement agreements are signed by a partner. Are you aware of any situations in which the use of terms in such an agreement have been questioned by that partner or brought to the attention of the board for discussion?

Emma Codd: No. A settlement agreement is entered into after resolution of other matters. Again, if someone was being exited because, effectively, we had to restructure the part of the business they were in, that is quite a lengthy process that is gone through. It involves our ER team, our legal team and then the partner is signing off on behalf the firm. We have such checks and balances in place. I can say that there would not be a situation where a lone partner could sign off an agreement or misuse an agreement. It just could not happen in our organisation.



Q406 Tonia Antoniazzi: 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 a high number of NDAs could be referred to a body such as the EHRC for investigation. What are your views on such an approach, Emma?

Emma Codd: I am all for transparency. I was a massive supporter of gender pay gap reporting and ethnicity pay gap reporting. You name it. If it does the right thing, we would support it. I do not know whether I am seeing this through the Deloitte lens—clearly I am—but my concern is that our settlement agreements are appropriately used. You may have a slight increase in one year and that may be for a very good reason.

Personally, what I would like to see more of—I have already referred to this—is reporting of the number of harassment and bullying cases that have been raised within an organisation and the action taken against that. This is something, as I said, that we are looking to do, and I believe we will do it. To me, that is something where you will then be able to compare like for like. With settlement agreements, certainly, it is very difficult without the full narrative, and that in itself is extremely difficult to do.

Whilst in principle I absolutely support any transparency that would help in dealing with the misuse of NDAs, I do struggle slightly with what reporting settlement agreement numbers would actually do. I would rather see something that would comprise, for example, a reporting of the number of sexual harassment cases, bullying and harassment cases or discrimination cases that had been raised, dealt with each year and their outcome, in terms of the number that have been found proven.

Q407 Tonia Antoniazzi: Richard and Tracy, do you have anything to add?

Professor Moorhead: Not really, no. I am broadly supportive of the idea, but the evidence today persuades me that you need to think about this in the round. There could be a package of things that might be monitored, some of which might be more useful than focusing purely on the NDAs. It has potential as an idea, but it needs a bit of contextualising and thinking about.

Tracy Vegro: I am pretty much in the same place. I am not against anything that puts more data out there. I would just say that there could be some sort of classification. What we really want to know is whether people are misusing NDAs and whether they are hiding bad cultural practices in an organisation. What will enable that to get more into the public domain so we can have an informed discussion about what the reasons for that are and how we can stop it? For me, you need to know a little bit more. Numbers alone might lead you to think that things are looking better than they are and they might be hiding other things. People might just be moved around an organisation. If a line manager has some really very bad cultural practices and it is never challenged, it does not help.



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Q408 **Chair:** This is the very last question from me. It is the same as in the last session, about whistleblowing. Do people actually understand what is in the public interest under whistleblowing law? Should there be a review of that?

Emma Codd: At the risk of sounding boring, I can only comment on my own organisation, but our people do understand what is in the public interest, but that is only because we talk about it constantly. We go through huge amounts of training and huge amounts of work to make sure that people feel able to speak up and that they understand what is in the public interest. From our perspective, I am not sure that, as an organisation, there would be any need for more clarity.

Q409 **Chair:** Is that because you are a regulated profession?

Emma Codd: No. In truth, it is because we have focused so much on this, on the ability of people to come forward. It may also be because we are a regulated profession, so we do have certain duties and requirements as well, but it is something that we do talk about again and again.

If I think about my friends or women working in the workplace, if I asked them whether they knew what was in the public interest, I suspect it would be a different answer. Broadly I would say that clarity would be a good thing.

Professor Moorhead: As the Committee knows, I am a lawyer by training. I have read the whistleblowing rules; I have read the guidance; I have read lawyers' cases and notes on it. I do not really understand it. I do not think the people who are really engaged with it do either. I have asked a few questions of the people who do deal with this day to day, about particular concepts, and they are not sure about some of those key concepts, partly because the courts do not get to deal with the cases. It is not clear, and there are various ways the legislation could be improved.

Tracy Vegro: I am a civil servant by background and I work at a regulator. We are a public interest body. There is not sufficient awareness and people do not feel they have enough understanding, and therefore they just do not voice their concerns. That cannot be good for society. Anything that brings that clarity or greater discussion has to be a good thing.

Chair: That was a really helpful session. Thank you so much. We have covered a lot of ground, and we are finishing a few minutes before I had hoped. Thank you very much. Thank you on behalf of the Committee.