

Women and Equalities Committee

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

Wednesday 3 April 2019

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

Questions 689–824

Witnesses

[I](#): Rebecca Hilsenrath, Chief Executive, Equality and Human Rights Commission, Paul Philip, Chief Executive, Solicitors Regulation Authority and Matthew Smith, Principle (Legal), Equality and Human Rights Commission.

[II](#): Lucy Frazer QC MP, Under-Secretary of State, Ministry of Justice, Kelly Tolhurst MP, Parliamentary under-Secretary of State, Department for Business, Energy and Industrial Strategy, Andrew Waldren, Deputy Director, Courts Reform Policy Division, Ministry of Justice and Joanna Warner, Deputy Director, Individual Rights and Migration in Labour Markets Department for Business, Energy and Industrial Strategy.

Written evidence from witnesses:

- [Equality and Human Rights Commission](#)
- [Solicitors Regulation Authority](#)
- [Department for Business, Energy and Industrial Strategy](#)

Examination of witnesses

Witnesses: Rebecca Hilsenrath, Paul Philip, and Matthew Smith.

Q689 **Chair:** Welcome to our witnesses and to those watching online and in the public gallery. Today we are hearing evidence as part of our ongoing inquiry into the use of non-disclosure agreements in discrimination cases. The first panel of this evidence session provides an opportunity to hear from the Solicitors Regulation Authority and the Equality and Human Rights Commission about their role as regulators, and in the second from Ministers and officials from the Ministry of Justice and the Department of Business, Energy and Industrial Strategy.

Before we begin with the first panel, I declare an interest: my husband, Iain Miller, is a partner at Kingsley Napley, specialises in professional regulation and works with the Solicitors Regulation Authority.

As is always the case, we have a number of questions to go through—probably more than ever in this session—so I might jump in and move us on if I feel that time is running away with us. We will start on this set of questions with Vicky Ford, but could I first ask each member of the witness panel to say their name and where they come from?

Rebecca Hilsenrath: I am Rebecca Hilsenrath, chief executive of the Equality and Human Rights Commission.

Matthew Smith: I am Matthew Smith, and I am a principal in the legal directorate of the Equality and Human Rights Commission.

Paul Philip: I am Paul Philip, chief executive of the Solicitors Regulation Authority.

Q690 **Vicky Ford:** Paul, can you speak louder please?

Paul Philip: I can try. Was that just a volume test?

Q691 **Vicky Ford:** Yes. Even though we are in quite a small room, it can echo. Can you please briefly set out the extent to which you as regulators oversee the use of non-disclosure agreements in discrimination cases, and the way that such cases are handled by employers and legal professionals? How do you interact with each other on this issue?

Rebecca Hilsenrath: Coming to the end of your question first, perhaps it will be helpful if I set out how we interact with each other. We actually work quite closely with the SRA. We have a good relationship with them. We ran a roundtable on sexual harassment for our RIO—regulators, inspectors and ombudsmen—forum, which I know the SRA attended, and they ran one on NDAs that we attended. We are drafting technical guidance on NDAs, which we will come to. I know that Paul at the SRA is keen to contribute to that, so that will be something that we are able to work together on.

In terms of NDAs generally, we have called for a ban on pre-event NDAs that ban disclosing future incidents of discrimination. We are producing technical guidance on NDAs, which my colleague Matthew is responsible for and can go into detail on. In terms of powers, we tackle non-disclosure agreements as features of discrimination when carrying out enforcement work. Measures on NDAs can play into work that we do when drawing up section 23 agreements. An NDA is not in itself an unlawful act, so it is not something that, as a stand-alone issue, we can take enforcement action against.

Paul Philip: The Solicitors Regulation Authority is the regulator of solicitors and solicitors' law firms in England and Wales. There are about 145,000 solicitors and about 10,500 law firms. We do not have a particular responsibility for non-disclosure agreements. We look at that in relation to the ethical guidance that we provide to the profession, to see whether any lawyer that has been party to such an agreement may have acted outwith our ethical code or acted without integrity. For example, have they maintained confidentiality and provided high standards of care. Most importantly—I know the Committee is sighted on this—have they paid due reference to their obligation, as officers of the court, to uphold the administration of justice and the rule of law?

Q692 **Tonia Antoniazzi:** My questions are to Rebecca and Matthew. Does the EHRC use regulatory powers to look at the way that employers use confidentiality clauses in discrimination cases? If not, does it have any plans to do so?

Rebecca Hilsenrath: We have carried out quite a lot of enforcement work on sexual harassment in general. That is something in which NDAs come up. As Matthew is actually responsible for carrying out that enforcement work, it may help if he talks you through some of that work?

Matthew Smith: We have carried out enforcement action in 11 cases so far, and five have been concluded through the agreement of an action plan with the organisation concerned. The specific way in which we might be able to tackle NDAs using our enforcement powers is to include something within the action plan if the use of an NDA has been a feature of the discrimination. However, as Rebecca said, using a non-disclosure agreement does not in itself amount to an unlawful act, and therefore does not trigger the use of our enforcement powers.

As I said, of the 11 cases so far, five concluded through the agreement of an action plan with the organisation concerned. That might require them to undergo training, improvement their policies and procedures, and various other specific measures to tackle harassment. Three of the other cases are ongoing, and for three cases we decided to take no further action.

Q693 **Tonia Antoniazzi:** On the NDAs, you said that if something is unlawful it will be dealt with in a different way. Would you consider investigating the way that specific employers use NDAs, or providing legal support to individuals who wish to challenge the way that an NDA has been used?

Matthew Smith: We would certainly consider providing legal funding to an individual—for example, suppose there was a sexual harassment claim, and the individual needed to challenge the lawfulness of the NDA in order to bring that claim. They might want to open up a settlement agreement, which would include confidentiality clauses, and we might provide funding for such a case. As far as I am aware we have had only one request like that, and it concerned claims that were 20 years out of time and that unfortunately had no prospect of success.

Q694 **Tonia Antoniazzi:** The CIPD has suggested that the EHRC could do more to investigate suspected breaches of discrimination law by employers if it had greater powers. Do you agree with that, and if so, what further powers would you want, and how would you want to use them?

Rebecca Hilsenrath: I am not entirely sure which powers the CIPD was referring to. We use our powers in relation to sexual harassment, and Matt has talked through some of that. We also work to ensure that we use our powers as effectively as possible. We do not have general powers of inspection—we do not have the power to be proactive in going into premises and inspecting. The CIPD was drawing comparisons between us and the HSE, but the HSE has considerably more resources than us, and considerably more staff and inspectors. We would obviously be able to do more if we had more resources, but we have not called for more powers in that regard.

Q695 **Tonia Antoniazzi:** So if you had more resources, you would want more power.

Rebecca Hilsenrath: Yes—well, that is not something that we have a position on, but in relation to the HSE example, if we were given powers to carry out proactive inspections across premises, that is a considerable job that sits entirely outside our current remit. The HSE has a budget of about £140 million, whereas we have £17 million. It simply is not comparable in terms of what we are resourced or set up to do.

Matthew Smith: In this particular context I am not sure that inspection powers would be of much use when going in to inspect premises. They might be of use in relation to our other work—discrimination in housing, for example—but I cannot see how it would help in this context.

Q696 **Tonia Antoniazzi:** You previously called for a duty on employers to protect workers from harassment and victimisation. We also called for that in our report on sexual harassment in the workplace. What is your response to the Government's suggestion that the forthcoming code of practice on sexual harassment might have the same effect?

Matthew Smith: The key to a mandatory duty is that it will create an unlawful act that will allow us to make use of our enforcement powers. At the moment, in order to trigger our enforcement powers we would be reliant on an individual bringing a particular case of sexual harassment to us, and they would then have to relive the experience, give witness evidence and so on. A mandatory duty would enable employees to come to us at an earlier stage and say, "Our employer does not have the

relevant practices, policies and procedures in place to comply with the mandatory duty”.

I would see it as a similar thing to the section 60 provision on pre-employment health questions. If an employer has asked some health questions but has not necessarily discriminated against the employee, that allows us to go and speak to the employer about their recruitment practices and take enforcement action at an early stage to nip it in the bud. We do a lot of work under section 60, which is very successful in changing practices and procedures, and I see that as similar in the sexual harassment context.

Rebecca Hilsenrath: Our report, “Turning the tables: ending sexual harassment at work”, published last year, was really pushing for a cultural change across the piece. The benefit of a mandatory duty is that it sets out a clear legal duty, and because that is pre-emptive, it is about trying to push that cultural change through.

Q697 **Tonia Antoniazzi:** Talking about cultural change, do you think there is a need for a wider duty on employers to protect their workers from discrimination?

Rebecca Hilsenrath: That is why we have called for the mandatory duty, yes.

Q698 **Tonia Antoniazzi:** The CBI has called for a code of practice on the use of NDAs in any employment dispute, suggesting that ACAS would be best placed to develop it. Do you agree that there should be a code? If so, who do you think would be best placed to develop it?

Rebecca Hilsenrath: We agree that there should be a code. Matthew has drafted an awful lot of it. It will exist as technical guidance until the Government consult on it, carry out any necessary reforms and lay it, which we are optimistic will happen. I think we will be in a position to publish the technical guidance in July. Is that right?

Matthew Smith: That is what we are aiming for.

Q699 **Chair:** Who directed you to produce that code?

Rebecca Hilsenrath: That was something that we took forward.

Q700 **Chair:** Sorry; the implication was that the Government had asked you to do it.

Rebecca Hilsenrath: A code of practice is only statutory at the point that the Government lay it. If the Government do not lay the code, it exists as technical guidance, which we will produce.

Q701 **Chair:** Did someone in Government ask you to develop the code of practice, or did you do it off your own backs?

Matthew Smith: The section on NDAs will form part of the technical guidance, and subsequently, potentially, the code of practice on sexual harassment and harassment at work. We have not been directed to do

that separately, as a different issue; it forms part of the same piece of work.

Chair: Part of the same thing? Right. Sorry.

Q702 **Tonia Antoniazzi:** You previously suggested that NDAs should only be used if the employee requests them in certain discrimination cases. How would that work in practice, and might there be some unintended consequences?

Rebecca Hilsenrath: We are not aware of any. There is nothing to stop an employer who is working with an employee at trying to identify a mutually satisfactory way forward, through a settlement, asking the employee if they are interested in an NDA. Initiating that conversation—obviously provided that it is done appropriately and without any sort of aggressive behaviour—would not make the NDA something that did not come at the request of the employee.

Q703 **Tonia Antoniazzi:** How do you respond to the CBI's concern that an employer would not be able to start a conversation with an individual about whether a confidentiality clause might be beneficial to them?

Matthew Smith: The employee would have to take legal advice on a settlement agreement anyway, so their solicitor should be talking the terms of the agreement through with them. If they wanted an NDA, for confidentiality, they should request that via their solicitor.

Q704 **Tonia Antoniazzi:** It has been suggested that the EHRC could have a role in collecting and analysing data about the use of NDAs by employers and about their handling of discrimination complaints. Do you think that such an approach would be valuable?

Rebecca Hilsenrath: I think there are probably two slightly different responses to that. First, in relation to the gender pay gap, the Committee will be aware that we have repeatedly called for the publication of accompanying narrative to be mandatory, so that employers set out a report—driven by their analysis of their data—on what they are doing to support women in the workplace, with time-bound action plans to identify where improvement can be made across issues, which would obviously include the sorts of things that are the subject of NDAs.

NDAs of themselves are not unlawful acts, as we have said, so it is quite difficult for us to understand what would be achieved by collecting that data. I think we would have to do quite a lot of work in understanding what that would be driving and what the objective would be. From the starting point, transparency is always a good thing, and we think the process of shining a light is generally helpful, but I think it is about drilling down a bit to understand the purpose of it.

Matthew Smith: To give an example, an employer could have a voluntary redundancy scheme and enter into 100 settlement agreements with 100 NDAs. That data would look bad on the face of it, but there wouldn't



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actually be anything there, whereas an employer could have one NDA on a very serious case of sexual harassment and we would only know that one NDA had been used, which would not particularly tell us a lot.

There is also the fact that NDAs do not concern only discrimination. We would also have to look at whistleblowing protection and whether there was a clause to prevent someone from blowing the whistle. We would have no remit over that, so we certainly couldn't be the only organisation to deal with the use of NDAs in that context.

Tonia Antoniazzi: It seems there needs to be some kind of reclassification of NDAs—of what they are for—for that data to be of any use. Thank you.

Q705 Jess Phillips: My questions are mainly for Paul. How effective do you think the SRA's March 2018 warning notice and other actions that the SRA might have taken to raise awareness have been, and how have they changed things, specifically with regard to NDAs?

Paul Philip: The first thing to say is that all the evidence—if it is evidence—is anecdotal. We issued the warning notice in March last year. We followed that up with a change to our guidance in relation to litigation and using NDAs in an inappropriate fashion. We have had about 20,000 hits on that particular bit of our website, looking at that documentation. If you read the legal press, you will see that it has been well discussed. There is no doubt that there has been heightened awareness of the issue.

Q706 Jess Phillips: But you don't have any specific mechanisms in place to check the effectiveness of changed regulation or warning notices.

Paul Philip: No, we do not.

Q707 Jess Phillips: You don't have any mechanism to assess it, although it is on the website.

Paul Philip: No we do not.

Q708 Jess Phillips: Have you taken any particular steps to ensure compliance with that?

Paul Philip: We published it and discussed it widely within the legal community. We are obviously dealing with a number of reports in relation to that.

Q709 Jess Phillips: Have reports gone up, do you think?

Paul Philip: There is no doubt they are going up. We gave you some figures yesterday. Since this issue has been raised, we had 13 reports in relation to harassment and sexual discrimination. There are another six unrelated to harassment or discrimination. There is no doubt that we would not have got that profile of reports two years ago.

Q710 Jess Phillips: So there has been an increase. That could be an efficacy measure.

Paul Philip: It could be. I suppose you could argue that it happened before but was never reported to us. Now it is being reported to us.

Q711 **Jess Phillips:** To go a bit more into some of that data, those 13 were specifically around this instance; can tell me, if you can—you can write to us if you are not sure of the specifics—how many of those came from legal practices or from individuals?

Paul Philip: We would need to write to you on that. I suspect both but I will happily give you the numbers.

Q712 **Jess Phillips:** You suspect both. Presumably individuals are not usually reading the SRA's guidance and those who are putting it out. Maybe they are.

Paul Philip: My gut feeling is that most would be from individuals, but I could be wrong.

Q713 **Jess Phillips:** You suspect that most of it would be from individuals.

Paul Philip: Yes, that would be my gut feeling, but I could be wrong.

Q714 **Jess Phillips:** Do you think that that questions the efficacy of putting out that guidance to lawyers?

Paul Philip: We put out the guidance on our general website and the general population can look at it. I think it is fairly accessible. More and more, in relation to the 12,000 people who complain about solicitors every year, people are looking at our website and actually quoting our guidance back to us, in terms of the nature of the ethical concern.

Q715 **Jess Phillips:** I suppose what I'm getting at—I'll just say it—is, is it effectively reissuing guidance? Is it currently changing the way that law firms are behaving? Or, does the fact that it has been in the newspapers and we are talking about it mean that people are more likely to go and report things to the SRA? You say those 13 cases are an increase in reports, but it is hard to say whether law firms are behaving differently. Do you think law firms are behaving differently?

Paul Philip: It is only anecdotal, but I think law firms are behaving differently because of the heightened awareness of the issue, because of our warning notice and because of this inquiry and the whole #MeToo backcloth.

Matthew Smith: If I may come in, I have noticed a real shift in the way that solicitors talk about these things. I speak to a lot of solicitors acting for both claimants and respondents. I have noticed a real change in that. It is no longer about how you can defend or deal with a grievance; it is about what measures you can put in place to prevent sexual harassment. A lot of the articles that solicitors are now putting out mention the warning notice. Training for solicitors mentions the warning notice a lot, and that is certainly in people's minds when they give advice.

Q716 **Jess Phillips:** I hear what both of you are saying. It is all very anecdotal, so even with the figures we have, perhaps you could write to us to



identify whether those figures relate to internal law firm settlement agreements—where a lawyer has brought an allegation about inappropriate behaviour within their own firm—or whether they relate to complaints by a member of the public about the way a lawyer has handled a settlement claim with which they have been involved. Do those figures include every instance in which someone has raised concerns about the professional conduct around advice and the drafting of a non-disclosure agreement? I am sure the Clerks will send that information over to you.

If a member of the public is concerned about the improper use of an NDA by a legal professional, what action can they take?

Paul Philip: They can report the lawyer to us, if it involves a solicitor. As I said, the warning notice on all ethical guidance is accessible on our website.

Q717 **Jess Phillips:** Do you think the general public know what the Solicitors Regulation Authority is?

Paul Philip: No, I don't think they do, but when people have a problem with a solicitor, they tend to go to Google and we can pop up.

Q718 **Jess Phillips:** In what sort of instances can and should people report to the SRA?

Paul Philip: Do you mean generally?

Jess Phillips: And in relation specifically to this.

Paul Philip: Whenever they believe there is wrongdoing, or that the solicitor has not acted in a way that someone feels they should have done, they can report them to us, and there is guidance about how to report it.

Q719 **Jess Phillips:** They might not be solicitors, so perhaps you could be a bit more explicit about exactly what sort of wrongdoing would be something that the SRA would look into.

Paul Philip: It could be anything. We have heard complaints such as, "The solicitor was rude" and "The solicitor failed to discharge an obligation." It might be that the service someone received was unacceptable, or that they thought the solicitor did something that reduced public confidence in the profession. It could be, "The solicitor stole my money"—there are all sorts of things, and we get all sorts of complaints about those types of issues.

Q720 **Jess Phillips:** If a group of people thought that a particular solicitor had written a non-disclosure agreement about one individual in their organisation over and over again, but that they had never acted to try to stop the behaviour of that person, would the Solicitors Regulation Authority look into that?

Paul Philip: Yes.

Q721 **Jess Phillips:** Could an NDA prevent someone from being able to raise

concerns about conduct with a legal professional?

Paul Philip: Not legitimately.

Q722 **Jess Phillips:** For example, if it was written in, or not made explicit in a person's non-disclosure agreement that they could speak to you, you would consider that a cause for complaint.

Paul Philip: I would.

Q723 **Jess Phillips:** Okay, good. What is your approach to dealing with complaints about poor practice from before March 2018—before the warning notice was issued?

Paul Philip: In relation to NDAs?

Jess Phillips: Yes.

Paul Philip: That the guidance has not changed. We have merely re-emphasised the guidance to the profession, so we would look at poor practice from before March last year in this area.

Q724 **Jess Phillips:** So if somebody came with a case from February 2018, you would consider it in exactly the same light because the guidance has not changed.

Paul Philip: Yes.

Q725 **Jess Phillips:** Do you apply the same standards when considering whether someone has acted appropriately, or do you expect a higher standard of behaviour following the warning notice?

Paul Philip: We expect the same standard, but we have re-emphasised that standard so that people are more aware of it.

Q726 **Chair:** Before we go on to the next set of questions, I want to ask a couple of supplementaries. You said that the guidance has not changed, but we heard from Matthew, quite explicitly, that the attitudes or the way that solicitors deal with NDAs has changed quite radically—those are my words, not yours, but I felt that you said things have changed demonstrably.

Matthew Smith: Can I expand on that? A lot of the focus has been on misconduct and the misuse of NDAs. My focus has been on this as something that has become standard practice across the board. It is not about the use of NDAs in specific egregious cases; it is about people just including them in settlement agreements as a matter of course because it has become standard practice. I think a lot of work could be done around tackling that. That is where attitudes have changed—people are saying that you need to think a lot more about whether you include these as standard practice, rather than it being a change in attitude as in, "We used to include them in all egregious cases and now we don't."

Q727 **Chair:** We are going to come on to talk about some of the impacts of NDAs on real people, not lawyers, and we have been quite shocked. This sort of invisible, "It's always in there; it's okay, isn't it, because we've

always done it that way,” has had much more impact than those who have put the clauses in there can ever realise.

Matthew Smith: We’re keen to tackle that.

Q728 **Chair:** Paul, do you want to comment on that?

Paul Philip: I would agree with Matthew. The change has been that we have emphasised more explicitly what has been unacceptable. The idea that you should be able to report to the police or to a regulator has always been our guidance to the profession, but now that we have made it very clear, there is more of a discussion within the profession about what is and is not acceptable. Therefore, I think that although it is anecdotal, there probably has been a change.

Q729 **Chair:** Can I also pick up on one issue that you moved over quite swiftly? We have heard very distressing—really distressing—personal testimony from people who have left their jobs because of various forms of discrimination and other acts. They are aware that what they have experienced is not isolated and, as Jess said, that those drafting the agreements have drafted multiple agreements. Can you remind us of the professional obligations if the person drafting those agreements is a solicitor regulated by you? Obviously, if they are an HR professional not regulated by you, that is entirely separate, but if somebody is aware of multiple NDAs being used to cover up unlawful behaviour, what is the professional obligation, in that sense, for somebody regulated by you?

Paul Philip: If you have a solicitor who has been involved in cases related to similar types of misconduct—for want of a better term—their responsibility is to their client, predominantly, and to the rule of law, so they have to act in their client’s best interests except where there are other considerations. For instance, if you were working in-house and you were seeing particular concerns about an individual, you would expect there to be whistleblowing arrangements and/or risk management arrangements in place, whereby the solicitor would report up the management line and ultimately to someone on the board so that the business itself can take responsibility. The nature of NDAs means that none of these issues have ever been proven in a court of law or in an employment tribunal. Everyone is innocent until proven guilty. What I think you are pushing at is the whole idea that there is no smoke without fire, and if you see lots of that, then surely there is some obligation, but that solicitor has duties of confidentiality and legal privilege towards their client, who is the business usually.

Q730 **Chair:** That is a corporate governance issue. You said there are two potential issues: one around the client and the other around the rule of law. Explain what you mean by rule of law in this context.

Paul Philip: Solicitors’ obligations are to act with integrity, to maintain confidentiality, to provide high standards of service and to uphold the administration of justice and the rule of law, which has to come first. Where they believe that an NDA would preclude someone from reporting a crime to the police, for instance, that is an issue that would be in breach of



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upholding the administration of justice, and therefore they have to act with integrity and say to their client, "I really can't be party to a document that includes such a clause."

Q731 **Chair:** And if they do not?

Paul Philip: If they do not, they are subject to our proceedings. They have an ethical responsibility to us to do that.

Q732 **Chair:** So they are subject to disciplinary proceedings.

Paul Philip: They could be, yes.

Chair: That is really helpful, thank you.

Q733 **Sarah Champion:** Paul, all my questions are also to you. I want to continue digging around in this grey area, because that seems to be where the biggest impact is happening on the individuals we have spoken to. In the March 2018 warning notice, it reminds regulated practitioners that they should not threaten consequences that cannot be legally enforced. Have you come across examples, or many examples, that use potentially unenforceable threats and clauses against the client?

Paul Philip: In the cases that we have reported to you, in terms of the numbers, there are all forms of life. There are suggestions that you cannot report it to the police, or you cannot report it to the regulator, whether that be us or other regulators. There are attempts to claw back money if that were to happen and that type of thing. There are all those types of things in the cases that we have in front of us.

Q734 **Sarah Champion:** Do you believe there is a lack of clarity in the area of the unenforceable, and therefore are you going to do more proactively to issue guidance?

Paul Philip: There is no doubt, with the benefit of hindsight, that there has been a lack of clarity, because people have clearly been doing that kind of thing. The nature of the discussion that Matthew alluded to earlier means there is more of a discussion and more of a heightened awareness about that, and they are less likely to engage without thinking carefully about it, so I think things have changed.

We issued that guidance nearly 14 months ago. We issued further guidance in relation to litigation. The Government is consulting, and I know you have some Ministers in later this morning. Once that is finished, we will consolidate all that and reproduce that guidance and continue to keep that at the forefront of solicitors' minds.

Q735 **Sarah Champion:** Do you think it is your role to do that, or should the Government be more on the front foot about it?

Paul Philip: We should be making it clear to the profession what is acceptable, regardless of what the Government does. The reason why we will wait is because it will need to be complementary to any proposals that the Government put forward.

Matthew Smith: That answer is that we will be putting forward the guidance to clarify exactly what NDAs can and cannot—rather, specifically, what they cannot—prevent an individual from disclosing. The SRA will be one of the stakeholders that will feed into that guidance.

Rebecca Hilsenrath: But also the Government should set up a mandatory duty on employers to take steps to safeguard their employees from sexual harassment. In that sense, yes, we do think the Government should be being proactive.

Q736 Sarah Champion: It has been suggested that lawyers should do more to flag up concerns about unethical behaviour by their clients. What obligations do lawyers have to bear in mind in considering whether or how to do that?

Paul Philip: Lawyers have a duty of confidentiality in relation to their client. That is a basic tenet of our legal system. If I am accused of some wrongdoing, criminal or civil, I can seek legal advice, and in the context of that legal advice, the lawyer has a duty of confidentiality and, more importantly, the client has legal privilege with the lawyer. Therefore, it is actually often difficult for the lawyer to breach that legal privilege to raise the issue further.

That is the real issue—that is the dynamic between someone who has been doing something that on the face of it is wrong, but that is not as yet unproven that it is being compromised through a non-disclosure agreement. The client has privilege and the lawyer nearly always has to uphold that privilege. Therefore, their opportunity to speak out in relation to something that is unproven but looks wrong is quite tricky for them.

Q737 Sarah Champion: Do you think there are different ethical considerations if you are an in-house lawyer from a private practice lawyer, or should it be the same across the profession?

Paul Philip: I do not think the ethical considerations are different; they have the same legal privilege obligations. The opportunity, perhaps, that in-house lawyers have is that they understand the business better, and that they can feed into the corporate governance of the business. But then, so can external lawyers. They could easily raise their concerns with their clients, and then if they felt they were not being taken seriously, move up the management chain or actually address it through corporate governance in the organisation.

Q738 Sarah Champion: Of the cases that come to you, are they evenly split between the two sorts of lawyers, or is it predominantly private practice that you are seeing?

Paul Philip: I will happily write to you about that. I think it is predominantly private practice, but I will have to let you know

Q739 Sarah Champion: Do you think that clauses that lack specificity should be either not there or it is made clear to the client that they are unenforceable?

Paul Philip: This is something that has come up in the last 18 months. I think there has been an issue in relation to blanket clauses stopping people telling anyone, which is quite clearly wrong. I think you should be very specific; I don't think an ex-employee who leaves the business should be left in any doubt as to who they can tell and who they cannot tell.

Q740 **Sarah Champion:** A number of submissions to this Committee have suggested that there should be expanded clauses and settlement agreements, which could help to reduce costs and clarify this muddy area. What is your view on that?

Paul Philip: I am probably the least qualified person on this panel to talk about NDAs, but it sounds very sensible to me. Having read other evidence that you have heard, I would agree with that evidence. Some form of commonality in terms of common clauses would be very sensible.

Q741 **Sarah Champion:** Would you say that it is your role to be involved in drawing that up?

Paul Philip: We would happily reference that in the documents that we put to the profession, highlighting that there are standard clauses, if they become available. We would hope that people would follow those clauses unless there is very good reason.

Q742 **Sarah Champion:** What is your view about having a standard, Rebecca?

Rebecca Hilsenrath: We have some concerns about a standard form of clause, simply because we are not convinced that a one-size-fits-all piece would necessarily work. There is a commonality, as Paul says, so we think a better way forward would be for NDAs to annexe a standard form, setting out an issue of statutes about what can and cannot be covered by an NDA. The umbrella piece would be standard but the clause itself is specific to the instance.

Q743 **Sarah Champion:** We have spoken a lot about clarity to the legal profession, but one of the concerns I have is about what could be done to clarify the situation to lay people, so that they actually know what they are going into rather than having to be so dependent on what they are being told.

Paul Philip: It is quite tricky. You would hope that you would never find yourself in this type of position, or only once or twice in your life, if you were very unlucky. Whenever individuals use solicitors the chances are that it is a rare purchase, we could say. Therefore, individuals do not understand the rules and they are asking lawyers for guidance because of that. It is quite tricky.

If the Government were to legislate and if there were further guidance from various bodies, including ours, in a unionised environment you can see that the unions would take advantage. If you are represented by a union, you would expect the representative to know that. There are many instances where people do not have that type of advice, and therefore it is quite tricky in my opinion.

Rebecca Hilsenrath: It is one of the issues that we would hope to cover in the technical guidance, which would become a statutory code for an obligation on the employer to provide independent legal advice to the employee, to provide reasonable time for the employee to reflect and for the employee to be accompanied to meetings. That would ensure that the playing field is as level as possible and the employee clearly understands the impacts of what they are getting involved in.

Q744 **Chair:** We took concerning evidence about the contents of the non-disclosure agreement that Zelda Perkins signed, which was drafted by a solicitor at Allen & Overy. You have told the Committee that the SRA are investigating this case. Will the SRA be publishing its findings, given the very clear public interest involved in this case and that you have powers to publish in certain, very specific circumstances?

Paul Philip: The solicitor involved is one of the cases that has been referred to the Solicitors Disciplinary Tribunal. In due course, I presume there will be an open hearing and therefore it will be published.

Q745 **Chair:** So that will be published. Given that we took evidence from Ms Perkins a year and half ago, and I believe that the case was known to you prior to that—possibly you were made aware of this up to two years ago—when would you anticipate that case coming to a conclusion?

Paul Philip: The matter has been referred to the tribunal, which is a different legal entity. It is now within their bailiwick to decide on the listing of the case and to set a date for the hearing. It is now out of our hands in terms of what we can do to progress that matter.

Q746 **Chair:** In your experience, how long does it usually take to progress those sorts of matters?

Paul Philip: It depends on the nature of the concern. It could be anything from a matter of weeks to a matter of a months.

Q747 **Chair:** When did you refer it?

Paul Philip: We only referred it last week.

Q748 **Chair:** Last week. So it took you two years to refer it.

Paul Philip: I gave evidence to this Committee last spring or early summer. At that point in time, we had not accessed a non-disclosure agreement—that was the evidence that I gave. We did that and went through the process of investigating the matter, interviewing everybody concerned and seeking further counsel's advice in relation to the charges. I am giving everyone an opportunity to make representations on that.

Q749 **Chair:** So it takes two years to do that.

Paul Philip: No, it only took us about 10 months to do that from the time at which we engaged.

Q750 **Chair:** What triggered you to refer it last week?

Paul Philip: Because we received further legal advice from counsel in relation to the charges. We agreed the charges and referred it.

Q751 **Chair:** And that just happened to be last week.

Paul Philip: It did.

Q752 **Chair:** We should probably get in contact with the tribunal. One would hope that we should get a resolution on that before the end of this year.

Paul Philip: That is a matter for the tribunal, but we will sit and hope.

Q753 **Chair:** Thank you very much for your time; I really appreciate it.

Examination of witnesses

Witnesses: Lucy Frazer QC MP, Kelly Tolhurst MP, Andrew Waldren and Joanna Warner.

Q754 **Chair:** I apologise to our witnesses that we are running a little late. We are keen to press on. Can I just remind colleagues that the acoustics in this room are dreadful, so please project. The microphones do not really amplify, so you really have to find a big voice. I thank our next panel for joining us today for this important inquiry on the use of non-disclosure agreements in discrimination cases. We have had some extremely powerful testimony from people who have been affected—in some cases their lives have been more or less destroyed by the use of non-disclosure agreements. The Committee is very focused on having a report that the Government will look at in great detail, so that we can try to put right some of the wrongs that we have very clearly uncovered. The usual process is that colleagues have a series of questions to ask. We are very mindful of the time. Just before Tonia kicks off with our first set of questions, could each member of the panel say who you are and where you come from.

Kelly Tolhurst: My name is Kelly Tolhurst and I am the Minister responsible for small business, consumers and corporate governance.

Joanna Warner: I am Joanna Warner. I head up the individual rights and migration branch in BEIS.

Andrew Waldren: Good morning. I am Andrew Waldren. I am the deputy director for court reform policy in the Ministry of Justice.

Lucy Frazer: I am Lucy Frazer. I am a Minister in the Ministry of Justice.

Q755 **Tonia Antoniazzi:** You recently launched a consultation focusing on what further implications might be put on confidentiality clauses to prevent their misuse. Are you considering all options, or have you ruled out, for example, banning the use of confidentiality clauses when settling cases in which discrimination or harassment is alleged?



Kelly Tolhurst: First, thank you for your question. I should just start off by saying that there is obviously a live consultation, which will end at the end of the month. I am very keen, as the Minister responsible for this area, to hear the views of the Committee. I am looking forward to getting the Committee's response to the consultation. We put in the consultation the areas that we will be looking at in more depth and we are asking questions about, but obviously we welcome any views and strong feelings that you have on that.

With regard to the direct question about banning NDAs in particular forms, that is something that we are quite happy to hear evidence and suggestions from the Committee on. Obviously, we have laid out what we want to do with regard to the four points around making sure that no NDA or confidentiality clause will be able to limit what people can report to the police if they believe that something is a crime. We want to make it clear what the limits of any confidentiality clause will be, and that will be in the form of a written statement.

The most important thing is that individuals understand what they are signing up for. It is about being very specific that, even though there is already a requirement to provide advice when signing settlement agreements, if there is a confidentiality clause in the agreement they must get advice on the limits of that clause. That is a change. It is about making sure that individuals know what the limits are, and that they are comfortable with what they are signing, and about the enforcement measures through an employment tribunal, or rendering void any confidentiality clause that seeks to prevent that.

Q756 **Chair:** So you are looking at everything?

Kelly Tolhurst: Yes. We are happy to have advice. I would like to say at the outset, with regard to the banning of NDAs, that I have personal experience. I have seen confidentiality clauses used. They have a legitimate place. Whether or not we decide to move in that way, we look forward to hearing from the Committee and reviewing the evidence that has been submitted.

I have one ask of the Committee, if that is okay. We are still quite a few weeks away from the end of the consultation, and it would be really useful for all colleagues to do as much as they can to encourage people to submit to the consultation. We have had some responses already, and I know that a lot will come in at the end of the consultation, but the more we have from across the spectrum, I would be very grateful.

Q757 **Chair:** Can I just be really clear here, though? The timing of this was not in the Committee's control. We had published our sexual harassment inquiry and had to wait quite a while for a response from the Government. The Government had undertaken to do a consultation on the use of NDAs. Again, that took rather a long time to become public. In the meantime, I am afraid that the Committee was not willing to wait any longer, so we got on with our job in the absence of anything coming out of Government. Any problems of timing really cannot be laid at the door



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of the Committee.

Kelly Tolhurst: Sorry—you misunderstood me. I was not criticising the Committee; I was saying that if there is anything you can do to encourage individuals or partners—

Q758 **Chair:** But our report may not fit your timeline, and I hope that you will undertake today to make sure that you take into account the findings of this Committee as part of your consultation.

Kelly Tolhurst: Absolutely. Before any kind of response we will wait for the Committee to respond.

Q759 **Tonia Antoniazzi:** What has been really shocking about taking evidence on NDAs is that individuals find themselves in situations that they have never been in before, and it has absolutely blown their lives away and they do not know where to get that information from when you talk about advice and solicitors. That has what has been so hard-hitting—the strong personal testimonies that we have had.

We have heard from individuals who do not want to sign an NDA but are told they will not get a settlement without one. Is it reasonable for employers to insist on NDAs in all settlement agreements? If not, what action are the Government prepared to take to prevent that blanket approach?

Kelly Tolhurst: Obviously, if there is a dispute, we would say to all employees to go to ACAS. That would be their first port of call in relation to any kind of dispute. In 2014, we introduced the early conciliation process, which is free for employers and employees. We would hope that employees and employers are able to work together to get a resolution, which may result in a confidentiality agreement in a settlement. ACAS have been clear that where a non-disclosure agreement is required, they step away from that. Obviously, the next stage would be a tribunal. I think most people in these terrible situations want to see justice and want to see things moved on. We would like to think that, working with ACAS, they are able to get the right advice and support or direction about which path it is best to follow. But it is legitimate that there will be cases where, depending on the settlement amount, confidentiality clauses may be used and could cover a whole host of things with regard to a dispute.

Q760 **Tonia Antoniazzi:** So there is nothing the Government can do to stop the blanket approach? That lies with ACAS, does it?

Kelly Tolhurst: From the evidence I have seen and from speaking to organisations, I know that not all organisations use these kinds of clauses in their settlements. One of the data misses is that we do not know how many NDAs are related to sexual harassment of that kind. I know personally that confidentiality clauses are used quite legitimately, rather than to cover up wrongdoing, sometimes at the request of the individual. I have seen cases in which that has happened. That is me speaking from personal experience. There should not be a blanket restriction on organisations' ability to use those clauses.

Q761 Tonia Antoniazzi: One of the issues being considered in your consultation is whether legal advice on settlement agreements should include advice on any confidentiality provisions that are included. Are you considering requiring employers to pay for that legal advice and any negotiations on the terms of any confidentiality provisions?

Kelly Tolhurst: Obviously we have the consultation, so we are—I am sorry to keep repeating myself—really keen to hear views, but I would say that the view at the moment is that employers are required to contribute to legal advice. Personally, I think that if they request that in a private settlement, they maybe should look to bear the brunt of that cost, but I would not want to set figures or boundaries for that, because that would limit the amount. Organisations will pay more for that advice, so we would not want to limit what organisations were prepared to do.

Q762 Vicky Ford: In your consultation, you say that “expansive” NDAs may not be enforceable. What remedy is there for an individual if they are subject to a potentially unenforceable NDA? Do you accept that there is a substantial financial risk to them in trying to get that overturned?

Kelly Tolhurst: The reason the consultation is quite broad is that we want to collect a lot of evidence and to have views put on these elements. The reality is that we have seen, and the Committee has heard evidence, that confidentiality clauses are being used to purposely cover up wrongdoing—crimes. It has been suggested that some have used these NDAs in that way. The consultation is about making explicit and raising awareness of the fact that not all settlements will necessarily be to cover wrongdoing, but where wrongdoing is found, that individual is not prevented from highlighting that a crime has taken place. I think that is key.

Regarding penalties, on the back of the Taylor review, we brought SIs through Parliament a couple of weeks ago—I think they became active last week—which increased the maximum penalty on employers for an aggravated breach from £5,000 to £20,000. That has already been done. We are looking to bring more forward as part of our employment rights Bill hopefully later in the year.

To stop the blanket use of NDAs—my understanding is similar to the banning of them. They do have a legitimate place. Sometimes they are used at people’s request. Sometimes they are used just to limit what is in the public domain in regards to the actual money that has exchanged hands when a confidentiality clause is used. We are focused on what we can do to ensure that where NDAs are being used to cover up wrongdoing we are able to bring that to the fore, as well as an awareness programme. It is about a culture change. Some organisations will not use NDAs at all.

Q763 Vicky Ford: We have heard people say that because of the NDA they cannot get another job, because they cannot explain what happened when they left their last job. It is incredibly difficult, because it is such an expansive NDA. Would you consider legislating to require a minimum level of specificity, to make it therefore easier to enforce, and to be clear for those involved exactly what was being covered?



Kelly Tolhurst: I think that is what the consultation is doing. That is why we are being very clear about the legal advice, because it is about ensuring that those individuals know the limits of that confidentiality clause, so that individuals truly understand what they are signing. That is quite important, because individuals do need to understand what they are getting into. That is why we are consulting on that. It is also important with regards to the statement of written particulars. With regards to that, there doesn't have to be a settlement agreed. Especially if we are looking at the ACAS through the earlier conciliation process, they will go to the tribunal courts. I am waiting for the outcome of what people have fed in to the consultation. I think it is quite broad. We have laid out the things that we are looking at.

Q764 **Vicky Ford:** We have recommended to the Government that they should legislate to introduce standard, approved confidentiality clauses, so that this is much clearer. You have rejected that approach because of concerns that that would be "highly unusual" or that such clauses could fall out of date. But do you accept that you could put in a mechanism to ensure that that wording could be kept up to date? If we are not going to legislate, how else will we deal with the issue of these expansive NDAs?

Kelly Tolhurst: You are quite right. We recognise that there are concerns around the wording. We have some concerns about mandatory wording, but a way in which we could work around that is by putting in legislation on wording specifics, and then backing that up with guidance. That would be our way of doing it, because fundamentally, if we were to put exact wording in legislation and things change, it is harder to change primary legislation. Working it in that way would enable us to change that.

Q765 **Chair:** The head of the SRA just said that he thought it was a good idea.

Kelly Tolhurst: He did?

Chair: Yes.

Kelly Tolhurst: Okay.

Chair: He is the head of lawyers, so that might be a good idea to think about.

Q766 **Vicky Ford:** Quickly, on the whole issue of public interest and whistleblowing, your written evidence clearly says that public interest should be able to override the duty of confidentiality, but we have heard a number of experts tell us that the whistleblowing law is overly complex. Some of those organisations have suggested that it all needs a wholesale review, including of how whistleblowing law interacts with equality Acts. Are you open to the suggestion of making that review?

Kelly Tolhurst: Obviously, there have been a number of changes to the whistleblowing legislation. The last one was in 2017. It is right that we keep it under review. We have the new responsibility on prescribed persons to report annually on their whistleblowing. When we have a change, it is always good to see how that change has worked, and to be able to review that substantively with information. I am quite interested in

the whistleblowing area. It has not just come up in the form of NDAs; it is something that many other Departments across Government are interested in as well. It is something that we are quite open to looking at further in the future.

Q767 Jess Phillips: Moving on to the tribunal courts—

Chair: It feels like Lucy might have something to say on that.

Jess Phillips: Yes. BEIS evidence suggests that employment tribunals are costly and stressful. That is not just their evidence, but lots of the evidence that we have seen in front of us. We know that other barriers to bringing a claim include a lack of legal knowledge and concerns about information being in the public domain. Do you, Lucy, think that these barriers and the emphasis on reaching a settlement mean that individuals are funnelled towards accepting non-disclosure agreements?

Lucy Frazer: Thank you very much. Obviously, it is really important that if people want to bring a claim, they should feel able to do so.

Q768 Jess Phillips: Do you think that they do?

Lucy Frazer: The tribunal system is set up to ensure that it is less formal than a court process. Our tribunal judges are trained to appreciate that people might not always have legal representation, so they are trained to understand and stop oppressive questioning, for instance.

Q769 Jess Phillips: Do you think that the general public know that?

Lucy Frazer: It is interesting that since fees have been taken away there has been a significant increase. Our tribunals are used. We have not just employment tribunals, but immigration tribunals and tribunals for DWP. They are extensively used across the board, often with great success, by applicants who are unrepresented. Of course one can always improve the system, but I think they offer a good service for those people who want to use them.

In terms of access and advice, I would like to mention that legal aid is available for Equality Act claims—claims under the Equality Act 2010 or any earlier discrimination legislation for discrimination, harassment or victimisation.

Q770 Jess Phillips: Based on a means test, or not?

Lucy Frazer: It has been based both on merits and means, as is most legal aid.

Q771 Jess Phillips: In that case, how much would you have to be earning to not qualify for the legal aid?

Lucy Frazer: I think there might be an income and a capital requirement, but can I just make it clear—

Q772 Chair: So what is it? Average income? £30,000 or £40,000 a year?

Lucy Frazer: I think it is £24,000.

Q773 Jess Phillips: So if you are earning £24,000 and let's say you have a £150,000 case, you would not get legal aid.

Lucy Frazer: We have committed in the legal aid review to look at the thresholds, which have not been updated since 2008. We acknowledge that we need to look at that, and we have started that review of thresholds not just in this area but across the board in every area of legal aid. We recognise this is something we should look at.

Q774 Jess Phillips: Let's just say, in this instance, that you are saying that if you earn less than £24,000 or thereabouts, legal aid would be available to you in an equality case.

Lucy Frazer: It is subject to two things: means and merits. It is for advice. We also recently made a change to ensure that it was more accessible. At the moment, for these sorts of claims, you have to go through the CLA telephone gateway and we have found in that that people are not accessing legal aid even though it is available through the gateway. So one of the things that we did in the legal aid action plan, which we announced in February, was to remove the requirement to go through the gateway. We will take away that requirement, so hopefully more people will access the legal aid that they are entitled to and deserve.

Q775 Jess Phillips: So you are currently working on reducing those barriers.

Lucy Frazer: Yes. What we find, as we have seen in this area, is that legal aid is available but people do not know it is available, so we have also committed to advertising and making people more aware of its availability. Legal aid is also available for representation in the Employment Appeal Tribunal. It is also available through the exceptional case funding scheme. Where it is not in scope, you can get it exceptionally if your claim is for a breach of human rights.

Q776 Jess Phillips: Okay—again, means and merit. We have received evidence that tribunal claimants can feel compelled to accept a settlement with an NDA because they fear that if they pursue their tribunal claim, they may be deemed to have been unreasonable and refused to settle and be liable for some of the other party's costs. There is also the public nature of tribunals: anyone can look up who has gone to tribunal, which makes them look like a bad employee. Is it acceptable that tribunal claimants should feel pressured to accept a non-disclosure agreement in this way?

Lucy Frazer: We are always asked by different groups, quite rightly, that justice should be seen to be done, so generally across the board for justice there is a requirement for transparency. As you know, Jess, there are areas where we do not disclose who are bringing claims, but that is limited, and we think very carefully about that. Generally, when you bring claims, there is openness and transparency, and there is a good reason for that. Costs are in the discretion of the judge to award or not.

Q777 Jess Phillips: Some of the evidence we have had suggests that people feel at tribunal that they will be considered unreasonable for not settling—they have had offers time and time again but have said, "No, I want my day in court. I want to go out there and tell the truth." In fact,

almost every single person with a non-disclosure agreement has said that to us. They have said, "No, I didn't want this. I wanted something to change. I wanted this to be heard," but they were led to believe they would be considered to be unreasonable.

Lucy Frazer: If they didn't settle.

Jess Phillips: If they didn't settle—that it would be held against them in the process.

Lucy Frazer: We are looking at the settlement process and the NDAs—that is something that BEIS is looking into. I can understand that people want their day in court and people should not feel that they should not be able to go to court—obviously that is wrong. I have not got the statistic, but we know that of all cases, only very few—less than 10%; I think significantly less—do go to court, so most cases settle when you look at it across the board. However, people should not feel that they need to settle and that there will be consequences if they do not.

Q778 **Jess Phillips:** We have seen evidence that the person that they might be taking to tribunal would request reporting restrictions, which stops them and forces them into signing NDAs, because what would be the point of getting a day in court if there was a restriction on reporting on their employer?

Lucy Frazer: Sorry, could you talk me through that again?

Jess Phillips: I have heard cases in which people were stopped from going to tribunal—

Lucy Frazer: Actually stopped?

Jess Phillips: Well, it was suggested—"You can take it to tribunal, but I will get reporting restrictions on the tribunal."

Lucy Frazer: That's about whether it is reported or not. They would still get their day in court. People go to court for a number of reasons. The primary aim of going to court in a civil case is to get compensation for the loss you have suffered and to get a legal remedy for the wrong committed against you. That will be achieved in circumstances in which you go to court, and whether the court is open or not, you will achieve a remedy of the wrong that has been done to you. If they want something other than that, that is a different question.

Q779 **Jess Phillips:** In the courts, is it currently okay for employers to request reporting restrictions?

Lucy Frazer: In the employment sphere or generally?

Q780 **Jess Phillips:** In employment tribunals.

Lucy Frazer: If you request reporting restrictions, you will have to persuade the judge. It is within the discretion of the judge to determine that, based on the evidence available.

Q781 **Jess Phillips:** Is it quite rare?

Lucy Frazer: I don't have the stats before me.

Q782 **Jess Phillips:** If you could, have a look at that. The CBI suggests that the employment tribunal system is failing to meet the needs of its users. Are there any plans to review the tribunal system as a whole?

Lucy Frazer: We are in the middle of a significant reform programme, with £1 billion across the board to improve our tribunals and courts, bringing in technology. I was recently with the senior president of the tribunals, who has an extensive programme for how to streamline our tribunals and make them efficient, including changes across the board on the flexible operating of the judiciary, which we brought in recently with the legislation that went through the House, as well as on IT, technology and other means.

Q783 **Jess Phillips:** Is part of that review to look at how we deal with complex and potentially sensitive matters of discrimination in courts?

Lucy Frazer: The reform programme is largely about bringing our courts system up to date, rather than the complexity of the law.

Q784 **Jess Phillips:** Will the review look into how we handle sensitive and difficult cases in courts, specifically in the tribunal courts?

Lucy Frazer: The reform programme is not focusing on that particular issue.

Q785 **Jess Phillips:** Can you update us on any plans to consult on time limits for lodging a tribunal case?

Lucy Frazer: There are two consultations on time limits. One is being undertaken by the Law Commission and one by the Government Equalities Office. The Law Commission's is on time limits across the board, and GEO's—

Q786 **Jess Phillips:** And if those consultations both come back and say that the time limits should be extended, which I imagine they almost certainly will, will the Government extend the time limits?

Lucy Frazer: That is not an area that my Department leads on, but I am sure that, if those are—

Kelly Tolhurst: As you know, we are already consulting on time limits in regard to pregnancy and maternity discrimination. Obviously, BEIS is leading on that.¹ Lucy is quite right: we will consult on those other areas, hopefully as soon as possible before the summer.

Jess Phillips: Can I save the Government some time and say that all the consultations will come back and say that there should be longer time limits? Literally every single inquiry that we have done that has involved this, and every single bit of evidence and every single report that we have ever sent to the Government says that we need to extend the time

¹ The Department for Business, Energy, and Industrial Strategy clarified on 25 April 2019 that in fact they are not currently consulting on the issue of time limits.

limits on tribunals.

Q787 **Chair:** I would add that, even though it has been pointed out that people can ask for an extension to a time period, we have been told unequivocally by leading legal experts that no lawyer ever would recommend asking for an extension like that, because of the uncertainty.

Lucy Frazer: Can I give you some stats on that? From April to June 2018, 120 applications were made to bring claims out of time; 118 applications were accepted; only two were rejected and neither was a discrimination claim.

Q788 **Chair:** And that was work that was done as a result of this Committee, indeed this Committee Chair, sitting in the then Minister's office.

Lucy Frazer: It was, absolutely.

Chair: That is great, and I hope that those were not just sensitised figures to people granting those. We have been told absolutely in black and white, however, that no lawyer would ever, ever recommend that as a course of action to their client.

Q789 **Jess Phillips:** What is more, 120 is one thing, but the general public will look at a thing that says, "You've got three months," and they will go, "We're out of time." It is meaningless to say that in the cases where people both have the advice and—

Chair: We make our case strongly.

Lucy Frazer: I think a commitment was given to respond to that point. Again, it is not my Department, but I think there was a Government commitment to ensure that people did understand that you can apply out of time, but I take on board the point you have made.

Q790 **Chair:** Can I move the questions on to penalties for employers? We have been struck by the enormous amount of evidence we have been given that demonstrates that non-disclosure agreements are being used to cover up unlawful discrimination. It is very clear—it is not a maybe, an if or a but; it is an absolutely clear situation. When I read the Government's good workplace guide, however, there is absolutely nothing in there about the important role the Government should have in enforcing workplace rights when it comes to discrimination. Why is discrimination not in there?

Kelly Tolhurst: If you are referring to the *Good Work Plan*, that was based on the back of the Taylor review, which looked predominantly at employees' status and workers' rights in a wider context, but I would say that that is because there is legislation already for us to tackle. It is clear—the law is already clear around discrimination in the workplace—

Q791 **Chair:** But your good workplace guide covers existing legislation and the enforcement of it.

Kelly Tolhurst: Yes.



Chair: So I do not think that that is the answer that would explain why discrimination features on not one page of that guide.

Kelly Tolhurst: Discrimination in the workplace—everything that we do, especially since I have been in the Department, in regards to looking at the workplace and looking at workers' rights, is around discrimination. That is why we brought forward the pregnancy and maternity redundancy discrimination element. I accept that it may not be expressly in the good work guide, but that is definitely not a signal of us not taking discrimination in the workplace seriously. In fact, I would say that is exactly why we are trying to take some of those steps forward to actively stop discrimination, because they are—

Q792 **Chair:** So in terms of enforcement of workplace rights, you see discrimination as central.

Kelly Tolhurst: Absolutely. If anybody has been discriminated against based on their sex or gender, or in regards to physical disabilities or religion, it is not acceptable, and actually, it is against the law to discriminate in the workplace—

Q793 **Chair:** We asked Sir David Metcalf to come before the Committee last week. He was very generous with his time. When we posed the question as to whether discrimination should form part of his work, he was very interested in that, but interestingly, he said that it had never been raised with him by a Minister.

Kelly Tolhurst: Right, okay. The last time I met Sir David, we were talking about a number of things, including we were talking about the single labour market enforcement body that we potentially will look to bring forward. I think—

Q794 **Chair:** Could your new single labour market enforcement body cover the issue of discrimination as an important part of enforcing workplace rights?

Kelly Tolhurst: It could. We are not at that stage; it could do anything. Obviously we have the EHRC, but we will be looking at how we can do this. Fundamentally, the reason we are in the space where we want a single labour market enforcement body is that we recognise that there may be gaps with all these different agencies working together. Individually, all those agencies across the workplace are doing some great work, but now is the time for us to look at how we improve that and do a better job. I think there are opportunities within that.

Q795 **Chair:** Okay. We were somewhat surprised that the EHRC was not on your list of organisations that are regulators of what goes on in the workplace. Indeed, we were surprised that Sir David Metcalf had not met with EHRC—I think he said that, from memory. He saw the merit in it, so I was very pleased that he saw that as an opportunity. I am heartened, Minister, that you see that it could be a possible way forward for it to become part of the Government's enforcement of workplace rights.

Kelly Tolhurst: I would say, as I would not rule anything out, we are at the stage where we are looking at it. It is part of a wider Government agenda, not just literally around rights in the workplace, but around how we are able to tackle modern slavery and our wider Government agenda.

Q796 **Chair:** But as well as dealing with the issues that affect small numbers of people, we should also be dealing with the issues that affect large numbers of people.

Kelly Tolhurst: Absolutely.

Q797 **Chair:** That includes 50,000 pregnant women a year leaving their jobs simply because they are pregnant. This has to work for everybody—for the many, not just the few, to coin a phrase.

Kelly Tolhurst: Chair, you are absolutely right; this is an ongoing piece, we are moving forward and there are a number of different work streams going on, but all the time that I have this role, I am committed to being able to plug those gaps where I can, but it is always that balance. For me, it is about what we can do in legislation and what we can do in bringing enforcement together. In some cases, it is also about whether it is practical to enforce, or whether there are better ways to get the desired outcome. For me, it is not about what an enforcer will do, but it is outcome-based and how we can best get the right outcome.

Q798 **Chair:** With that in mind, I am thinking about what Sir David Metcalf said—that the way you get the law enforced is by having the right balance of compliance and deterrence. Do you think we have the right balance when it comes to discrimination in the workplace and the way NDAs are covering up the lack of compliance? I am particularly struck that almost every single idea the Committee has put to Government to try to redress the balance of power problems that we have in this place have been rejected. Those are problems that you have admitted are there, because in your consultation you say there is “evidence to suggest that some employers have been exploiting an imbalance of power in a workplace relationship”, so we are somewhat surprised as a Committee that at every turn you have rejected our calls for a rebalancing of that power.

One of the recommendations we made was that employers would be required to pay employee costs if an employer loses a certain sort of discrimination case, but you have rejected that. Are you content that the balance of power is right? If so, why did you write in your consultation that you felt there was a problem with the balance of power? How are you going to address this? It is a fundamental problem.

Kelly Tolhurst: You are right that that is in our consultation, but I would argue that the majority of confidentiality clauses are not used to deliberately cover up wrongdoing and criminal activity.

Q799 **Chair:** How do you know that?

Kelly Tolhurst: Because we know that confidentiality clauses are used in a number of different ways: first, to protect trade secrets—

Q800 **Chair:** But, Minister, we do not know the content, so that is an assertion from you. They might all be used for that.

Kelly Tolhurst: Well, the ones I have had direct experience of were used for other things, because I saw them used in the workplace before my time in Parliament, and I can speak from my own personal experiences.

Q801 **Chair:** But it is always very dangerous to extrapolate from personal experience. The evidence that we have had in this Committee is the devastating effect that non-disclosure agreements are having on people's lives today—not some time in the past, but today. We have to deal with that reality, not the things that have happened to us in the past.

Kelly Tolhurst: Absolutely. That is exactly why we are looking at those areas in the consultation, because we absolutely accept that. You are absolutely right. This is about culture change and shining a light on it. The fact that we have had so much press activity and publicity around this has been a good thing. It has highlighted to employees that there is another way forward, and that this should not be happening to them. I know we cannot rely on that, but it has been great for getting it out there. It is right that they are not used to cover up criminal activity and wrongdoing. Absolutely, those individuals—

Q802 **Chair:** Your consultation will not close the door on redressing the balance of power between employers and employees. Your consultation will look at that and will relook at some of the recommendations this Committee has put to the Government in the past. Yes or no? We are terribly short of time.

Kelly Tolhurst: I think it does look at addressing that, because it is not just around what we are doing in law—it is around making sure that we have positive culture change as well.

Q803 **Sarah Champion:** Minister, you will be delighted that I have quick-fire questions on protection of workers. The CIPD has called for greater oversight of employers to ensure that they follow grievance procedures correctly. What are your thoughts on that? Do you think the mechanisms are currently in place to enable that to happen?

Kelly Tolhurst: Legislation is a safety net. Obviously any kind of workplace abuses are not right. I refer back to ACAS. There is a code of practice in complaints and grievance procedures, which ACAS has. There is also some guidance for employers as well.

If a tribunal comes forward, ACAS assesses whether or not the employer has adhered to the code.² If a judgment is made that the employer has not adhered to the code, there is an opportunity within the rules to have an uplift on the compensation to 25%. I don't think it is widely understood by employers, but ACAS is very good at giving guidance to employers as well as employees. They run a lot of courses and training for employers.

² After the oral evidence session, it was clarified that the Minister meant to say, "If a tribunal comes forward, the tribunal assesses whether or not the employer has adhered to the code."

Most employers will want to do the right thing. Most employers do not want to deliberately disadvantage their workers, especially small businesses. Their workforce is even more important, especially when they are dealing with small numbers of employees. Most organisations will take up those opportunities to get advice.

Q804 Sarah Champion: What moved forward the gender pay gap enormously was compelling organisations to put their figures out, not least because it moved the onus of finding that information away from the employee and on to the employer. Would you consider doing something similar in cases of discrimination—compelling the organisation to put that into the public domain?

Kelly Tolhurst: It is a good point. It is a good suggestion. I would say that at the moment we are seeing the benefits and the outcome of the gender pay gap³. In time, that will be reviewed. Obviously, we have wider concerns about how the gender pay gap has worked, and what some of the issues are with it. There are opportunities in the future to look at widening that. That is not a bad idea.

Q805 Sarah Champion: In response to our call for a duty on employers to protect workers from harassment and victimisation, you said you would consult on whether that would be a useful tool. When is that going to happen?

Kelly Tolhurst: That will be part of the consultation that the Equalities Office will hold later in the year. There already is a liability for employers to ensure health and safety in the workplace, and make sure people can work there free of harassment.

Q806 Chair: To be very clear, health and safety does not cover sexual harassment.

Kelly Tolhurst: No, I apologise. I was just outlining that there is already a liability on employers to have due regard for the workplace. That will be part of that particular conversation.

Q807 Sarah Champion: So it will start by the end of the year?

Kelly Tolhurst: Yes.

Q808 Sarah Champion: The CBI has called for a statutory code of practice on NDAs. Do you plan to introduce such a code?

Kelly Tolhurst: A statutory code of practice? We are consulting at the moment and, as I say, I have indicated wordings. A good way to do it might be to legislate and then provide guidance. We have consulted on the four areas and asked wider questions. A code of practice may be something that we can look at—absolutely. I am open-minded.

Q809 Sarah Champion: It has been suggested that one way to make confidentiality agreements less attractive to the employer would be to

³ After the evidence session it was clarified that the Minister meant 'gender pay gap reporting'



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place a legal obligation on employers to provide references when they are asked to do so. Would you consider requiring employers to do that?

Kelly Tolhurst: It is still something that is very much dealt with, because not all employers won't give references—

Q810 **Sarah Champion:** But some very much use it as a tool to basically blackmail people to sign NDAs.

Kelly Tolhurst: Yes. There is a whole host of reasons why the NDA or confidentiality clause may be signed. It would very much be a case-by-case basis. I understand that we do not know the specifics of all the individual things that would stop that, or even why an employer would not answer those basic questions. In regards to that question, I would not see us putting a requirement on those employers to do that.

Q811 **Sarah Champion:** Could you think of a good reason why an employer wouldn't give a reference?

Kelly Tolhurst: As I say, most employers will give a reference, even if it is a very basic one. In some cases, I have seen that happen—the refusal of a reference.

Q812 **Sarah Champion:** Would that set alarm bells ringing?

Lucy Frazer: Can I just come in there on a legal point? When you give a reference, it is worth remembering that you have a duty of care to the person you are giving the reference to. Giving a reference is quite a big obligation, because you have to be honest, obviously, and you owe a duty to the future employer. That is one thing that you have to bear in mind when you are thinking about obligations. I am just throwing that out as a point.

Jess Phillips: I am not sure that is relevant in this case.

Q813 **Sarah Champion:** I am not sure if you are arguing for or against giving references.

Lucy Frazer: I am just saying that you have to remember the duty on the employer.

Q814 **Jess Phillips:** This is not when somebody has been sacked for a safeguarding issue. In the case of settlements, it would be different. It sounds like you are suggesting that, when somebody has raised a case, you have a duty of care to their future employer, who might not want to employ somebody who might raise cases.

Lucy Frazer: No, I am not saying that at all in any particular context. I am not expressing a view.

Q815 **Chair:** I suppose the point you are making is that it is a complex obligation.

Lucy Frazer: It is a complex requirement. It is a complex obligation. When I have taken references from people who have worked for me, all I get is, "Yes, you worked between these dates." They are not willing to

engage with me on the conversation. I say that with a legal background rather than to put forward a Government position.

Q816 Chair: Can I move on to a final two minutes' worth of questions. They are about corporate governance and the role of boards, if that is okay, Sarah. I realise that you are in the middle of a consultation, which we are very pleased to see, but you might want to be aware of some of the other issues that have been raised with us. They include the role that corporate governance could have in improving this situation, particularly the oversight of company boards of directors, in terms of signing off NDAs, including the number of agreed NDAs in annual reports, or—to build on a point that Sarah raised a little while ago—including maternity retention rates in annual reports to help tackle pregnancy and maternity discrimination.

The Government have proved strongly, with their action on gender pay gap reporting, that transparency is the way forward. Do you see those other transparency measures as strategically part of the Government's future plan?

Kelly Tolhurst: I feel very strongly, across the board, about corporate governance and the responsibility of large—or all—organisations. I would say that boards have collective responsibility for what is going on within their organisations. Part of what we have done for our wider corporate governance review is look at and make changes to the corporate governance code on the responsibility of boards, relating to how their actions have an impact on their workforce and the wider environment in which they work.

The reforms that we put in obviously spoke about strengthening the workers' voice in company boardrooms. We have given them the option of one of three areas to make sure that that voice is heard: they can either appoint a worker-director, a non-executive director focused on that, or a workers' advisory council. We also now have the Wates corporate governance principles, which apply to all companies where the corporate governance code does not apply. The Wates principles are to ensure that organisations have due processes and procedures in place for employees to be able to report any grievances or concerns that they may have.

Q817 Chair: What happens if people do not adhere to your corporate governance principles? What is the sanction?

Kelly Tolhurst: At the moment, the corporate governance code is a new change. It is not just about figures; they actually have to apply a narrative.

Q818 Chair: But what is the sanction if they do not?

Kelly Tolhurst: The sanction is that the information is public and transparent. They will have to prove to their employees that they are acting in a proper way and in the interests of their employees and of the wider environment in which they work.

Q819 Chair: Do you think that there should be more of a sanction?

Kelly Tolhurst: Ultimately, it is about ensuring a culture change, so it is right that there is the use of some sanctions. In a number of areas, the way that that is achieved is through a mixture of those tools. Transparency and openness are a way of doing that.

Q820 **Chair:** Your own advisor told us just a week ago that you have to have a certain amount of deterrence. I am not hearing a huge amount of deterrence other than transparency. I am sorry to cut you off there, but I have a final question. Would you be concerned if the chief executive or chairman of an organisation was not aware of the use of NDAs to cover up unlawful behaviour? Presumably that would go against your corporate governance and what you would want to see as the Government.

Kelly Tolhurst: Absolutely. Within the governance code, you obviously have the risk audit committees, which are identifying risk for the organisation. If that work is going on within the organisation, in my view it should already be at board level. Some organisations are already voluntarily reporting that information. You could have an HR director who might be sitting on that board and have that information. Those things should be there.

Q821 **Chair:** So you would be surprised if the Committee was being told by a major corporation in this country that its chairman and chief executive were not aware of the use of NDAs to cover up unlawful behaviour.

Kelly Tolhurst: I would be concerned that the boards were not aware of that, because it would be perceived as a risk. It is the collective responsibility of that board, who are ultimately responsible for their employees, whoever works in that organisation and the customers they respond to. As I say, we made these changes in regards to the corporate governance code literally last year. There is always more work to do; it is about finding a balance. If NDAs are being used illegally to cover up sexual harassment or another crime, that is illegal activity; it is against the law⁴. Yes, I would be concerned. They have a duty to the environment in which they operate, and to the people they employ and their customers. Therefore, in my view it is the responsibility of the board to know exactly what is going on within that organisation.

Chair: Brilliant. Thank you very much.

Lucy Frazer: Can I make one minor point, just to ensure the record is right. I notice that one of your witnesses said the Legal Aid Agency took a lot of time in the context of the three-month limit, and it was not approved in time. I just want to make it clear that the Legal Aid Agency is not responsible for authorising those claims; it is a delegated function of the provider to authorise them, and 90% of claims across the board are usually authorised by delegated organisations within 20 days. I did not want the Legal Aid Agency to be misrepresented.

Q822 **Chair:** Who oversees that?

⁴ It is not currently a criminal offence to use an NDA in any context, though an NDA that does purport to prevent whistleblowing is unenforceable.

Lucy Frazer: What do you mean?

Chair: Who oversees the contract?

Lucy Frazer: Well, the contracts are granted by the Legal Aid Agency, but it is the provider's obligation to say whether there is eligibility and then proceed. It was just a minor point in case you mentioned it.

Q823 **Jess Phillips:** Just to pick up on that. If a lawyer thinks, "I can't be bothered with this case," they can say, "No, the Legal Aid Agency—"

Lucy Frazer: You are assuming that solicitors do not take their legal obligations very seriously, which I hope and think they do.

Q824 **Chair:** Thank you for clarifying that; that is wonderful. I am so sorry to keep you so long. Please exit stage right; that is the end of our witness session. Thank you very much.