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Women and Equalities Committee

The use of non-disclosure agreements in discrimination cases

Ninth Report of Session 2017–19

Report, together with formal minutes relating to the report

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Women and Equalities Committee

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Contacts

All correspondence should be addressed to the Clerk of the Women and Equalities Committee, House of Commons, London SW1A 0AA. The telephone number for general enquiries is 020 7219 6123; the Committee's email address is womeqcom@parliament.uk.

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Contents

Summary

It is completely unacceptable that allegations of unlawful discrimination and harassment in the workplace are routinely covered up by employers with legally drafted non-disclosure agreements (NDAs). It is clear that in some cases allegations of unlawful discrimination are not investigated properly—or at all—by employers. The difficulties of pursuing a case at employment tribunal and the substantial imbalance of power between employers and employees, mean that employees can feel they have little choice but to reach a settlement that prohibits them speaking out.

Our Report shows unequivocally that in many cases signing a non-disclosure agreement is not benign. And we challenge the Government to act to change this now. The most shocking evidence given to our inquiry has been the detrimental effect an NDA can have on the lives of ordinary people. We received evidence from those who, after signing an NDA found it difficult to work in the same sector again. Some suffer emotional and psychological damage as a result of their experiences, which can affect their ability to work again or to move on. Some also suffer financially as a result of losing their job and bringing a case against their employer.

The wider effects of NDAs are also deeply troubling. Victims may be reluctant to report their own experience for fear that their allegations will not be taken seriously or investigated properly and that they will lose their job. This cover-up culture has to be challenged. NDAs should not be used to silence victims of discrimination and harassment. Employers and their legal advisers should not be complicit in using NDAs to cover up allegations of unlawful acts.

Discrimination at work is unlawful and employers should not have the option to cover it up through the use of NDAs. They have a duty of care to provide a safe place of work for their employees and that includes protection from unlawful discrimination. Insufficient focus and force from regulators to require employers to do more to protect employees has to change.

It is in the public interest that employers tackle discrimination and harassment and that allegations of such behaviour are investigated properly and not covered up by legally sanctioned secrecy. The Government has to reset the parameters within which NDAs can be used and must address the failure of the employment tribunal system to ensure all employees who have experienced discrimination have a meaningful route of legal redress.

Some organisations now routinely settle employment disputes without the use of NDAs. We are recommending a package of measures to ensure more follow suit.

Our key recommendations are that the Government should:

- ensure that NDAs cannot prevent legitimate discussion of allegations of unlawful discrimination or harassment, and stop their use to cover up allegations of unlawful discrimination, while still protecting the rights of victims to be able to make the choice to move on with their lives;

- require standard, plain English confidentiality, non-derogatory and similar clauses where these are used in settlement agreements, and ensure that such clauses are suitably specific about what information can and cannot be shared and with whom;
- strengthen corporate governance requirements to require employers to meet their responsibilities to protect those they employ from discrimination and harassment; and
- require named senior managers at board level or similar to oversee anti-discrimination and harassment policies and procedures and the use of NDAs in discrimination and harassment cases.

We also renew our previous calls for the Government to:

- place a mandatory duty on employers to protect workers from harassment and victimisation in the workplace; and
- urgently improve the remedies that can be awarded by employment tribunals as well as the costs regime to reduce disincentives to taking a case forward. Tribunals should be able to award punitive damages, and awards for the non-financial impact of discrimination should be increased significantly.

These actions must be taken urgently to bring about an immediate step change in the use of NDAs in discrimination cases.

1 Introduction

Why we undertook this inquiry

1. We launched this inquiry in November 2018 because of ongoing concerns about the use of non-disclosure agreements following our 2018 Report on Sexual harassment in the workplace, in which we highlighted our concerns that "some allegations of sexual harassment are being 'dealt with' using settlement payments and agreements that prevent the employee from speaking about the alleged behaviour—even unlawful behaviour—without those allegations ever being investigated and without any sanctions for perpetrators."[1] We wanted to see whether the picture was similar for people who have suffered other forms of unlawful discrimination and harassment and to follow up on the recommendations we made in our Report.

2. The law makes it clear that discrimination and harassment in the workplace is unlawful. This has been set out in the Equality Act 2010 and in preceding legislation. Rights for employees are also set out in the Employment Rights Act 1996, which allows employees to bring constructive unfair dismissal claims against their employer where they consider that they have been subjected to severe harassment or unfavourable treatment that is not covered by the Equality Act 2010. In addition, employers have a duty under both common law and statute to provide a safe place of work for employees.[2] This means providing both a physically and psychologically safe working environment.

3. As we have previously highlighted, the burden of enforcement rests on the individual who has experienced discrimination to seek redress and thereby increase employer compliance. This is concerning because, as we know from our previous work on workplace sexual harassment and on pregnancy and maternity discrimination, only a minority of those who experience unlawful discrimination and harassment will go on to make a complaint to their employer.[3] Of those who do make a complaint, many will find that their case is handled poorly by their employer. A tiny minority of cases will end up in employment tribunal, largely because potential claimants find the prospect of taking a case to tribunal so daunting and financially risky.[4] This is concerning because if people who have experienced discrimination cannot trust their employer to deal with such complaints fairly and effectively, and if those employees do not feel able to take their case to tribunal, there is nowhere else for them to go. If they are facing a rogue employer who harasses and discriminates against their staff—repeatedly in some cases—there is even less chance of their being exposed and lawful resolutions being reached.

4. It is less clear how many unlawful discrimination and harassment cases are being settled with agreements that include gagging clauses that prevent signatories from speaking about the discrimination they experienced. We knew that statistics on the use

1 Women and Equalities Committee, Fifth Report of Session 2017–19, Sexual harassment in the workplace, HC725, paras 74–76

2 The Health and Safety at Work etc. Act 1974 is the main act setting out the health and safety duties of a company, its directors, managers and employees.

3 Women and Equalities Committee, First Report of Session 2016. Pregnancy and Maternity Discrimination, HC 90, para 116; Women and Equalities Committee , Sixth Report of Session 2017–19, Sexual harassment of women and girls in public places, HC 701, paras 109 and 123. See also Equality and Human Rights Commission, Turning the tables - Ending sexual harassment at work, March 2018, p. 5 and Civil Service HR, Review of Arrangements for Tackling Bullying, Harassment and Misconduct in the Civil Service, 24 September 2018, p. 6

4 See Chapter 2 for more detailed figures and discussion of barriers to taking a case to tribunal.

of NDAs in such cases would not be available because of the secrecy that surrounds their use. Some agreements prevent signatories even from mentioning that the agreement exists. Nevertheless, we wanted to explore in more detail how NDAs are being used in discrimination cases. In doing so, we wanted to hear directly from individuals about their experience of signing an NDA.

Who we heard from

5. We have received written and oral evidence from a range of people and organisations including employers, employees, unions, human resources professionals, charities, employment lawyers, academics, regulators and professional bodies. We are particularly grateful to those individuals who submitted evidence based on their personal experiences of workplace discrimination and harassment, especially those who have signed an NDA. Clearly, the nature of NDAs means that those who have signed them are subject to restrictions that appear to limit their ability to discuss their experience even with Members of Parliament, and we appreciate their willingness to share their stories. Their perspective has been invaluable in helping us to understand the effects of NDAs on those who sign them.

6. During this inquiry we have received more than 90 written submissions, some of which have been published anonymously, and held 11 oral evidence sessions. Part of the written and oral evidence has been kept confidential in order to protect the identity of the submitters and other sensitive information.

7. We thank our specialist advisers Marian Bloodworth, Employment Partner at Kemp Little LLP, and Richard Moorhead, Professor of Law and Professional Ethics, Vice Dean (Research) at University College London Faculty of Laws, Centre for Ethics and Law, for their support and advice.[5]

What do we mean by non-disclosure agreements? A note on terminology

8. A non-disclosure agreement is a contract that contains clauses that restrict what a signatory can say, or who they can tell, about something. These can be confidentiality or gagging clauses, which prevent or limit what information can be shared, or they can be non-derogatory or non-disparagement clauses, which prevent signatories from saying anything derogatory about particular individuals or organisations.

9. There are three main types of agreement used by employers that might contain such clauses: agreements to protect intellectual property or other commercial or sensitive information; employment contracts, which can include clauses preventing the disclosure of confidential information during and after employment; and agreements to settle employment disputes or to end employment. For example, if an employee alleges that they were harassed or discriminated against, they may agree to settle, or close, the case instead

5 Marian Bloodworth declared the following interests: Deputy Chair of the Employment Lawyers Association; Co-Chair, Consultation, Legislation Advice Committee for CityHR, a London-based association for HR Professionals. Professor Richard Moorhead declared no interests.

of asking a judge to rule on it at employment tribunal. To close the case they will reach a settlement agreement, which may include confidentiality and non-derogatory clauses.[6] The focus of our evidence-taking has been on this third type of NDA.

10. Among lawyers and employers, the term "non-disclosure agreement" may be used only to describe the first type of agreement outlined above, which protects intellectual property or other commercial or sensitive information. However, in wider public debate, the term NDA is increasingly used as a catch-all term to describe any agreement containing confidentiality or non-disparagement clauses, or to describe those clauses themselves. This is how we have used the term during this inquiry and in our previous inquiry and report on Sexual harassment in the workplace. This approach has helped us to focus on the fundamental issues. We are concerned with the way that these mechanisms are being used in discrimination cases rather than on how they are currently categorised.

6 Agreements facilitated by Acas are known as COT3 agreements and may also include confidentiality and non-derogatory clauses.

2 Why so many NDAs? Benefits, drawbacks and drivers

11. Confidentiality and non-derogatory clauses have become commonly used in agreements reached between employers and employees when settling or closing employment complaints or employment tribunal cases about discrimination or harassment. Indeed, they are commonplace when settling any type of employment dispute.[7] Employment lawyers and others told us that such NDAs can be beneficial to both employers and employees in workplace discrimination cases. However, we are concerned that many employees and indeed lawyers were not fully aware of the potential downside of signing NDAs. There appeared to be a lack of awareness about the problems that can be caused by NDAs and it is clear that some of those who draft NDAs, including those who are not legally qualified, could be using NDAs in an unlawful way.

12. Some witnesses suggested that a main benefit for employees is being able to move on with their life and career quickly and quietly, without the stress of going to tribunal. Employment lawyer Emma Webster of Your Employment Settlement Service (YESS) told us:

> [A] lot of my clients want these confidentiality clauses themselves. They want to be able to move on. They want to be able to draw a line under this situation. They want to be able to continue their careers without being blacklisted and without being cast as a troublemaker and without being the person who has raised the fact that their previous employer has discriminated against them.[8]

We also heard that NDA settlements enable employees to achieve higher payments than might be awarded at tribunal or in a settlement without confidentiality.[9] Some of these benefits come from the settlement of the dispute, rather than the confidentiality agreement, and could be achieved through settlement without an NDA. However, several witnesses suggested that employers would be less willing to settle, or to settle early, without them.[10]

13. The Employment Lawyers Association suggested that a key benefit of settlement agreements for employers was enabling settlement without admission of liability and that confidentiality was an important part of this.[11] Joeli Brearley of Pregnant then Screwed told us that there was no incentive for employers to settle without confidentiality, and that women who have suffered pregnancy or maternity discrimination are driven towards settlement by their situation:

> There is no reason for a company to settle before going to tribunal without a non-disclosure agreement. That is their carrot because it means their reputation is protected. Otherwise, why would you not wait until a tribunal and hopefully get off the hook? You may as well settle and know that you

7 Q4 [Rosalind Bragg; Joeli Brearley]; Qq85–87 [Kiran Daurka]; Q93 [Jane Mann]; Clifford Chance LLP (NDA0010); Gowling WLG (NDA0012); Thompsons Solicitors Scotland (NDA0015); McAllister Olivarius (NDA0056);

8 Q22

9 Q25 [Emma Webster]; Employment Lawyers Association (NDA0017); TUC (NDA0024); CBI (NDA0059)

10 Qq38–40 [Joeli Brearley, Emma Webster]; Qq86–87 [Kiran Daurka]; Maternity Action and YESS (NDA0005); Clifford Chance LLP (NDA0010); Gowling WLG (NDA0012); Employment Lawyers Association (NDA0017);

11 Employment Lawyers Association (NDA0017)

> are going to protect your reputation. That is why they have to exist. Women have to be able to settle, because they are so vulnerable if they are pregnant or they have just had a baby.[12]

14. Although employees may be encouraged to sign NDAs by the immediate circumstances, the evidence we have seen demonstrates that in the longer term serious problems can arise for the employee. These include difficulty in moving on with their career, intense fear of repercussions if the agreement is breached, barriers to accessing professional or emotional support for the discrimination or harassment they suffered and other personal and emotional repercussions. We look at these in more detail in Chapter 3. Another concern is that the use of NDAs effectively covers up unlawful discrimination and harassment, allowing management behaviour and organisational culture to go unchallenged and unchanged. What is more, this can enable perpetrators to go on to harass or discriminate against others and prevents victims of such behaviour from knowing about or supporting other complaints.[13]

A culture of discrimination?

15. At the organisational level, it is very worrying that some employers appear to have a culture of tolerating unlawful discrimination and harassment and covering it up with NDAs when individual complaints threaten to bring it into the open. Employment lawyer Jane Mann of Fox Williams LLP shared her concern about "culture and systemic discrimination", suggesting that in some organisations one might commonly see behaviour "as a matter of culture that people do not realise at all are discriminatory and they give rise to lots of cases and lots of cases are settled."[14] Employment lawyer Emma Webster of Your Employment Settlement Services (YESS) highlighted the lack of action against perpetrators in some organisations, telling us:

> [W]hat is problematic is that organisations' HR departments will see, time and time again, the same issues coming before them, and they will not take any good management action against either the individual perpetrator or the organisational culture.

16. She went on to suggest that some organisations failed to tackle improper behaviour "where an individual is financially useful" or "if they are the head of the company".[15] We have heard about high-profile examples of this such as the Harvey Weinstein case, and we have also received several examples from individuals. One witness described the difficulties of pursuing a sexual misconduct complaint against a senior individual, suggesting that businesses that rely on "rainmakers"—individuals whose personal reputation or connections make them "disproportionately valuable" to the company—"are apt to grant these 'rainmakers' a certain degree of latitude when it comes to standards of behaviour."[16] Another individual told us simply, "I was told the abuser was indispensible and I was not."[17]

12 Q39
13 Thompsons Solicitors Scotland (NDA0015); Pregnant Then Screwed (NDA0019); National Education Union (NDA0049); McAllister Olivarius (NDA0056); Q88 (Baroness Kennedy); Dr Emma Chapman (NDA0031); Professor Abigaël Candelas de la Ossa and Selena Phillips-Boyle (NDA0051)
14 Q145
15 Q27
16 A member of the public (NDA0082)
17 A member of the public (NDA0006)

17. The extent to which the use of NDAs perpetuates a culture of secrecy and discrimination is, by the very nature of NDAs, unclear. However, several witnesses suggested that NDAs are only one of a range of issues that need to be tackled.[18] Kiran Daurka of the Discrimination Lawyers Association described them as "an end product", and highlighted a need for more joined-up thinking by employers about culture and how grievances are handled.[19] Julie Morris of Slater and Gordon said: "[t]he oversight needs to be of the complaints process, the grievance process, what the outcomes are and what the company or organisation is doing about complaints of discrimination and whether a board director has that as part of their health and safety obligations to be involved in an annual review of what is taking place within the organisation."[20] We discuss the role of boards in Chapter 4.

Employer handling of discrimination complaints and grievances

18. In our 2018 Report, we found evidence of "serious weakness and poor practice in employers' handling of sexual harassment in the workplace".[21] The evidence we have received for this inquiry paints a remarkably similar picture of poor employer handling of other types of discrimination and harassment case, with several individuals describing shortcomings in the handling of their discrimination or harassment complaint.[22] Law firm Slater and Gordon stated:

> [G]rievances do not often assist individuals as it is rare for an employer to uphold allegations of discrimination or harassment and we often see overwhelming efforts to find against an employee in such circumstances often because it is one person's word against another. Instead of an employer upholding complaints or even confirming that they have been unable to resolve a conflict of evidence, they more frequently find against an employee.[23]

19. Employment lawyer Kiran Daurka told us that she did not think she had "ever had a client whose grievance was upheld on harassment or discrimination".[24] We also heard that in some cases employers do not even pay lip service to grievance procedures, with one individual telling us that in their case, "no grievance procedures were observed even though they were requested."[25] Law firm McAllister Olivarius suggested that NDAs were used by some employers, particularly in the education sector, to avoid conducting an investigation into discrimination or harassment allegations, stating:

> Employers often use NDAs to avoid the need to conduct a proper investigation and issue findings in response to a complaint. The NDA may be offered to the accused employee or the complainant, but either way the allegations in the complaint are left untested and a risk unassessed. We have

18 Q27 [Emma Webster]; Q143 [Baroness Kennedy, Kiran Daurka]; Q145 [Julie Morris, Jane Mann];
19 Q143
20 Q145
21 Women and Equalities Committee, Fifth Report of Session 2017–19, Sexual harassment in the workplace, HC725, paras 74–76
22 A member of the public (NDA0041); A member of the public (NDA0044), A member of the public (NDA0085); A Member of the Public (NDA0099); A Member of the Public (NDA0086); A Member of the Public (NDA0102); A Member of the Public; (NDA0103)
23 Slater and Gordon (NDA0053)
24 Q145
25 A member of the public (NDA0014)

> handled cases, particularly at universities, where institutions have agreed with an accused employee that he can leave quietly in exchange for valid charges being dropped and suppressed by an NDA.[26]

20. Ben Wilmott of the Chartered Institute of Personnel and Development accepted that "there are examples of poor practice, and of course we should be absolutely trying to improve practice" but did not accept that poor practice is commonplace.[27] We heard from several employers who set out actions they were taking to ensure that grievance procedures and practices were fit for purpose and how they were addressing discrimination and harassment more widely. For example, Rupert McNeil, Government Chief People Officer, told us about the actions being taken across the civil service:

> In the past 12 months, we have continued to upgrade and improve our investigation capability across the civil service between Departments and the bullying, harassment and discrimination guidance, which is very important. That is all dealing remedially with problems but most of our effort is actually on things like encouraging flexible working, looking at the elimination of things like micro-behaviours in the way in which people are interacting with colleagues, and basically raising the bar about how people should create an inclusive workplace.[28]

21. However, working for an employer with good policies and procedures does not necessarily mean that complaints and grievances will be well-handled. One individual told us:

> There seems to be an expectation that if an employer has a written grievance procedure, including an appeal process, this will itself ensure fairness, thoroughness and good practice. This was not my experience. My former employer's written procedure was long and comprehensive and looked very good. The reality was that there was a serious disconnect between the statements made in their grievance policy and the way they behaved. There was / is no way to get this addressed. There doesn't seem to be a legal obligation on the employer to behave honestly or ethically, and they know this and take advantage of it.[29]

Balance of power

22. A common theme that came across throughout this inquiry was the imbalance of power between the employer and employee at most stages of a discrimination complaint and subsequent settlement or tribunal claim, particularly with larger employers. For example, employers set and oversee company policy and grievance processes and therefore have control over the investigation and handling of any discrimination complaint. As a result, they retain any information that is obtained as part of that process and can choose how much, if any, they share with the complainant. Several witnesses raised concerns

26 McAllister Olivarius (NDA0056)
27 Q339
28 Q186
29 A member of the public (NDA0044)

about the difficulty that employees can experience in accessing information about the outcome of investigations into their complaints about discrimination or harassment. Farore Law stated:

> Currently we have three clients unable to access the outcome of their internal complaints to their employers of harassment and discrimination. All worked or work in the City in financial institutions. These clients are also unable to access any of the evidence or recommendations made. This is because the employers have used external law firms to conduct the investigations, and then covered both the investigation report and the outcome with legal privilege, which, of course, they refuse to waive. We regard this as a potential abuse of privilege, if not an abuse of process. This practice must be outlawed.[30]

Nathalie Abildgaard, a City worker who recently settled a sexual harassment case against her former employer without an NDA stated that she had to submit a data subject access request "to learn the outcome of their investigation into my sexual harassment allegations".[31]

23. If litigation is being considered as a possible option, employers will tend to have greater familiarity with the employment tribunal system and easier access to legal advice and expertise than employees. Larger employers in particular may have much deeper pockets and therefore a greater ability to fund litigation, employ experienced lawyers and drive negotiations by choosing when to make settlement offers, how much to offer and what to include in the suggested terms. Several individuals described financial, emotional and psychological pressure being put on them by employers and/or their lawyers during litigation, with some noting the importance of good legal advice.[32] One individual told us:

> In a lot of scenarios, including mine, pressure is put on you by the other parties. They intimidate and there are lots of very dark things that go on in that period when you are not sure what is going on, and lawyers can help you massively.[33]

We discuss access to legal advice in more detail in chapters 2 and 3.

24. Employers can also influence a former employee's future employment prospects through the reference that they provide, and this can be used as a bargaining chip. Jayne Phillips of the National Education Union identified the fact that there is no legal obligation to provide a reference as a key factor in the power imbalance between employers and employees when negotiating a settlement agreement, suggesting that confidentiality is seen as a trade-off for a reference.[34] A former teacher who was advised by their union to sign an NDA in order to get a reference told us that it had been their main consideration in deciding whether to sign an NDA:

30 Farore Law (NDA0020)
31 Evidence to Women and Equalities Committee inquiry into Enforcing the Equality Act: the law and the role of the EHRC, Nathalie Abildgaard (EEA0270)
32 A member of the public (NDA0086); Evidence given in confidence; Witnesses in private; Evidence to Women and Equalities Committee inquiry into Enforcing the Equality Act: the law and the role of the EHRC, Nathalie Abildgaard (EEA0270)
33 Q840
34 Q306

> It comes down to the reference. It was never about the money. It was never about the money. I did not want to sign that NDA. I did not want the settlement agreement. I wanted to resign from my job, knowing that I had the reference I deserved. That was not given as an option.[35]

25. Law firm Clifford Chance described confidentiality clauses as "the most significant 'bargaining chip' for the individual given the imbalance in the relationship" between employer and employee, suggesting that they could be used to secure agreement terms such as requiring "remedial steps such as training programmes to be instituted and a satisfactory form of reference to be agreed". Employment lawyer Jane Mann suggested that while, generally "the employer is in a stronger position because they have the greater resources", this could change "in the immediate run-up to a tribunal hearing, where matters are going to be made public" when "suddenly the individual can get into quite a powerful position to negotiate something, but that is only if they have been able to take the case all the way to the doorstep of the tribunal."[36]

26. **We are concerned that the imbalance of power between employers and employees is one of the key drivers behind the widespread and commonplace use of NDAs in the settlement of discrimination cases. It is particularly worrying that secrecy about allegations of unlawful discrimination is being traded for things that employers should be providing as a matter of course, such as references and remedial action to tackle discrimination. We have been disappointed, but not surprised, to hear examples of large employers using the significant resources at their disposal to put considerable pressure on employees who pursue allegations of discrimination or harassment at tribunal—for example by making the process more protracted and difficult—instead of taking action to tackle and prevent future discrimination or harassment. There are widespread examples of poor practice in the handling of harassment and discrimination complaints. We are particularly concerned that some employers are using NDAs to avoid investigating unlawful discrimination and harassment complaints and holding perpetrators to account.**

27. ***The Government should begin an awareness-raising programme for employers and employees about how to handle grievances fairly and effectively, including signposting to relevant guidance and support. This should include guidance on the handling of investigations into allegations of unlawful discrimination and harassment following a settlement agreement if this is agreed before any investigation is completed. It should do this within the next six months.***

28. ***The Government should consider requiring employers to investigate all discrimination and harassment complaints regardless of whether a settlement is reached.***

29. **Employers gain significant bargaining power from their ability to choose whether to provide a reference.** ***The Government should legislate to require employers to provide, as a minimum, a basic reference for any former employee confirming as a minimum that they worked for that employer and the dates of their employment. It should do this within the next year.***

35 Q459
36 Q101

3 Going to employment tribunal

30. When an employee experiences harassment or discrimination, if they are unable to resolve their dispute internally with their employer, the case can be taken to an employment tribunal to be heard by a judge. Employment tribunals are less formal than courts and were originally intended to provide a forum for employees and employers to settle employment disputes in a way that was accessible and took into account the reality of the workplace. However, the proportion of individuals who say they have experienced workplace discrimination or harassment and go on to pursue cases at tribunal is very low.

31. The prospect of being taken to tribunal does not act as an incentive to employers to comply with the law. What is more, employees face what are often overwhelming barriers to pursuing a tribunal case, including the three-month time limit to bring a case, the potential to be written off as a troublemaker by other employers and the fact that the cost of legal advice could far exceed potential compensation.[37] These are all serious risks that employees have to weigh up even in clear cases of unlawful discrimination. These barriers are discussed in more detail below.

32. Rosalind Bragg of Maternity Action told us that while about three quarters of pregnant women and new mothers in the workplace will experience some form of pregnancy and/or maternity discrimination, only around three per cent. will pursue a formal grievance and fewer than 1 per cent. will go to tribunal.[38] Joeli Brearley of Pregnant then Screwed suggested that only 0.6% of women who encounter discrimination raise a tribunal claim.[39] In our 2018 Report, we highlighted the EHRC's estimate that there had been only 18 tribunal claims alleging sexual harassment in the previous year.[40]

Reporting and reputation

33. Since February 2017, employment tribunal decisions have been published online and are easily searchable. As employment lawyers Brahams Dutt Badrick French explained, "with the recent introduction of the online database of Employment Tribunal decisions, on which all Tribunal judgments are published, the names of claimants and details of their claims, including the treatment they suffered, can become easily publicly accessible by a google search."[41] Several witnesses highlighted concerns about being seen as a troublemaker as a significant reason why many potential claimants would prefer to settle confidentially rather than pursue a discrimination claim to tribunal.[42] Rosalind Bragg told us:

> There is this very well-founded fear amongst women that, if they talk about having had problems at work, even if their problem is not of their own making, they will be labelled as a troublemaker and they will find difficulties getting new employment.[43]

37 Women and Equalities Committee, Fifth Report of Session 2017–19, Sexual harassment in the workplace, HC725, paras 78–97
38 Q2
39 Q55
40 Women and Equalities Committee, Fifth Report of Session 2017–19, Sexual harassment in the workplace, HC725, para 78
41 Brahams Dutt Badrick French LLP (NDA0016)
42 Q22 [Emma Webster]; Q34 [Rosalind Bragg]; Q45 [Joeli Brearley]; Q107 [Julie Morris]
43 Q34

34. We heard from individuals who believed that their career had been blighted—in some cases for decades—because prospective employers were aware of discrimination complaints that they had raised against a previous employer. Some individuals had suffered significant press intrusion and inaccurate reporting around their tribunal case.[44] Other individuals told us that they had signed NDAs partly to protect their career and reputation from the very public fallout of the tribunal process.[45]

35. In our 2018 Report, we raised concerns about whether the protections within the tribunal system—for example around anonymity—were sufficient to protect individuals with claims alleging sexual harassment. During that inquiry, employment lawyer Andrew Taggart of Herbert Smith Freehills LLP told us that claimants could apply for restricted reporting orders "so that there are restrictions on the reporting of the name of an individual", but that these did not give full anonymity, with the final decision still being published.[46] He also suggested that a review could help to establish whether further protections and modifications to the employment tribunal system were needed to enable those with discrimination cases to bring their case with dignity.[47]

36. We recommended in our 2018 Report that the Government take steps to ensure that "tribunal claimants alleging sexual harassment that could constitute a sexual offence should have access to similar protections to those available to complainants in sexual offence cases in the criminal justice system", such as lifelong anonymity.[48] The Government response stated that "The Employment Tribunal Rules of procedure […] allows for parties to request anonymity for any length of time, including lifelong anonymity should they require this."[49] However, Brahams Dutt Badrick French have suggested that anonymity is "far from automatic" and have raised the concern that "claimants with unusual names (often from ethnic minorities)" might be more disadvantaged than others by the practice of publishing tribunal decisions online.[50]

37. **We are concerned by the evidence that online publication of tribunal judgments has increased the risk for claimants of being blacklisted by future employers, and that this is a significant barrier to potential claimants bringing discrimination claims. We note that it is possible to be granted anonymity within the employment tribunal system but we are not convinced that this would be apparent to potential claimants and litigants in person. Indeed, the impression we have received from experienced employment lawyers is that anonymity is hard to obtain and rarely granted. We are particularly troubled by the suggestion that ethnic minorities may be disproportionately disadvantaged by the online reporting of tribunal judgments.**

44 Witnesses in private; A member of the public (NDA0044);
45 Witnesses in private
46 Oral evidence taken on 25 April 2018, Q234.
47 Oral evidence taken on 25 April 2018, Qq233–234.
48 Women and Equalities Committee, Fifth Report of Session 2017–19, Sexual harassment in the workplace, HC725, para. 97
49 Women and Equalities Committee, Seventh Special Report of Session 2017–19, Sexual harassment in the workplace: Government Response to the Committee's Fifth Report of Session 2017–19, HC1801
50 Brahams Dutt Badrick French LLP (NDA0016)

Time limits

38. We have previously highlighted our concerns about the three-month time limits for lodging certain discrimination claims at tribunal and the deterrent effect that the limit has on those considering making a tribunal claim. We have also made clear our concerns that particular groups, such as those who have been the targets of pregnancy or maternity discrimination or of sexual harassment, may be disproportionately disadvantaged by the short time limit. The need for longer time limits in such cases is well-evidenced in our 2016 Report on Pregnancy and maternity discrimination and our 2018 Report on Sexual harassment in the workplace.[51]

39. During this inquiry, Ministers told us that the Law Commission has been consulting on whether to extend time limits and that a Government consultation is also expected.[52] We are still awaiting details of when that Government consultation will take place. With that in mind, we will not rehearse here the arguments for extension, except to say that the evidence we have received for this inquiry provides further support for such an extension. ***We reiterate our previous calls for time limits to be extended to six months in cases where sexual harassment, or pregnancy or maternity discrimination, is alleged. Likewise, we reiterate our call for a wider review of the time limit in all discrimination cases.***

40. **We are concerned that particular groups of people, or people with particular types of claim, may be disproportionately disadvantaged by aspects of the tribunal system. We have outlined particular concerns about how short time limits and online reporting of tribunal judgments might disproportionately affect particular groups. We consider that an equalities review of the tribunal system is long overdue. We must have confidence that the system set up for dealing with complaints of workplace discrimination is not itself having a discriminatory effect.**

41. We note that the Law Commission consultation on time limits is part of a wider review of "the jurisdictions of the employment tribunal, Employment Appeal Tribunal and the civil courts in employment and discrimination matters"[53] How**e**ver, this review is focused on jurisdiction and limits, and does not address equality of access more broadly or potentially discriminatory systemic elements.[54]

42. ***We recommend that the Government commission an equalities review of the employment tribunal system and report publicly on its findings. The review should consider whether particular groups of people, or those with particular types of claim, are being disproportionately disadvantaged by the way that the tribunal system currently operates and whether modifications to the system are required to rectify this. The review should look not only at those who have lodged tribunal claims, but should also seek evidence from those who have considered bringing a claim but been deterred from doing so.***

51 Women and Equalities Committee, First Report of Session 2016–17, Pregnancy and maternity discrimination, HC 90, paras 133–143; Women and Equalities Committee, Fifth Report of Session 2017–19, Sexual harassment in the workplace, HC725, para 86–92

52 Qq785–786 [Lucy Frazer QC and Kelly Tolhurst]

53 Law Commission, Employment Law Hearing Structures - Consultation Paper, September 2018

54 Law Commission web page, Employment Law Hearing Structures, accessed on 16 April 2019.

Access to legal advice

43. Lack of access to legal advice is another major barrier to bringing discrimination cases to tribunal.[55] Rosalind Bragg of Maternity Action told us:

> There is a huge shortage of affordable legal advice for women who experience pregnancy and maternity discrimination. There is essentially no legal aid support here. There is a very minimal provision, and it is wholly inadequate for women who wish to pursue a case. They do not have access to support at tribunal. […] there is very limited advice available that allows them to clarify whether they have in fact experienced discrimination and what their options are.[56]

44. Alternative options for those who cannot afford to instruct a lawyer and who do not qualify for legal aid include legal advice offered through household insurance, trade unions, legal advice centres and lawyers working on a no-win, no-fee basis. The Employment Lawyers Association has suggested that such options are "rarely satisfactory for those seeking to settle or litigate sensitive harassment or discrimination claims".[57] Professor Dominic Regan, a special adviser to the Association of Costs Lawyers and visiting Professor at City Law School, London, suggested that solicitors will "regularly act on a 'no win, no fee' basis if they think the case has real merits" but that they "will avoid difficult cases because they will run the risk of putting in many hours of work for which they will never be paid." He went on to suggest that in such cases lawyers will usually take the maximum allowable payment for their work of 35% so that successful claimants "will therefore see a sizeable slice of their compensation go to their legal representatives".[58]

45. The individuals we heard from also identified the lack of affordable legal advice as an issue. One individual stated that "[l]egal advice is cost prohibitive".[59] Another described having to pursue a claim as a litigant in person because they weren't in a union and their home insurance provision "appeared to cover employment only for minimal phone help".[60]

46. Lucy Frazer QC, Under-Secretary of State, Ministry of Justice, told us 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." She added that access to this support was subject to "means and merit" testing and that it covered advice.[61] However, employment lawyers and others have suggested that access to legal aid is very limited.[62] The ELA stated that it "is not normally available to employees, even those with very low earnings."[63] Emma Webster said that "[t]here is no legal aid that supports anybody through the tribunal process."[64]

55 Q40 [Emma Webster]; Q42 [Rosalind Bragg, Joeli Brearley]; Qq147 [Baroness Kennedy]; Maternity Action and YESS (NDA0005); Brahams Dutt Badrick French LLP (NDA0016); Employment Lawyers Association (NDA0017); A member of the public (NDA0091);
56 Q42
57 Employment Lawyers Association (NDA0017)
58 Professor Dominic Regan (NDA0073)
59 A member of the public (NDA0006)
60 A member of the public (NDA0042)
61 Qq769–775
62 Q40 [Emma Webster]; Q42 [Rosalind Bragg]; Q150 [Julie Morris]; Employment Lawyers Association (NDA0017);
63 Employment Lawyers Association (NDA0017)
64 Q40

47. The limited extent of legal aid in discrimination cases was set out by the Minister in further written evidence. She clarified that, currently, those seeking legal aid must go through the Civil Legal Advice (CLA) gateway—a telephone service in which their case is assessed. If "their case appears to be eligible and the statutory tests of means and merit tests are met", they are then referred to one of the specialist discrimination providers for further advice. This advice will be given remotely if the case is considered suitable for this, and face-to-face if not. Legal aid for representation at first-instance tribunal is "not generally available" for discrimination claims, but applications can be made for representation at Employment Appeal Tribunal. She also set out the current means test, including that an individual must not have: a monthly gross income over £2,657; a monthly disposable income over £733; or disposable capital over £8,000.[65]

48. Government statistics show that in the first three quarters of the financial year 2018–19, there were 11 applications for civil representation for discrimination cases, of which six were granted. In 2017–18, there were 10 such applications, of which nine were granted.[66] The figures for legal advice show that in the first three quarters of financial year 2019–19, there were 1,420 matters started in which "legal help and controlled legal representation" was available in the discrimination category. In 2017–18, there were 1,836 such matters started. The Minister noted that these figures did not include discrimination claims funded under other categories, such as housing. However, she also informed us that the Government was "concerned by the fact that these numbers are low" and suggested that this "may be due to the mandatory telephone gateway". She added that the Government had therefore "committed to removing the mandatory element of the telephone gateway so that face to face advice will be available in the future" in the hope that this would "improve access to legal aid."[67]

49. **We are concerned by the lack of affordable legal advice available for employment discrimination cases. We hope that an awareness-raising campaign will help signpost employees to the free advice that is available, and that such advice will be improved. However, tailored advice will be needed by many employees and access to legal aid for discrimination cases is very limited. *The Government should review legal aid thresholds and monitor the effect of the changes it is making to improve access to legal aid. We make further recommendations on the provision of legal advice on the content of NDAs below.***

Litigants in person

50. It has been argued that tribunals are accessible to those who do not have legal representation, because they are less formal than other courts. Minister Lucy Frazer QC told us:

> 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. […] Our tribunals […] are

65 Ministry of Justice (NDA0081)

66 See columns S and AT in table 6.1 of Legal aid statistics England and Wales tables October to December 2018. Accessed at https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-october-to-december-2018

67 Ministry of Justice (NDA0081)

> 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.[68]

51. However, The Employment Lawyers Association (ELA) has suggested that while employees "do not, technically, need to instruct lawyers to go to Tribunal […] they are likely to be at a disadvantage if they do not and their employer and/or the perpetrator does."[69] During our 2018 inquiry we heard compelling evidence from the Free Representation Unit (FRU) about the particular challenges and barriers for litigants in person bringing a tribunal claim involving a complaint of sexual harassment.[70] One litigant in person described how they were supported through the process by a friend, who spent hundreds of hours preparing documents and supporting them emotionally. They outlined how delays in the process meant that it took almost two years to get to a hearing and suggested that the employment tribunal system was no longer set up for individuals to represent themselves. They described how the experience had affected them:

> If it was not for the kindness shown from a friend, […] I would not have been able to get as far as I did with the employment tribunal case, if at all. […] The technical process of the employment tribunal is potentially overwhelming for a lay person. Hundreds of people, each year must be put off going through the process. The length of time the process takes creates what feels like unrelenting stress and must also deter applicants seeing the process through. Add to this personally for my claim, my very limited income as I'd been sacked and the humiliation and injustice I felt. […] As a result of the initial allegation, during the subsequent two-year process, and until the present time, I have suffered immeasurably with my mental and physical health.[71]

52. We note that discrimination cases tend to be both complex and sensitive, and that this makes them more onerous for claimants to pursue as litigants in person. Claimants may be dealing with significant emotional fallout from the original dispute, as well as, often the stress of being without employment. In addition, the more complex the claim, the more difficult it will be for them to gather and collate evidence, and the longer may be required for a hearing. **We are concerned that the tribunal system may have become too onerous for litigants in person with complex discrimination claims. We are currently considering this issue further in our inquiry on Enforcing the Equality Act: the law and the role of the EHRC, but it is clear that many people either do not know of, or do not have access to, support in navigating an increasingly complex tribunal system. *We recommend that the Government review the practical support currently available to litigants in person, in consultation with Acas and other relevant organisations, with a view to filling gaps in support.***

68 Qq768–769

69 Employment Lawyers Association (NDA0017)

70 Women and Equalities Committee, Fifth Report of Session 2017–19, Sexual harassment in the workplace, HC725, para 79; Oral evidence to the Sexual harassment in the workplace inquiry on 6 June 2018 Qq508–511 [Michael Reed]

71 A member of the public (NDA0042)

Cost risks and compensation

53. As we highlighted in our 2018 Report, tribunal awards are low and costs can be high. In contrast to other forms of civil litigation, each party pays their own legal costs regardless of the result.[72]. Consequently, even in cases where the claimant "wins", their legal costs may not be covered by the compensation.[73] The ELA has highlighted the cost risks of taking forward a case, setting out the likely minimum legal costs and the average award:

> Tribunal litigation is expensive and very time consuming for participants and lawyers and, accordingly, pursuing litigation to the Tribunal is not undertaken lightly by those who are advised properly. For example, irrecoverable legal costs associated with a properly run discrimination / harassment claim that is taken through Tribunal without settlement are unlikely to be less than £10,000. The average Tribunal award for sex discrimination, according to Tribunal figures is £19,152.

54. The ELA added that the even after abolition of tribunal fees, "employees are normally at a huge disadvantage, because of their typically more limited financial resources."[74] We note that the costs of going to tribunal can be far higher than the minimum figure of £10,000 given by the ELA. In a recent employment tribunal case in which sexual harassment was alleged, The Times reported that the claimant—former City worker, Nathalie Abildgaard—had legal costs of £100,000. In this case, her legal costs were exceeded by her reported settlement of £270,000, but they give an idea of the potential cost risks. Ms Abildgaard was quoted as stating:

> The barriers for individuals to get access to justice are too high. […] It's been incredibly expensive and time-consuming. I was only able to do this because I have no financial commitments—I don't have children and have no mortgage or student loan. This is not the case for most people. […] It's been an exhausting process, incredibly stressful […] I had to withstand a lot of hostile behaviour from the respondents. You're against someone who has almost unlimited resources compared with you.[75]

We heard similar sentiments from individuals who had pursued cases at tribunal or had considered doing so. Some of those we heard from had suffered severe financial loss as a result of taking a case to tribunal. Others had settled their case because they felt that extreme inequality in the resources available to them, in comparison to those available to their employer, meant there was little realistic prospect of them winning their case and recovering their costs.[76]

72 Professor Dominic Regan (NDA0073)
73 Women and Equalities Committee, Fifth Report of Session 2017–19, Sexual harassment in the workplace, HC725, paras 83–85
74 Employment Lawyers Association (NDA0017)
75 City sex-pest case: payout of £270,000 for Nathalie Abildgaard, The Times, 14 April 2019. Accessed on 16 April.
76 Evidence given in private; Evidence given in confidence; A member of the public (NDA0042);

55. Several legal experts agreed that concerns about costs and low awards are a key barrier to potential claimants bringing a claim and one of the main reasons for settling cases instead of pursuing them.[77] Julie Morris, Employment Solicitor and Head of Personal Legal Services, Slater and Gordon, said:

> The reality is that the legal costs of going to tribunal, coupled with the fact that the remedy in the tribunal is relatively limited […] mean that it very rarely makes financial sense to go all the way to the tribunal. If your employer is making an offer to you that stops you having to incur those costs and compensates you for your claim, in most cases they will take that financial settlement. Most employees will have a price at which they are prepared to settle. It has become the absolute norm that in return the employer would expect an NDA as part of the price of that settlement.[78]

56. This was echoed by the evidence we received from individuals. One witness told us that she would not have considered pursuing her tribunal claim had she not received no-win, no fee legal support from her solicitor and an offer of pro bono advocacy if the case went to a hearing.[79]

Compensation awards

57. Compensation for discrimination cases in the employment tribunal is split into financial losses, including lost salary and bonuses, and non-financial losses, and so settlements can be high where the employee has lost a highly paid job. However, the claimant is expected to prevent or reduce their financial losses—for example by taking reasonable steps to obtain alternative employment—and compensation will not be awarded for any loss that should have been prevented but was not. Non-financial losses include injury to feelings, personal injury, psychiatric harm and aggravated damages, and these can be awarded even where there is no financial loss. Injury to feelings compensation is assessed using guidelines known as Vento bands or guidelines, which set out three bands of potential awards. The Vento band guidelines are reviewed annually by the Presidents of the Employment Tribunals in both England and Wales, and Scotland. The current guidelines suggest payments of £900 to £8,800 for "less serious cases" in the lower band; £8,800 to £26,300 for cases in the middle band, which "do not merit an award in the upper band"; and £26,300 to £44,000 for "the most serious cases" in the upper band. Only "the most exceptional cases" will receive awards exceeding £44,000.[80]

58. We heard from Californian employment lawyer Peter Rukin about the very different regime in California, where compensation awards can be much higher. He told us:

> Obviously, it depends on the facts of the case. It depends on what jurisdiction you are in. […] Generally speaking, when we are talking about sexual harassment claims that are meritorious and that would go to trial and potentially obtain a successful verdict, you are talking about values ranging

77 Q107 and Q164 [Julie Morris]; Q166 [Baroness Kennedy and Jane Mann]; Employment Lawyers Association (NDA0017); McAllister Olivarius (NDA0056)

78 Q107

79 Q541 [Dr Emma Chapman]

80 Tribunals Judiciary and Employment Tribunals (Scotland), Presidential Guidance, Employment Tribunal awards for injury to feelings and psychiatric injury following De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879 - Second addendum to presidential guidance originally issued on 5 September 2017, 25 March 2019

> from tens of thousands of dollars to millions of dollars. There are cases where multi-million dollar verdicts have been given in sexual harassment claims.[81]

Cost orders and one-way cost shifting

59. While it is usual for each party to pay its own costs in the UK, tribunals may make costs orders requiring one party to pay the other's costs where there has been "unreasonable conduct", but such orders are rare. Professor Dominic Regan has set out how in county or High Court cases, "pressure can be exerted on claimants by threatening to pursue costs if an offer was not accepted and, at the hearing, the claimant recovered less."[82] Those courts have different cost regimes to tribunals and so the use of such tactics should be less common at tribunal. However, we have heard that such threats are being used, even though they may be unenforceable. Claimants who do not have legal representation may be particularly vulnerable to such tactics. One litigant in person described reluctantly settling for a sum that was "as much as I could have hoped for if I had been successful in my claim" but that was "conditional on the inclusion of a NDA", because they were concerned about being pursued for the other side's legal costs if they did not. They stated:

> I totally abhor NDAs and from the outset had said I would never sign one. I wanted to see the tribunal through to the end. […] My case was strong, and I had no doubt I would win at the tribunal. Unfortunately, because of the substantial amount offered, I knew that even if I had won at the hearing, it was possible that if a judge awarded me less than the Respondent, they could then have applied to the court for their costs. This can happen if a judge decides that it was vexatious, to continue with the full hearing when what is considered to be a reasonable offer has been made. I did not want to take the risk, given that costs were likely to be extensive, with the amount of time allocated to the hearing, and that the Respondent would likely be employing solicitors and Barristers.[83]

60. **We are concerned that fears about being pursued for employers' legal costs may be driving individuals to agree to settlement terms such as confidentiality clauses that they do not want which cover up unlawful behaviour. This may be due to a lack of clarity around the costs regime, or to the use of potentially unenforceable threats by the other party or their lawyers. *The Government must ensure that there is adequate guidance for tribunal judges and litigants about the circumstances in which a refusal to settle a claim may be considered "unreasonable". This guidance must be made clear and accessible to litigants in person and should set out that refusal to agree to an NDA should never, in itself, be deemed unreasonable behaviour in this regard.***

61. We were interested to hear from Californian employment lawyer Peter Rukin about the one-way cost shifting system that operates with employment cases there, with employers paying employees' costs if the employee's case is upheld. He explained how this drives companies to settle meritorious cases, stating:

81 Q61
82 Professor Dominic Regan (NDA0073)
83 A member of the public (NDA0042)

> Under California law, if the company loses a trial they not only have to pay their own lawyers' fees, they not only have to pay a damage reward to the employee but they also have to pay the employee's lawyers' fees incurred in the litigation of the case. Really, there is significant exposure. If you have got any kind of meritorious sexual harassment claim, there is very significant exposure. In my experience, it is the risk of that exposure that really drives the settlement process.[84]

He went on to explain that "the cost of litigation for either side in a harassment case can run up into easily well beyond the tens of thousands of dollars, into the hundreds of thousands of dollars", noting that "those fee awards may be larger than the actual damage awards to the employee".[85]

62. Employment lawyer Julie Morris suggested that if this approach were adopted in the UK, it might give employees "much more of an appetite to fight and not have to take a settlement because they cannot afford to fight". She also highlighted the need to consider how such a system might apply to smaller employers.[86] Another employment lawyer, Jane Mann, suggested that such a cost-shifting system was worth considering here "because the imbalance is a massive issue". However, she also drew attention to the need to "have regard to the interests of the employers".[87]

Previous Committee recommendations on costs and compensation

63. In our 2018 Report we called on the Government to "improve the remedies that can be awarded by employment tribunals and the costs regime to reduce disincentives to taking a case forward." We recommended that tribunals "should be able to award punitive damages and there should be a presumption that tribunals will normally require employers to pay employees' costs if the employer loses a discrimination case in which sexual harassment has been alleged."[88] The Government recognised, in its response, concerns about costs and about being pursued for employers' costs, "dissuading people experiencing sexual harassment in the workplace from enforcing their rights", but did not set out any actions it would take to tackle this problem.[89] This is unacceptable.

64. Whilst recognising the problem, the Government rejected our recommendation for punitive damages on the grounds that "the current range of remedies available to Employment Tribunals […] offers significant deterrent to employers and compensation to workers" and that the "fundamental purpose of a tribunal award is to compensate a party for the detriment suffered and to restore them to the state they would have been in had that treatment not occurred".[90] It is clear that the current regime is not a deterrent to employers but is a significant deterrent to employees. The Government has stated that it will raise the aggravated breach penalty, for cases with deliberate or malicious breaches, from £5,000 to £20,000. Currently, however, these penalties are awarded rarely. It rejected

84 Q69
85 Q72
86 Q164
87 Q166
88 Women and Equalities Committee, Fifth Report of Session 2017–19, Sexual harassment in the workplace, HC725, para 85
89 Women and Equalities Committee, Seventh Special Report of Session 2017–19, Sexual harassment in the workplace: Government Response to the Committee's Fifth Report of Session 2017–19, HC1801
90 Women and Equalities Committee, Seventh Special Report of Session 2017–19, Sexual harassment in the workplace: Government Response to the Committee's Fifth Report of Session 2017–19, HC1801

our recommendation on cost awards stating that this would "raise questions of whether the reverse should apply: that people accused of sexual harassment and against whom the case was not proved should be automatically awarded costs from the complainant".

65. **The Government is wrong in its assertion that there is currently "significant deterrent" and compensation for unlawful discrimination within the tribunal system. The evidence we have received from legal experts and from individuals attempting to use the tribunal system demonstrates that this is not the case. Employment lawyers routinely advise potential claimants with strong cases of unlawful discrimination against using the system because the risks outweigh the potential benefits. A rebalancing is required. We also challenge the suggestion that the tribunal system is meeting the stated aim of compensating parties for the detriment suffered and restoring them to the state they would otherwise have been in. When compensation awards are significantly depleted by, or fail to cover, the legal costs of bringing a case, then that party is not being restored to the financial state they would have been in had that treatment not occurred. In addition, no account is being taken of the significant financial and reputational risk of bringing a case in the first place.**

66. **The Government is wrong to suggest that one-way cost shifting for employment claims would not be defensible. It would be a welcome step towards redressing the imbalance of power, where this exists, between employers and employees with a discrimination dispute. In addition, compensation awards must be significantly increased to incentivise employers to do more to prevent discrimination and harassment in the workplace. This can be done through the introduction of punitive damages and by increasing the current awards available for non-financial losses such as injury to feelings and psychiatric harm.**

67. ***We call again on the Government to urgently improve the remedies that can be awarded by employment tribunals as well as the costs regime to reduce disincentives to taking a case forward. Tribunals should be able to award punitive damages and there should be a presumption that tribunals will normally require employers to pay employees' costs if the employer loses a discrimination case in which sexual harassment has been alleged. The bands in the Vento guidelines should be increased significantly to take into account the non-financial impact of discrimination. These changes should be made within the next two years.***

4 Content and effect of NDAs

68. Although several employment lawyers told us that NDAs can be as beneficial for employees as they are for employers, we were keen to hear directly from individuals about their experience of signing an NDA and its effect on them.[91] We received written and oral evidence from a number of individuals who had signed an NDA and we know that others did not come forward for fear of breaching their NDA. The majority of those who were able to give evidence about their experience of signing an NDA expressed grave concerns about how NDAs were used by employers. Many told us that they had not wanted to sign one but had felt they had no other option. We were struck by the fear, anger and raw emotion that witnesses expressed and still felt about their experience years—even decades—after signing an NDA. Only one individual we heard from said that settling with an NDA had brought a broadly positive outcome for them. We accept that evidence of personal experience can only ever be anecdotal and we have no way of establishing how representative the views and experiences we heard were. Nonetheless, we found these personal testimonies very powerful in highlighting some of the difficulties that can arise for, and continue to affect, individuals who sign an NDA. We discuss these in more detail below.

Agreeing restrictions and carve-outs

69. In our 2018 Report on Sexual harassment in the workplace, we highlighted some of the most stringent and shocking examples of NDA clauses that we had come across—such as those in the Zelda Perkins case. She described how her agreement with Harvey Weinstein/Miramax barred her from discussing any aspect of her time at Miramax with family, friends, medical practitioners, the Inland Revenue, accountants, financial advisers or legal representatives unless they first signed an NDA.[92] During that inquiry, Max Winthrop of the Law Society told us that NDAs usually contain lists of those with whom the signatory can discuss the issues covered in the NDA, stating:

> That is a standard provision. Your spouse or civil partner will be able to be told about the contents of the agreement. Then, it goes on to provisions with regard to regulatory authorities, a court of competent jurisdiction, tax authorities and suchlike. To find an agreement without those provisions would be rather unusual. If you are acting for an employee and none of that leeway is granted to the employee, there will be questions.[93]

70. In the same evidence session, employment lawyer Gareth Brahams agreed that NDAs usually contain such exceptions, but also noted that "you certainly come across confidentiality provisions that do not make that saving."[94] More recently, during this inquiry, employment lawyer Jane Mann told us that Zelda Perkins' agreement had

91 Q135 [Julie Morris, Kiran Daurka]; Clifford Chance LLP (NDA0010); Gowling WLG (NDA0012); Brahams Dutt Badrick French LLP (NDA0016);

92 Women and Equalities Committee, Fifth Report of Session 2017–19, Sexual harassment in the workplace, HC725, paras 113–122; Oral evidence taken on 28 March 2018, 2018, Q52

93 Oral evidence taken on 28 March 2018, Qq172–173

94 Oral evidence taken on 28 March 2018, Q174

contained "a very unusual set of clauses" and said that she had been "concerned" and "quite surprised to read and hear about" some of the clauses in it, which she had not seen before.[95]

Restrictions on seeking professional advice and support

71. It is difficult to establish how widely NDA clauses that restrict signatories from seeking professional advice are used. Several witnesses suggested that NDAs should not prevent signatories from accessing professional advice and assistance from legal advisers, union representatives, counsellors or therapists.[96] The Centre for Women's Justice suggested that "'blanket' non-disclosure clauses which unreasonably prevent an individual from discussing allegations with third parties (like medical practitioners, her family, or fellow victims) are unfair contract terms and should be treated as unenforceable."[97] Sue Coe, Senior Policy Officer for Equality and Strategy at the Trades Union Congress, said that the TUC "would like to see explicit statements in settlement agreements around employees not being limited from seeking therapeutic support or legal advice."[98]

72. **We can see no justification for any clause in a settlement agreement to limit an individual's right to access professional advice or support relating to the workplace harassment or discrimination they have experienced. Likewise, we see no reason why any agreement settling a dispute in which harassment or discrimination is alleged should restrict access to professional services such as legal or financial advice. Not only should such clauses be unenforceable, but agreements should expressly state that nothing within them can prevent the signatory from seeking such professional advice. Likewise, signatories should always have the option of nominating close family or friends with whom they can discuss restricted issues.**

Agreeing what can be said to prospective employers

73. One issue that has arisen for some individuals who have signed an NDA when leaving their employment has been knowing what their NDA permits them to say to prospective employers—for example in job interviews—about why they left their previous role.[99] One witness stated that before they signed the agreement a solicitor advised them by telephone, outlining "what I was not allowed to say and do by simply reading out the terms of the agreement", but giving "no advice whatsoever about what I could say." They explained that at the time it "did not occur to me to ask questions about what I could say, as I was not thinking of future job interviews or future performance management reviews". They went on to describe how this lack of clarity about what they could say had made it "incredibly difficult" to move forward in their career:

> I therefore found it difficult at future job interviews. Clearly, when your CV states that you were in a senior role and then a month later you are working as a supply teacher, people are going to ask questions. As the agreement stated that I could not disclose anything negative about my previous employer,

95 Q92
96 TUC (NDA0024); CIPD (NDA0025); National Education Union (NDA0049); McAllister Olivarius (NDA0056); Centre for Women's Justice (NDA0065); Q334 [Ben Wilmott]
97 Centre for Women's Justice (NDA0065)
98 Q335
99 Thompsons Solicitors Scotland (NDA0015); A member of the public (NDA0014); Witnesses in private

> I found it extremely difficult to answer their questions and found myself unable to be myself and answer their questions sincerely and honestly. To be frank, it is no exaggeration to say that I was terrified of breaking the terms of that agreement and I found myself taking responsibility for the ending of my employment, which eroded my confidence and feelings of self-worth.[100]

74. Employment lawyers have suggested that negotiations on the terms of NDAs will often include discussion of what can be said in references and to prospective employers.[101] The ELA stated that "employees are frequently concerned about securing a new job and may seek agreement on the terms of references for prospective employers."[102] However, even witnesses who were represented during negotiations have described feeling extremely limited by their NDA about what they could say in future job interviews, with some suggesting that this had cost them several potential jobs.[103] One witness, who had not felt able to apply for another job yet, said they were not sure how they would handle questions about why they had left their former role but that they would find it "extremely difficult" not to be able to be truthful about it.[104]

75. One individual described the approach that they had taken to dealing with questions about the events that led up to their NDA and why they had left that employment:

> The biggest thing is that in the aftermath you need to come to terms about how you talk about it. You pretty much have to write a script for yourself of what to say. Once you know what to say and are comfortable with it, you refer back to that. The hardest part is defining what your story is in a way that is clearly not telling white lies or whatever, but covers what needs to be said without infringing on your confidentiality agreement.[105]

Unfortunately, not all of those who sign NDAs are able to move forward in this way.

76. Employment lawyers highlighted the contested nature of discrimination disputes and argued that there were good reasons to agree to confidentiality around the behaviour or actions leading up to the dispute.[106] Jane Mann told us that "when parties are settling a dispute, which may involve all sorts of allegations being made in both directions, the parties may wish to bring an end to that and to give both sides the reputational protection in not talking about it in the future."[107] Emma Webster also suggested that there were benefits for the individual of being able to move on with some reputational protection.[108]

77. **We are deeply concerned that some individuals who sign NDAs are being left uncertain about what they are permitted to say about the alleged unlawful discrimination, harassment or other employment issue that led to the settlement. This lack of clarity can have a devastating effect on people's career, self-esteem and personal life. Confidentiality, non-disparagement and similar clauses in settlement agreements**

100 A member of the public (NDA0014)
101 Gowling WLG (NDA0012); Employment Lawyers Association (NDA0017)
102 Employment Lawyers Association (NDA0017)
103 Witnesses in private
104 Q675
105 Q839
106 Q22 [Emma Webster]; Clifford Chance LLP (NDA0010); Gowling WLG (NDA0012); Slater and Gordon (NDA0053)
107 Q100
108 Q22

need to be suitably clear and specific about information that can and cannot be shared. Most employees will already be covered by their employment contract in terms of commercial confidentiality and this need not be duplicated in an NDA on departure although employees may need to be reminded of this and other relevant obligations in law. It is understandable why an employer might wish to keep confidential the size of the financial settlements. It should, however, be for individuals to decide whether to tell a third party or a new employer why they left a previous employment if the case involved allegations of unlawful discrimination. NDAs should not be used to silence victims of discrimination and harassment, and employers and their legal advisers should not be complicit in using NDAs to cover up allegations of unlawful behaviour.

78. ***The Government should legislate to ensure that NDAs cannot be used to prevent legitimate discussion of allegations of unlawful discrimination or harassment, and in the public interest consider how to stop their use to cover up allegations of unlawful discrimination, while still protecting the rights of victims to be able to make the choice to move on with their lives. Legitimate purposes include discussing potential claims with other alleged victims, or supporting such victims through the trauma of raising a complaint of discrimination and harassment.***

Protected disclosure and whistleblowing

79. Whistleblowing legislation means that someone who raises concerns—in the public interest—about breaches of the law or dangers to health and safety, or about the cover-up of such behaviour, is entitled to protection from victimisation or dismissal.[109] We are concerned that NDAs are being used unethically and sometimes unlawfully to deter whistleblowers from being able to speak out in the public interest. As we set out in our 2018 Report, any NDA clause designed to prevent a worker from whistleblowing—also known as making a protected disclosure—would be void under section 43J of the Employment Rights Act 1996. However, an individual who signs an NDA containing such a clause might not realise that it is unenforceable. Even if they suspected that it was not enforceable, they would probably need legal advice to work out whether they were entitled to protection under complex whistleblowing law, as set out in the Public Interest Disclosure Act 1998 (PIDA).[110]

80. In particular, there is a lack of clarity about when it would be in the public interest to blow the whistle. The whistleblowing charity Protect has suggested that although the anti-gagging provisions in section 43J are "potentially a powerful tool against the use of inappropriate gagging clauses in the employment context" they are not working as they should because they have "not been tested in practice". Protect outlined the difficulty for an individual who has suffered discrimination at work of establishing whether they would qualify for whistleblowing protection, and therefore whether an NDA could legitimately prevent them from raising their concerns:

> A protected disclosure is one which tends to show that one of the categories of concern are engaged (crime, breach of a legal obligation, miscarriage of justice, health and safety, damage to the environment or cover up of any of these) and meets the test that it is in the public interest. It is the last

109 Under the Public Interest Disclosure Act 1998 (PIDA)

110 Women and Equalities Committee, Fifth Report of Session 2017–19, Sexual harassment in the workplace, HC725, para 118

> point which particularly distinguishes an individual complaint of sexual harassment or other discrimination from a whistleblower complaint. While case law sets out some guidance about when the public interest is engaged it is difficult to identify when a disclosure of a single breach/ discrimination against an individual would be seen to be in the public interest […][111]

81. Several legal experts, employers, unions and others have also drawn attention to this lack of clarity.[112] Ben Wilmott said that the CIPD had received feedback from its members and employment lawyers that 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."[113] Employment lawyer Jane Mann talked about a grey or "fuzzy zone" of behaviours that "can impact on people very badly at work", but are "not clearly covered by the whistleblowing legislation and […] are not clearly criminal offences that can be reported."[114] Professor of Law and Ethics, Richard Moorhead, told us that he had read whistleblowing law and guidance and still did not understand it, adding that "the courts do not get to deal with" the cases that might bring the necessary clarity.[115]

82. Given the complexity of the law, it is unsurprising that Protect has identified a lack of awareness among employees about whistleblowing protections.[116] It has also suggested that "many NDAs involving whistleblowers have unclear or opaque wording", making it difficult for individuals to fully understand the effect of such agreements.[117] Certainly, several of the individuals we heard from had little understanding of how their potential rights under whistleblowing law might be affected by their NDA. One witness described feeling "very bound and gagged" by their NDA and said that they really wanted to break it but that they had no idea how it affected their ability to make a protected disclosure under whistleblowing legislation.[118] Another told us that when they signed their NDA they "did not know what whistleblowing was" and that it had only "come onto my radar since then".[119]

83. In our 2018 Report we recommended several actions that the Government could take to help tackle the problems we have outlined for potential whistleblowers. These included requiring the use of standard, plain English confidentiality clauses, which must explain clearly what disclosures are protected under whistleblowing laws and cannot be prohibited or restricted. We also recommended changes to the law to ensure that disclosures of unlawful sexual harassment to the police and all regulators, including the Equality and Human Rights Commission (EHRC), and to any court or tribunal would be covered under whistleblowing law.[120]

111 Protect (NDA0038)
112 Q17 and Q58 [Emma Webster]; Q106 [Kiran Daurka]; Qq160–161 [Jane Mann]; Qq356–358 [Sue Coe, Debbie Alder, Ben Wilmott, Jayne Phillips]; Q409 [Tracy Vegro, Professor Moorhead]
113 Q358
114 Qq160–161
115 Q409
116 Protect (NDA0038)
117 Protect (NDA0038)
118 Qq 627, 645 and 667
119 Q433
120 Women and Equalities Committee, Fifth Report of Session 2017–19, Sexual harassment in the workplace, HC725, paras 131–132

84. In its response to the Report, the Government acknowledged the concerns we raised about the unethical use of NDAs and agreed that "NDAs require better regulation and a clearer explanation of the rights that a worker cannot abrogate by signing one […] [p]articularly that workers have the right to make a public interest disclosure". It announced that it would "consult on the best way to achieve this, including the Committee's recommendation of a standard approved confidentiality clause." It also agreed to add the EHRC to the list of prescribed persons to whom employees can make a disclosure. However, it said it was "not persuaded that there is a need to prescribe every court or tribunal" and that it needed "to think through the wider implications" of adding the police and would consider further whether to add other regulators.[121]

85. In March 2019, the Government launched a consultation on measures it proposed to take to prevent misuse of confidentiality clauses in situations of workplace harassment or discrimination. The proposals include legislating "that no confidentiality clause can prevent a person making any disclosure to the police", and making it clearer "to workers that they still maintain some disclosure rights even when they sign a confidentiality clause".[122] The consultation does not cover the proposed changes to whistleblowing law that the Government has committed to make. We discuss the Government's proposals on the wording of clauses in more detail below.

86. Following the Government's response to our report, Protect has welcomed the undertaking to "strengthen the regulatory environment for those who wish to report sexual harassment" but has also raised concerns about "the piecemeal approach of this amendment". It reiterated the difficulty of testing whether an individual is covered by PIDA in sexual harassment or discrimination claims and describes the public interest test as "an additional hurdle for victims". It suggests that to avoid unintended consequences the Government should properly review how the Equality Act and PIDA operate alongside each other. It also suggested that section 43J of the Employment Rights Act should be "amended with more robust language".[123] Other witnesses also advocated clarifying whistleblowing legislation.[124]

87. **We welcome the Government's undertaking to add the EHRC to the list of prescribed persons for the purposes of employment protections for whistleblowers. We look forward to hearing whether it plans to add any other regulators or relevant authorities to the list, as we previously recommended. However, we also acknowledge the concerns raised by Protect about taking a piecemeal approach to amending whistleblowing legislation. Our concerns about the complexity of whistleblowing law and the lack of clarity about when the public interest test would be met in workplace discrimination cases have been amplified by the evidence we have heard in this inquiry. If employment lawyers, HR practitioners, whistleblowing experts and others are all telling us that they are not clear about the circumstances in which the public interest test is likely to be met—and if those laws are consequently not being tested—then greater clarity is needed. We consider that the legislation needs to be simplified and clarified.**

121 Women and Equalities Committee, Seventh Special Report of Session 2017–19, Sexual harassment in the workplace: Government Response to the Committee's Fifth Report of Session 2017–19, HC1801

122 Department for Business, Innovation and Industrial Strategy, Confidentiality clauses: consultation on measures to prevent misuse in situations of workplace harassment or discrimination, March 2019

123 Protect (NDA0038)

124 Q358 [Jayne Phillips, Sue Coe]; Q409 [Professor Moorhead]

88. ***The Government should review the operation of measures under the Public Interest Disclosure Act 1998 and the Employment Rights Act 1996. In particular, they should clarify the extent to which these measures can provide protection to those who wish to raise concerns with regulators and other relevant bodies or people about workplace discrimination or harassment. The review should consider: how best to simplify and clarify existing legislation; how whistleblowing law interacts with other relevant legislation such as the Equality Act; and whether the public interest test is workable.***

Restrictions on assisting with police, court and other proceedings

89. We are particularly concerned about the use of NDAs to prevent signatories from providing evidence or otherwise assisting with police inquiries, court proceedings, regulatory investigations and hearings and other employees' grievances or complaints. In our 2018 Report, we highlighted provisions in Zelda Perkins' NDA relating to her ability to contribute to police investigations and court cases, which she summarised as being asked to use her "best endeavours to not disclose anything in a criminal case".[125] Professor Richard Moorhead has suggested that such clauses may amount to an attempt to pervert the course of justice, which is a criminal offence.[126] He explained that if someone does something "that is likely to prevent or discourage somebody from engaging with the police" or to "inhibit or shape" the way that they engage with the criminal process, and if their intention was to have that effect, they would be committing this offence.[127]

90. We are also concerned about the use of warranty clauses, which require the signatory to warrant, for example, that they know of no reason why they would make a complaint to the police or another enforcement body. Protect has raised concerns that warranty clauses may be used "to circumvent the anti-gagging provisions in PIDA".[128] Professor Moorhead noted that some warranty clauses state that monies will automatically be repayable "if the individual exercises or attempts to exercise any of the statutory rights referred to in the agreement for Public Interest Disclosures" and explained that the use of such clauses could also constitute an attempt to pervert the course of justice in certain circumstances.[129] Farore Law has called for clarity from the Crown Prosecution Service on the kind of conduct around the drafting and negotiation of an NDA that would amount to perversion of the course of justice and has suggested that the Solicitors Regulation Authority (SRA) should "specifically outlaw" poor practice.[130]

91. **There is clearly potential for NDA agreements to be negotiated, drafted, and/or enforced in ways which may amount to perverting the course of justice. It would be helpful for the Crown Prosecution Service to recognise this. Further guidance from the CPS on the type of cases in which it might be appropriate to prosecute would also be helpful.**

92. We were so concerned about unethical practice by lawyers and employers in drafting NDAs, that we recommended in our 2018 Report that the Government should "make it an offence for an employer or their professional adviser to propose a confidentiality clause

125 Oral evidence taken on 28 March 2018, Q53
126 Q372; Women and Equalities Committee, Fifth Report of Session 2017–19, Sexual harassment in the workplace, HC725, para 124
127 Q372
128 Protect (NDA0038)
129 Professor Richard Moorhead (NDA0069)
130 Farore Law (NDA0020)

designed or intended to prevent or limit the making of a protected disclosure or disclosure of a criminal offence."[131] The Government stated in its response that this "could be difficult to enforce" but said that it would "consider and consult on enforcement approaches".[132] In its recently published consultation, it stated:

> [T]he existence of a confidentiality clause is not necessarily conclusive proof of underlying misconduct or criminal misconduct. It would be difficult for employers to know what content is and is not acceptable in any given situation that might arise in the future, and it would be extremely difficult to monitor the wording of confidentiality clauses to the extent that a criminal sanction could be effectively enforced.[133]

The consultation does not ask for contributors' views on this proposal, but instead proposes that a confidentiality clause in a settlement agreement that does not meet new wording requirements—which are yet to be agreed—is "made void in its entirety" and asks whether contributors agree with that approach.[134]

93. **We are disappointed that our recommendation that the Government "should make it an offence for an employer or their professional adviser to propose a confidentiality clause designed or intended to prevent or limit the making of a protected disclosure or disclosure of a criminal offence" is not being taken forward. The Government's argument that this "could be difficult to enforce" is weak. Failure to tackle poor and unethical practice in this area leaves workers insufficiently protected and facilitates the covering up of discriminatory and, in some cases criminal, behaviour. The Government must show that it is taking this issue seriously. *We therefore reiterate our recommendation that the Government should make it an offence for an employer or their professional adviser to propose a confidentiality clause designed or intended to prevent or limit the making of a protected disclosure or disclosure of a criminal offence.***

Assisting with discrimination and harassment complaints by other employees

94. Several witnesses raised concerns about the use of NDAs in discrimination cases making it difficult for other victims of discrimination to gain supporting evidence from colleagues.[135] One individual suggested that employers use NDAs "to control and silence victims of abuse", especially in sex discrimination and harassment complaints, with the employee often being unaware that there have been other complaints.[136] Law firm McAllister Olivarius made a similar point, stating:

> The wide use of NDAs also makes it more difficult for future victims of a repeat workplace offender to bring a claim and prove it. Complainants usually have little documentary evidence to prove workplace harassment

131 Women and Equalities Committee, Fifth Report of Session 2017–19, Sexual harassment in the workplace, HC725, para 133

132 Women and Equalities Committee, Seventh Special Report of Session 2017–19, Sexual harassment in the workplace: Government Response to the Committee's Fifth Report of Session 2017–19, HC1801

133 Department for Business, Innovation and Industrial Strategy, Confidentiality clauses: consultation on measures to prevent misuse in situations of workplace harassment or discrimination, March 2019

134 As above

135 A member of the public (NDA0006); Farore Law (NDA0020); National Education Union (NDA0049); McAllister Olivarius (NDA0056); BBC Women (NDA0057); A member of the public (NDA0086)

136 A member of the public (NDA0006)

> and so rely on the testimony of others, to establish patterns of behaviour. This can be difficult to obtain at the best of times, since employees are reluctant to speak against their employer, but it is virtually impossible to obtain where the witness, a previous victim, has signed an NDA.[137]

95. The NEU has raised concerns about NDAs being used to prevent its members from giving information or evidence relating to "sexual harassment allegations during future investigations where they are party to a further dispute or where they are called as a witness to another dispute". It suggested that "there is no clear case law on whether a confidentiality clause in a settlement agreement or COT3 can prevent an employee from giving witness evidence" in quasi-judicial regulatory proceedings. It proposed that the law should be amended to ensure that NDAs cannot prevent teachers from giving evidence in such proceedings, adding that this was "particularly important in relation to repeat offenders who may continue to work in a school or college while a succession of targets of harassment leave under settlement agreements."[138] Farore Law said it was clear that "NDAs can and have been used to essentially shield repeat offenders by placing strict conditions on victims and therefore isolating them. (For instance, if clients are prevented from discussing matters amongst themselves, the risk of a collective response is minimised.)"[139]

96. While many of the witnesses we heard from had concerns about the chilling effect of NDAs, some argued that there was a need for employers to protect reputation.[140] We note these arguments but we are concerned that NDAs should not be used to prevent victims of discrimination from sharing information to support other victims' cases. We note that there are protections under the Equality Act—for example relating to pay secrecy and victimisation—that could be extended to prevent the use of NDAs in this way. Pay secrecy clauses are unenforceable where employees make pay disclosures for the purposes of establishing whether their pay or that of another person is affected by having a protected characteristic.[141] This principle could be extended to make unenforceable any provision in an NDA seeking to restrict disclosures made for the purposes of establishing whether other employees have experienced discrimination or harassment. The measures on victimisation, under section 27, provide protection against retaliation for those who bring proceedings, give evidence or provide information, or take any other steps in connection with the Equality Act 2010. These could be further strengthened by making unenforceable any provision in an NDA that would remove the protections set out in section 27.

97. **We are gravely concerned that NDAs are being used to silence victims of discrimination and can make it more difficult for other victims to obtain supporting evidence for similar complaints. *The Government should legislate to ensure that NDAs cannot prevent signatories from sharing information that may be helpful to a potential discrimination or harassment complaint or claim by another employee. Such legislation could build on existing protections in the Equality Act 2010 regarding pay secrecy clauses and victimisation. And we restate that employers and their legal advisers should not be complicit in using NDAs to cover up allegations of unlawful behaviour and that it is in***

137 McAllister Olivarius (NDA0056)
138 National Education Union (NDA0049)
139 Farore Law (NDA0020)
140 Qq93, 100 and 143 [Jane Mann]; The Law Society of England and Wales (NDA0008)
141 Section 77, Equality Act 2010

the public interest that the Government considers how to stop the use of NDAs to cover up allegations of unlawful discrimination whilst protecting the rights of victims to be able to move on with their lives.

Clawback clauses and fears of repercussion

98. A considerable fear and deterrent for some of the individuals we heard from was that of being pursued for the entire settlement amount they had received if their former employer thought that they had broken their NDA.[142] One individual, who otherwise felt that their NDA had been broadly beneficial to them, described it as "a weight that hangs over you for the rest of your life." They also expressed the unfairness they felt at the prospect that they could be pursued for damages by their perpetrator if their NDA was breached, stating:

> If I was found to have breached my confidentiality agreement, even in this room, I would have to give back every penny, and also damages and everything that comes from that, which I find difficult, because ultimately I am the victim here. If it did come out somewhere, the person who was the perpetrator should just live with the fact that they have done what they have done. It should not be on me to hold their secret. If it does get out into the public, I am the one who has to repay every penny. To be honest, that is unreasonable because, if you take into account tax and things like that, I would be paying back more money than I received in the first place, not to mention the fact that you use that settlement to move forward with your life.[143]

Another individual highlighted the potentially "onerous" and "one-sided" nature of clawback clauses, in which "remedies for a breach by an employee are defined in detail, while the remedies for a breach by the employer are not", leaving the employee "in a much more difficult position should they wish to pursue a breach by the employer."[144]

99. Legal experts have also raised concerns about the use of draconian clawback clauses.[145] Kiran Daurka described as "potentially unenforceable" clawback clauses that would require the individual to pay back the full amount plus the employer's costs if they sued the individual for breach of the agreement. However, she noted that the deterrent effect of such clauses still held because of the difficulties of testing their enforceability in court, stating:

> It is a massive deterrent to individuals. It has a real impact, that particular clause, more than anything, even though potentially it is not enforceable. You can say to your client, "I am not sure if it is enforceable. It has not really been tested and you do not want to be the one testing it". You have tried to have it removed, but it is standard. It is not going to come out of there. I think the clawback is a real silencer.[146]

142 Witnesses in private; Evidence given in confidence

143 Q833

144 A member of the public (NDA0046)

145 Q137 [Kiran Daurka], Oral evidence: Sexual Harassment in the Workplace, Wednesday 28 March 2018, Q186 [Suzanne McKie]; Professor Richard Moorhead (NDA0069)

146 Q137

100. Individuals also told us that knowing that a clause may be unenforceable does not necessarily take them any further forward. One witness observed that "reassurances that NDAs are unenforceable […] give very little comfort in the real world."[147] Another highlighted the barriers to fighting such a case in the courts, particularly against a well-resourced employer, stating:

> I wouldn't want to go to a court of law about this […] I think the bigger problem is that I would not necessarily have the legal means to represent myself in that scenario, and the other person has unlimited means, or at least relatively unlimited means.

They suggested that clawback provisions for breaching a non-disclosure agreement should be limited so that individuals should not be faced with potentially having to pay back more than they received, stating:

> [R]ather than repaying every penny of everything just because someone finds out about the existence of your agreement, what about if it was just limiting the actual damage suffered to the perpetrator? If there is no damage, then it doesn't really matter.[148]

101. As we have outlined above, the Government's recently published consultation suggests that its main approach to enforcing the use of confidentiality agreements would be that any confidentiality clause in a settlement agreement that does not meet new wording requirements would be "made void in its entirety". It suggests that "this would mean that an employee who breaches the confidentiality provisions of a settlement agreement could not be sued for doing so if the confidentiality provision was not drafted appropriately" and that this "should encourage employers to ensure they draft confidentiality clauses correctly […] If they do not, they will be taking the risk that the reason behind the dispute is made public with no recourse for the employer".[149]

102. **We are deeply disappointed by the Government's suggestion that simply making NDA clauses unenforceable if they do not meet wording requirements will be sufficient encouragement to ensure that employers draft clauses correctly. We have highlighted the evidence that unenforceable clauses are widely used to deter disclosure of discrimination and harassment. Currently there is little risk to employers and legal practitioners in using such clauses, and considerable risk to the individual in challenging them. Other enforcement measures will be required to bring about a change in practice. We discuss enforcement in more detail in the next chapter. *We restate our previous recommendation that the use of provisions in confidentiality agreements that can reasonably be regarded as potentially unenforceable should be clearly understood to be a professional disciplinary offence for lawyers advising on such agreements.***

Access to legal advice

103. We have already highlighted the importance of good legal advice in bringing a discrimination claim to tribunal. This is no less important when a settlement agreement is being drafted, considered and signed. Individuals who have legal representation will

147 A member of the public (NDA0046)
148 Q848
149 Department for Business, Innovation and Industrial Strategy, Confidentiality clauses: consultation on measures to prevent misuse in situations of workplace harassment or discrimination, March 2019

have a greater opportunity to negotiate the terms of the agreement than those who do not. However, for a settlement agreement to be binding, the employee must receive a minimum level of independent legal advice on its terms and effects.[150] Some employers therefore make a contribution of around £200-£500 towards the employee's legal costs, but this is not a requirement. Often, this advice will cover only the minimum required to achieve this legal sign-off of the agreement and will not include advice on whether the agreement is a good deal for the employee.[151] The Employment Lawyers Association told us that a £500 employer contribution "will rarely be sufficient to cover the type of complex advice that is typically required where there has been sexual harassment or other types of discrimination."[152] The Government noted in its recent consultation that this advice "might not always cover the extent to which a worker is still able to discuss their experience with anyone or the specific legal disclosure rights they maintain."[153] If an employee is unhappy with the terms of the agreement, they are faced with the choice of signing an agreement they are unhappy with, picking up the cost of negotiating more favourable terms, or walking away with no settlement, and potentially being left with the bill for the legal advice that they had already received as the employer contribution may not be paid if the agreement is not signed.[154]

104. The Government has proposed in its consultation to extend the requirement for legal advice "to specify that, for a settlement agreement to be valid, the independent advice a worker receives must cover the nature and limitations of any confidentiality clause in the settlement agreement, and the disclosures that a worker is still able to make."[155] However, this does not extend to providing advice on whether the agreement appears to be reasonable and fair in the circumstances, or on the enforceability of the NDA.

105. **Employees without legal representation may be severely disadvantaged in the lead-up to an NDA being signed, as they have very little opportunity to negotiate the terms of the proposed settlement. Minimum requirements for legal advice on settlement agreements are insufficient to ensure that individuals are properly advised on confidentiality and similar clauses. We are concerned that this leaves them vulnerable and particularly at risk of feeling unable to challenge NDA terms that they are uneasy about. It is in the public interest to address this imbalance of power and ensure that individuals are not left feeling that they have no choice but to accept unfair NDAs.**

106. **We welcome the Government's proposal to require that the independent advice a worker receives on a settlement agreement must cover the nature and limitations of any confidentiality clause in the agreement, and the disclosures that a worker is still able to make. This advice should also cover any concerns about the reasonableness and enforceability of the terms. However, the cost of this additional requirement for legal advice cannot be allowed to fall on the employee.**

150 Section 203(3) of the Employment Rights Act 1996 requires that a worker receive advice from an independent adviser (such as a lawyer or a trade union official) as to the terms and effect of the agreement for the agreement to be valid.

151 Q42[Emma Webster]; Q151 [Julie Morris]; Gowling WLG (NDA0012)

152 Employment Lawyers Association (NDA0017)

153 Department for Business, Innovation and Industrial Strategy, Confidentiality clauses: consultation on measures to prevent misuse in situations of workplace harassment or discrimination, March 2019

154 Slater and Gordon (NDA0053)

155 Department for Business, Innovation and Industrial Strategy, Confidentiality clauses: consultation on measures to prevent misuse in situations of workplace harassment or discrimination, March 2019

107. ***The Government should require employers to make a financial contribution sufficient to cover the costs of the worker's legal advice on any settlement agreement proposed by the employer. This advice should cover, as a minimum, the content and effect of any confidentiality, non-derogatory or similar clauses, and any concerns about the reasonableness or enforceability of those clauses. Where the worker wishes to negotiate the terms of those clauses, further contributions should also be payable by the employer to cover the costs of legal advice and representation for those negotiations. These contributions should be payable regardless of whether the employee signs the agreement.***

Conclusion and recommendations on the drafting of NDAs

108. The evidence we have highlighted show some of the ways in which clauses can be drafted to silence victims of harassment and discrimination. We have previously recommended the use of standard, plain English confidentiality clauses in settlement agreements, and during this inquiry employment lawyers, employers and others have broadly agreed that this would be a sensible approach. Employment lawyer Emma Webster told us that the use of standard settlement agreements and clauses "tweaked to fit the individual circumstances" would " reduce legal fees massively" by reducing the amount of time needed to go through agreements.[156] Ben Wilmott told us that the response that the CIPD had got after consulting members and employment lawyers was that "some greater standardisation around the wording of confidentiality clauses would be helpful."[157] However, Jane Mann was opposed to a standard template "because there are so many circumstances in which employment may be coming to an end and agreements are being negotiated and you need to allow the parties to reach their own agreement."[158]

109. In its recently launched consultation, the Government said it was "concerned that requiring a single form of words in all written employment contracts and settlement agreements could become quickly out of date as other protections develop over time" and that it was "highly unusual for legislation to require such specific wording to be included."[159]

110. **There is a clear need for action to ensure that confidentiality, non-derogatory and other clauses cannot be drafted in such a way that they lack clarity about what the effect of the clauses are and, importantly, about the types of disclosure that they cannot prevent. Clauses must be suitably specific, without being overly stringent, and their limits should be clearly set out. We are not convinced by the Government's arguments against the need for standard clauses. We have found wide support for this idea and believe it has the potential to bring an immediate step change in lawyer and employer practice in this area.**

111. ***We welcome the Government's consultation on the use of confidentiality clauses. However, we note that other types of clause can also have a gagging or chilling effect. We recommend that the Government should legislate, within the next two years, to ensure that any clause in a settlement agreement that has the effect of controlling what information an individual can share with other people, organisations or bodies should:***

156 Q48
157 Q353
158 Q154
159 Department for Business, Innovation and Industrial Strategy, Confidentiality clauses: consultation on measures to prevent misuse in situations of workplace harassment or discrimination, March 2019

- ***be clear and specific about what information cannot be shared and with whom;***
- ***contain agreements about acceptable forms of wording that the signatory can use, for example in job interviews or to respond to queries by colleagues, family and friends;***
- ***contain clear, plain English explanations of the effect of clauses and their limits, for example in relation to whistleblowing.***

112. ***We further recommend that the Government should legislate, within the next two years, to require the use of standard, plain English, confidentiality, non-derogatory and similar clauses where these are used in settlement agreements, with additional guidance on suitable forms of wording to ensure that they are clear and specific. Standard clauses on the damages that can be reclaimed for the breach of confidentiality, non-derogatory and similar clauses should also be included. Non-standard clauses of this type should be legally unenforceable unless the relevant party can show a clear need for alternative clauses. This reasoning should be provided with the draft agreement to enable those giving legal advice on the effect of such clauses to advise on their propriety. The direction of travel of the Government should be towards assessing in the public interest how to stop the use of NDAs where there are allegations of unlawful discrimination whilst still protecting the rights of victims to move on with their lives.***

5 Compliance and enforcement

A perennial problem - the enforcement gap

113. We have previously highlighted serious concerns about the lack of enforcement in relation to poor employer practice on pregnancy and maternity discrimination and sexual harassment in the workplace.[160] As we warned in our 2016 Report on Pregnancy and maternity discrimination, the very low numbers of women taking action against employers for pregnancy and maternity discrimination leaves an enforcement gap, because this type of action is the main source of enforcement for discrimination law. This enforcement gap leaves it open to employers to flout the law. We therefore called on the Government to "ensure that pregnancy and maternity discrimination laws and protections are better enforced".[161] Sadly, we have heard many of the enforcement issues that we identified in that Report repeated in the evidence we have taken for this inquiry.

114. In our 2018 Report on Sexual harassment in the workplace, we called on the Government to establish a regime to ensure that tackling sexual harassment is given as much attention by employers as money laundering and data protection—for example by requiring employers to take proactive steps to tackle and prevent sexual harassment and by giving the EHRC greater powers to investigate and sanction employers that do not take appropriate action to protect employees from such discrimination. [162]

115. During this inquiry, we have heard evidence from public sector employers that have been taking steps to reduce their use of NDAs and ensure that they are used appropriately. For example, the civil service has significantly reduced its use of NDAs in settlement agreements since the introduction of Cabinet Office guidance in 2015.[163] Brighton and Hove City Council has implemented a number of safeguards around its use of NDAs, including the "creation of a Compensation Panel of Senior Officers (Head of Finance, Head of Legal and Head of HR) which is required to review and approve any proposed settlement agreement", criteria for assessing whether an NDA is required in each case; reporting of all NDAs to the council's chief executive; and, in specified circumstances, approval by elected members. The council stated that it also "meets the legal expenses of the employee in every case (up to a set figure) to ensure that employees always receive independent legal advice in relation to the terms of the proposed settlement agreement", and that it conducts equalities assessments of the impact of entering into settlement agreements.[164]

116. While we were encouraged to hear about good practice and positive change by some employers, we were disappointed to hear stories in the news throughout this inquiry about both public and private employers, including large companies, that appeared to be failing to deal with discrimination, and in some cases had repeatedly used NDAs to

160 Women and Equalities Committee, First Report of Session 2016–17, Pregnancy and maternity discrimination, HC 90

161 As above, para. 144

162 Women and Equalities Committee, Fifth Report of Session 2017–19, Sexual harassment in the workplace, HC725, para 133

163 Civil Service (NDA0084)

164 Brighton & Hove City Council (NDA0036)

settle discrimination claims.[165] For example, a recent news report by Tortoise Media has highlighted the widespread use of NDAs by the NHS and local authorities, and the amount of public money paid out as part of those NDAs, in the past five years. The article stated that 359,000 people have signed NDAs with local authorities in return for compensation of £190m since 2014, with one authority—Stoke-on-Trent City Council—signing 946 and paying out nearly £22m in that five-year period. It also states that "NHS England, the UK's largest employer has agreed 1,072 NDAs for departures of staff that were not compulsory redundancies at a cost of £49.6m since 2014", whereas NHS Scotland, which has a much smaller workforce, "signed a comparatively low 71 NDAs at a cost of £1.1m." Most worryingly, it includes testimony from former NHS employers who describe being asked—or feeling pressured—to sign an NDA when they raised serious safety concerns.[166]

117. It is disappointing that some organisations continue to use NDAs to suppress allegations about improper behaviour. However, these cases are also unsurprising given the enforcement gap we have previously highlighted. We are encouraged by recent reports that the Government plan to end the use of NDAs in the NHS for whistleblowers, but the fact that NDAs are being used in such cases highlights the inadequacy of current protections to prevent this. [167]

The role of regulators

118. The key regulator with responsibilities relating to the use of NDAs is the Solicitors Regulation Authority (SRA), which regulates the legal practitioners who draft and advise on NDAs. The main action that the Solicitors Regulation Authority (SRA) has taken in this area has been to publish its March 2018 Warning Notice on Use of non-disclosure agreements (NDAs).[168] The notice reminds legal practitioners of their ethical obligations and sets out some of the practices around the use of NDAs that could lead to disciplinary action. These include using NDAs to "impede or deter, a person from: reporting misconduct, or a serious breach of our regulatory requirements" or from "making a protected disclosure under the Public Interest Disclosure Act 1998", as well as using "inappropriate or disproportionate threats". Since then, we have received evidence that the warning notice and reporting in the wake of the #MeToo movement and our own Report of 2018 has raised awareness among legal practitioners about the ethical use of NDAs in settlement agreements, and that there has been some change in approach, with attempts to insert more egregious clauses becoming less common. Employment lawyer Jane Mann told us:

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

165 Sir Philip Green named in Parliament as businessman at centre of Britain's #MeToo scandal, The Telegraph, 26 October 2018; Ted Baker staff complain of 'forced hugs' by company founder, The Observer, 2 December 2018; NDAs: UK universities misusing 'gagging orders' described as 'outrage', BBC News, 5 May 2019; Oxford among top 'gagging' universities, The Times, 21 April 2019; UK universities must break their silence around harassment and bullying, The Guardian, 18 April 2019; Sexual harassment and bullying rife in legal profession, Financial Times, 14 May 2019

166 Non-disclosure agreements - Addicted to secrecy, Tortoise Media, 11 May 2019

167 Gagging orders for NHS whistleblowers will be banned, Health Secretary promises, The Telegraph, 22 April 2019; Whistleblowing: Government tries again to ban "gagging clauses" in NHS; British Medical Journal, 3 May 2019; Gagging orders on NHS whistleblowers to be banned, The Independent, 23 April 2019

168 Solicitors Regulation Authority, Warning notice - Use of non-disclosure agreements (NDAs), 12 March 2018

> the negotiation and drafting of these types of settlement agreements and the behaviour of solicitors in relation to these negotiations. I think there is a sea change at the moment, not just in our profession in the way our regulator and we ourselves look at it, but across the business world and across society.[169]

119. Professor Richard Moorhead has suggested that the SRA could do more in this area, by further clarifying its guidance and, crucially, taking action to enforce it. He told us:

> The key issue is enforcement. We need to see the SRA enforcing against solicitors who have breached the rules.[170]

However, the SRA told us that it had received only "19 reports since late 2017 about the inappropriate use of NDAs", so its enforcement action on NDAs is currently limited.[171]

120. Another regulator with responsibilities in this area is the Bar Standards Board (BSB), which regulates barristers, who may be involved in drafting or advising on NDAs. In February, the BSB informed us of its decision that formal regulatory guidance on NDAs is "neither necessary nor appropriate" because the conduct of barristers is already covered by the BSB handbook and code of conduct and because it is for Parliament to legislate on whether the use of NDAs should be restricted or made unlawful, and that it is "not for the BSB, as a regulator, to perform that role." Professor Moorhead called this decision "regrettable" and suggested that it should be revisited. He also outlined his concerns about guidance produced by the Law Society on this issue, describing it as "a disappointing document, that shows no ethical leadership in the field" and suggesting that it too should be revisited. **We agree that the Law Society's guidance on NDAs needs revisiting.**

121. ***Regulators of members of the legal profession must make it clear to those they regulate that they will take rigorous enforcement action in this area if they become aware of actions and behaviours that do not meet the high ethical standards expected of legal professionals. This should be set out in guidance and followed up by appropriate action***.

122. The Equality and Human Rights Commission (EHRC), which is tasked with eliminating unlawful discrimination, carries out enforcement work in relation to discrimination and harassment, but has a limited role to play in the use of NDAs. Its chief executive, Rebecca Hilsenrath told us:

> [W]e tackle non-disclosure agreements as features of discrimination when carrying out enforcement work. […]. 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.[172]

169 Q158
170 Q368
171 Solicitors Regulation Authority (NDA0076)
172 Q691

123. Matthew Smith of the EHRC explained how the EHRC's powers to make employers take action on discrimination and harassment could be greatly enhanced if the Government were to place a mandatory duty on employers to take reasonable steps to protect workers from harassment and victimisation in the workplace—something that the EHRC has previously called for and that we called for in our 2018 report.[173] He stated:

> 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.[174]

Rebecca Hilsenrath went on to explain that the EHRC was already drafting a code of practice on sexual harassment and harassment at work, which she expected it to publish in July.[175] The code will specify the steps that employers should take to prevent and respond to sexual harassment. It also includes guidance on the use of NDAs in such cases. The code had been intended to support the duty we recommended. However, the Government has agreed to take forward only the code and not the duty at this stage, arguing that the code may have the same impact as the duty.[176]

124. **Effective enforcement of workplace protections requires a careful balance of encouraging compliance and delivering enforcement. The evidence is clear that currently there simply is not enough enforcement in the mix. We have repeatedly highlighted the lack of regulation and dearth of meaningful sanctions around employer action to protect workers from discrimination. The Government has failed to ensure that there is sufficient incentive to encourage employers to take appropriate action to tackle and prevent discrimination and to ensure that complaints about discriminatory behaviour are handled and, where appropriate, settled in a responsible way. As a result, the law as it stands is not working as Parliament intended it to in providing protection from unlawful discrimination and harassment.**

125. **We welcome the forthcoming introduction of a statutory code of practice on sexual harassment and harassment at work. The code will provide important guidance for employers, but we are sceptical as to how effective the code will be without a corresponding duty requiring employers to take appropriate action to tackle these issues. *We repeat our previous recommendation from our 2018 Report that the Government should place a mandatory duty on employers to protect workers from harassment and victimisation in the workplace. Breach of the duty should be an unlawful act enforceable by the Commission and carrying substantial financial penalties. Consideration should also be given to whether the duty should be widened to cover any form of unlawful discrimination or harassment.***

173 Women and Equalities Committee, Fifth Report of Session 2017–19, Sexual harassment in the workplace, HC725, para 32; and Equality and Human Rights Commission, Turning the Tables - Ending sexual harassment at work, 27 March 2018, para 1.1

174 Q696

175 Q698

176 Women and Equalities Committee, Seventh Special Report of Session 2017–19, Sexual harassment in the workplace: Government Response to the Committee's Fifth Report of Session 2017–19, HC1801

126. ***The Government should require employers to appoint:***

- ***a named senior manager at board level or similar to oversee anti-discrimination and harassment policies and procedures;***
- ***a named senior manager at board level or similar to oversee the use of NDAs in discrimination and harassment cases;***
- ***These roles should not be seen as the responsibility of an HR or support function but should be given to a manager with responsibility for a business function within the organisation.***

127. **Guidance from regulators and other trusted sources such as Acas must do more to highlight the responsibilities of lawyers, professionals and managers to "report up" to senior managers and boards any concerns they may have about systemic issues with culture and discrimination, or about repeated or especially worrying allegations of improper behaviour by a particular individual or in a particular business area.** ***The SRA should consider drafting guidance for lawyers on reporting up within their own firm and their client organisations, including on how to balance this with their other professional obligations. EHRC, Acas and other guidance and codes of practice on the use of NDAs in discrimination and harassment cases should highlight the responsibilities of HR professionals and line managers to report such concerns to senior managers and board members.***

128. We note that the Government has acknowledged the need for greater enforcement capability against employers for breaches of labour market non-compliance by appointing Sir David Metcalf as Director of Labour Enforcement and by proposing a consultation on a new single labour market enforcement body. It has not set out how his work will interact with that of the EHRC. **We welcome the appointment of Sir David Metcalf as Director of Labour Enforcement and the proposed consultation on a new single labour market enforcement body. We will consider further in our Enforcing the Equality Act inquiry how this work could interact with that of the EHRC on enforcing employers' actions to protect workers from discrimination and harassment.**

Suggestions on requiring employers to report on NDA numbers

129. Several witnesses suggested that employers should be required to report annually on the number of NDAs they agreed.[177] Others suggested that this could turn into a box-ticking exercise and that the figures might not provide very useful information.[178] Certainly, our experience of collecting data from employers on their usage of NDAs in recent years was that employers used different definitions of what was an NDA or confidentiality clause and so the figures were not necessarily comparable. We can see a use for such figures, provided that there is also some oversight of employers' use of NDAs, but also see the potential limitations of taking a solely quantitative approach to overseeing the use of NDAs by employers in discrimination cases. Some witnesses suggested that it would be more useful to collect figures on the number of discrimination and harassment

177 Qq49–50; Q53 [Joeli Brearley, Emma Webster]; A member of the public (NDA0086); A member of the public (NDA0102); Zelda Perkins (NDA0080)

178 Q145 [Julie Morris, Jane Mann]; Mr Mark Anderson (NDA0035)

complaints or grievances lodged within the organisation each year.[179] If organisations were required to collect such data they could be expected to have a better overview of potentially discriminatory practices internally.

130. **We can see the potential merits of requiring employers to collect data, and potentially report, on the use of NDAs in settlement agreements, and on complaints and grievances about discrimination and harassment. However, we think it important to consider further how such data could be used, what kind of qualitative oversight could be provided and by whom, and any potential unintended consequences.**

131. ***The Government should consider requiring employers to collect data and report annually on:***

- ***the number and type of discrimination and harassment complaints/grievances and the outcome of such complaints***
- ***the number of settlement agreements containing confidentiality, non-derogatory and similar clauses they have agreed, and the type of dispute they relate to.***

132. Talking specifically about pregnancy and maternity discrimination, Maternity Action and YESS suggested that reporting on maternity retention rates, rather than on the use of NDAs in pregnancy and maternity discrimination cases, would be the key measure that could help reduce pregnancy and maternity discrimination.[180] Rosalind Bragg of Maternity Action told us:

> [M]aternity retention rate reporting […]is a very useful mechanism to be able to pick up bad practice. It picks up the bad practice that leads to compromise agreements and settlement agreements being signed, but it also picks up the bad practice that does not end up there; it picks up women who have left because they have found their workplace untenable but who have not taken action.[181]

We found support for this approach from employers, lawyers and others.[182] Sarah Jones of the BBC and Anna Purchas of KPMG agreed that the most useful information would be the number of women still with employers a year after returning from maternity leave.[183]

133. ***We have already called on the Government to introduce employer reporting on maternity retention rates in our response to its recent consultation on pregnancy and maternity discrimination. We restate that call here.***

Corporate responsibility

134. For public and private companies, oversight of their actions to tackle and prevent discrimination and harassment, and to ensure that NDAs are not being used inappropriately to mask such behaviour, rests largely with boards and shareholders. The UK corporate

179 Q145 [Jane Mann, Julie Morris]; Q406 [Emma Codd]
180 Qq25; 41 and 49 [Rosalind Bragg, Emma Webster]; Maternity Action and YESS (NDA0005)
181 Q41
182 Q163 [Kiran Daurka; Baroness Kennedy; Jane Mann]; Q297 [John Rumney, Larissa Reed, Sarah Jones Anna Purchas]; Q347 [Sue Coe]
183 Q297

governance code, which is overseen by the Financial Reporting Council (FRC), provides some guidance in this area, but this does not apply to all companies. There is potential for poor and discriminatory practices to go unchallenged in companies in which those responsible for oversight lack awareness or concern about these issues. Tracy Vegro of the FRC told us that it is "not a legal requirement that NDAs and the sums of those NDAs are signed off by the board" and that currently boards would be unlikely to be aware of "every single" NDA. She added that recent changes and guidance to the corporate governance code suggested that "for the board to be asking about NDAs and the sums involved would be a good indicator of the underlying culture."[184]

135. Several legal experts, employers, individuals and others agreed that boards should play a role in overseeing the use of NDAs.[185] Jane Mann suggested that such oversight could form part of current corporate governance expectations, highlighting the potential for boards to receive reports relating to the use of NDAs, and to "steps to introduce culture change and to report on diversity and the management of claims and complaints internally".[186] Law firm Gowling WLG suggested taking a health and safety approach to harassment and discrimination, including by nominating someone to oversee risk, stating:

> It may be appropriate to treat harassment or discrimination cases in a similar way to Health & Safety issues, with a risk profile on the board agenda as a duty to protect the health, safety and welfare of the employees. Harassment/discrimination could be considered in a similar way to safeguarding, requiring a person with oversight to monitor recurring issues and a risk register/ central repository to record agreements and complaints and identify patterns.[187]

Ben Wilmott of the CIPD suggested that the role of remuneration committees (RemCos), which are sub-committees of boards, could be expanded to include consideration of culture and the use of NDAs when making recommendations on executive pay, stating:

> 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.[188]

However, Sue Coe of the TUC warned that there was "some scepticism" among its members as to "whether internal transparency and reporting up to boards" would be effective enough to "drive the level of change and the level of reduction in confidentiality clauses that we have seen, for example, in the civil service."[189]

136. Some companies told us that their boards or senior executives already had oversight of cultural issues, grievance-handling and the use of NDAs.[190] Anna Purchas told us that KPMG monitors the number of settlement agreements that it uses and that the board

184 Qq392–393
185 Prospect Trade Union (NDA0009); Equality and Human Rights Commission (NDA0011); Zelda Perkins (NDA0080); A member of the public (NDA0102)
186 Q160
187 Gowling WLG (NDA0012)
188 Q351
189 Q347
190 Q273 [Anna Purchas], Q397 [Emma Codd]; KPMG (NDA0064), Deloitte (NDA0068)

receives regular updates "around staff leaving the firm".[191] Deloitte stated that relevant senior executives are provided with monthly anonymised reports "of all matters that our specialist ER team are managing in respect of our employees. This includes details of all complaints, mediations, grievances, disciplinary cases and any appeals."[192]

137. **We are convinced of the need for boards of public and private companies to take greater responsibility in overseeing their organisation's use of NDAs in settling harassment and discrimination cases, as well as its action to tackle and prevent improper behaviour. Current corporate governance requirements simply do not go far enough to require companies to meet their responsibilities to protect employees from discrimination and harassment.**

138. ***The Government must strengthen corporate governance requirements on all companies—public and private—to require them to meet their responsibilities to protect those they employ from discrimination and harassment. These should include:***

- ***requiring companies to nominate a director to hold responsibility for overseeing the use of NDAs and ensuring that where they are used in settling discrimination and harassment cases, their use is appropriate;***
- ***requiring companies to nominate a director to hold responsibility for reviewing settlement sums and monitoring whether these are an appropriate use of company resources;***
- ***requiring companies to nominate a director to hold responsibility for overseeing anti-discrimination and harassment policies, procedure and training, including learning lessons from how previous such cases were handled.***

139. ***The Government should strengthen regulation of companies' adherence with their corporate governance responsibilities, including by ensuring that there are appropriate sanctions for poor practice.***

191 Q255
192 Deloitte (NDA0068)

6 Conclusion

140. Discrimination at work is unlawful under the 2010 Equality Act and employers have a duty of care to provide a safe place of work for their employees. It is hard to understand on what basis it could ever be deemed to be in the public interest for employers to use legal agreements, often drawn up by professionally qualified lawyers, HR and trade union professionals, to cover up allegations of unlawful and sometimes criminal behaviour committed in the employer's organisation. It is difficult to think of any other aspect of business or service delivery where this would be seen as business as usual. This ingrained behaviour has to be vigorously challenged.

141. It is clearly in the public interest to ensure that allegations of law-breaking are investigated wherever they occur and are not covered up by legally sanctioned secrecy. This is no less so for allegations of unlawful discrimination.

142. The Government needs to consider its duty to ensure that effective mechanisms are in place to enforce the law and to ensure that employees can assert their legal rights. At the very least, the Government has to reset the parameters within which NDAs can be used when there are allegations of unlawful discrimination. And the direction of travel has to be to stop the use of NDAs to cover up allegations of unlawful discrimination whilst protecting the rights of victims to move on. It must also as take urgent action to address the failure of the employment tribunal system to offer very vulnerable employees who have experienced discrimination any meaningful route of legal redress.

143. We have been particularly struck by the evidence we have heard that NDAs are used so routinely when settling discrimination and harassment cases—and other employment disputes—that many employers and lawyers believe them to be integral to settlement agreements. As a result, individuals who wish to settle discrimination cases are routinely advised that they cannot expect to settle without agreeing to some confidentiality. McAllister Olivarius has suggested that the use of NDAs has become a habit that is hard to break and has outlined some of the difficulties its lawyers have experienced in getting confidentiality clauses removed from settlement agreements, stating:

> When questioned, their lawyers are often unable to articulate why their clients demand confidentiality and yet they strongly resist the NDA's removal. This happens even when it is not clear that an NDA was specifically requested by the employer. […] We have been told that NDAs cannot be removed because they are intrinsic to the settlement agreement and "always" included, no discussion.[193]

144. It has been suggested that the use of confidential settlements to avoid employees having to go to tribunal or being blacklisted by potential employers is an imperfect but necessary solution to the problems faced by employees who experience bullying or harassment.[194] Emma Webster of Your Employment Settlement Service (YESS) highlighted the "incredibly vulnerable" position of some discrimination victims who might not feel able to "take on" their employer, for whom a confidential settlement was a solution.[195]

193 McAllister Olivarius (NDA0056)
194 Q22 [Emma Webster]; Q45 [Joeli Brearley]; Q107 [Julie Morris]
195 Q22

145. Employment lawyers, unions, individuals who have suffered discrimination and others told us that many employees settle cases and sign an NDA in order to avoid the risks and difficulties of pursuing a tribunal case and the potential subsequent effect on their career.[196] This is the case even for employees with strong cases.[197] Joeli Brearley outlined findings from research that Pregnant then Screwed had conducted with 260 women who had experienced pregnancy and maternity discrimination and had signed non-disclosure agreements, with 91% saying "that they felt forced to sign that non-disclosure agreement". She went on:

> It is put to them as if it is a choice, but it is not a choice; there is no other option—there is nowhere else for them to go. Having a lawyer and going through to tribunal means that you are going to have to be put out there as a troublemaker and that your career will be ruined for the rest of your life.[198]

As we have highlighted, there are other drivers behind this feeling of having no option but to sign an NDA including the imbalance of power between employers and employees, poor employer practice in tackling discrimination and handling discrimination appropriately and a lack of enforcement.

146. **The evidence clearly shows that there needs to be a package of measures: the misuse of NDAs is one element of a wider system of legislative, regulatory and judicial measures and processes that are failing to protect employees from discrimination and abuse of power. Individuals who have experienced discrimination can feel that they have no option but to reach a settlement, which will routinely include secrecy clauses. We have seen that the use of unethical, vague or excessively restrictive NDAs can create long-lasting fear for those who sign them and can curtail their career.**

147. **We are encouraged to see that some employers, particularly in the public sector, now routinely settle discrimination cases without using NDAs, demonstrating that confidentiality clauses are not intrinsic to settlement agreements. Other public sector employers must now take the lead in ensuring that NDAs are not used to cover up discrimination and harassment, allowing such behaviour to go unchecked. Lawyers and employers must think more carefully about why they are requesting confidentiality and whether it is needed at all, and individuals should never feel forced into signing an NDA.**

148. **There is a clear public interest case for changing the law to provide more protection for employees who face job loss because of discrimination at work. Something more radical than tinkering with the wording of NDAs is required. The Government must ensure that legislative, regulatory and judicial systems do more to prevent harassment and discrimination and to support individuals who find themselves subjected to such behaviours. Our recommendations set out the actions that the Government and regulators should take to bring about a step change in the use of NDAs in discrimination cases.**

196 Witnesses in private; Q25 [Emma Webster]; Qq45–46 [Joeli Brearley], Q107 [Julie Morris]; Prospect Trade Union (NDA0009); Thompsons Solicitors Scotland (NDA0015); Employment Lawyers Association (NDA0017); National Education Union (NDA0049); Oral evidence: Sexual Harassment in the Workplace, HC 725, Wednesday 28 March 2018, Q166 [Gareth Brahams];

197 Employment Lawyers Association (NDA0017); Maternity Action and YESS (NDA0005)

198 Q45

Conclusions and recommendations

Why so many NDAs? Benefits, drawbacks and drivers

1. We are concerned that the imbalance of power between employers and employees is one of the key drivers behind the widespread and commonplace use of NDAs in the settlement of discrimination cases. It is particularly worrying that secrecy about allegations of unlawful discrimination is being traded for things that employers should be providing as a matter of course, such as references and remedial action to tackle discrimination. We have been disappointed, but not surprised, to hear examples of large employers using the significant resources at their disposal to put considerable pressure on employees who pursue allegations of discrimination or harassment at tribunal—for example by making the process more protracted and difficult—instead of taking action to tackle and prevent future discrimination or harassment. There are widespread examples of poor practice in the handling of harassment and discrimination complaints. We are particularly concerned that some employers are using NDAs to avoid investigating unlawful discrimination and harassment complaints and holding perpetrators to account. (Paragraph 26)

2. *The Government should begin an awareness-raising programme for employers and employees about how to handle grievances fairly and effectively, including signposting to relevant guidance and support. This should include guidance on the handling of investigations into allegations of unlawful discrimination and harassment following a settlement agreement if this is agreed before any investigation is completed. It should do this within the next six months.* (Paragraph 27)

3. *The Government should consider requiring employers to investigate all discrimination and harassment complaints regardless of whether a settlement is reached.* (Paragraph 28)

4. Employers gain significant bargaining power from their ability to choose whether to provide a reference. *The Government should legislate to require employers to provide, as a minimum, a basic reference for any former employee confirming as a minimum that they worked for that employer and the dates of their employment. It should do this within the next year.* (Paragraph 29)

Going to employment tribunal

5. We are concerned by the evidence that online publication of tribunal judgments has increased the risk for claimants of being blacklisted by future employers, and that this is a significant barrier to potential claimants bringing discrimination claims. We note that it is possible to be granted anonymity within the employment tribunal system but we are not convinced that this would be apparent to potential claimants and litigants in person. Indeed, the impression we have received from experienced employment lawyers is that anonymity is hard to obtain and rarely granted. We are particularly troubled by the suggestion that ethnic minorities may be disproportionately disadvantaged by the online reporting of tribunal judgments. (Paragraph 37)

6. *We reiterate our previous calls for time limits to be extended to six months in cases where sexual harassment, or pregnancy or maternity discrimination, is alleged. Likewise, we reiterate our call for a wider review of the time limit in all discrimination cases.* (Paragraph 39)

7. We are concerned that particular groups of people, or people with particular types of claim, may be disproportionately disadvantaged by aspects of the tribunal system. We have outlined particular concerns about how short time limits and online reporting of tribunal judgments might disproportionately affect particular groups. We consider that an equalities review of the tribunal system is long overdue. We must have confidence that the system set up for dealing with complaints of workplace discrimination is not itself having a discriminatory effect. (Paragraph 40)

8. *We recommend that the Government commission an equalities review of the employment tribunal system and report publicly on its findings. The review should consider whether particular groups of people, or those with particular types of claim, are being disproportionately disadvantaged by the way that the tribunal system currently operates and whether modifications to the system are required to rectify this. The review should look not only at those who have lodged tribunal claims, but should also seek evidence from those who have considered bringing a claim but been deterred from doing so.* (Paragraph 42)

9. We are concerned by the lack of affordable legal advice available for employment discrimination cases. We hope that an awareness-raising campaign will help signpost employees to the free advice that is available, and that such advice will be improved. However, tailored advice will be needed by many employees and access to legal aid for discrimination cases is very limited. We hope that an awareness-raising campaign will help signpost employees to the free advice that is available, and that such advice will be improved. However, tailored advice will be needed by many employees and access to legal aid for discrimination cases is very limited. *The Government should review legal aid thresholds and monitor the effect of the changes it is making to improve access to legal aid. We make further recommendations on the provision of legal advice on the content of NDAs below.* (Paragraph 49)

10. We are concerned that the tribunal system may have become too onerous for litigants in person with complex discrimination claims. We are currently considering this issue further in our inquiry on Enforcing the Equality Act: the law and the role of the EHRC, but it is clear that many people either do not know of, or do not have access to, support in navigating an increasingly complex tribunal system. *We recommend that the Government review the practical support currently available to litigants in person, in consultation with Acas and other relevant organisations, with a view to filling gaps in support.* (Paragraph 52)

11. We are concerned that fears about being pursued for employers' legal costs may be driving individuals to agree to settlement terms such as confidentiality clauses that they do not want which cover up unlawful behaviour. This may be due to a lack of clarity around the costs regime, or to the use of potentially unenforceable threats by the other party or their lawyers. *The Government must ensure that there is adequate guidance for tribunal judges and litigants about the circumstances in which a refusal to settle a claim may be considered "unreasonable". This guidance must be made clear and accessible to litigants in person and should set out that refusal to agree to an NDA should never, in itself, be deemed unreasonable behaviour in this regard.* (Paragraph 60)

12. The Government is wrong in its assertion that there is currently "significant deterrent" and compensation for unlawful discrimination within the tribunal system. The evidence we have received from legal experts and from individuals attempting to use the tribunal system demonstrates that this is not the case. Employment lawyers routinely advise potential claimants with strong cases of unlawful discrimination against using the system because the risks outweigh the potential benefits. A rebalancing is required. We also challenge the suggestion that the tribunal system is meeting the stated aim of compensating parties for the detriment suffered and restoring them to the state they would otherwise have been in. When compensation awards are significantly depleted by, or fail to cover, the legal costs of bringing a case, then that party is not being restored to the financial state they would have been in had that treatment not occurred. In addition, no account is being taken of the significant financial and reputational risk of bringing a case in the first place. (Paragraph 65)

13. The Government is wrong to suggest that one-way cost shifting for employment claims would not be defensible. It would be a welcome step towards redressing the imbalance of power, where this exists, between employers and employees with a discrimination dispute. In addition, compensation awards must be significantly increased to incentivise employers to do more to prevent discrimination and harassment in the workplace. This can be done through the introduction of punitive damages and by increasing the current awards available for non-financial losses such as injury to feelings and psychiatric harm. (Paragraph 66)

14. *We call again on the Government to urgently improve the remedies that can be awarded by employment tribunals as well as the costs regime to reduce disincentives to taking a case forward. Tribunals should be able to award punitive damages and there should be a presumption that tribunals will normally require employers to pay employees' costs if the employer loses a discrimination case in which sexual harassment has been alleged. The bands in the Vento guidelines should be increased significantly to take into account the non-financial impact of discrimination. These changes should be made within the next two years.* (Paragraph 67)

Content and effect of NDAs

15. We can see no justification for any clause in a settlement agreement to limit an individual's right to access professional advice or support relating to the workplace harassment or discrimination they have experienced. Likewise, we see no reason why

any agreement settling a dispute in which harassment or discrimination is alleged should restrict access to professional services such as legal or financial advice. Not only should such clauses be unenforceable, but agreements should expressly state that nothing within them can prevent the signatory from seeking such professional advice. Likewise, signatories should always have the option of nominating close family or friends with whom they can discuss restricted issues. (Paragraph 72)

16. We are deeply concerned that some individuals who sign NDAs are being left uncertain about what they are permitted to say about the alleged unlawful discrimination, harassment or other employment issue that led to the settlement. This lack of clarity can have a devastating effect on people's career, self-esteem and personal life. Confidentiality, non-disparagement and similar clauses in settlement agreements need to be suitably clear and specific about information that can and cannot be shared. Most employees will already be covered by their employment contract in terms of commercial confidentiality and this need not be duplicated in an NDA on departure although employees may need to be reminded of this and other relevant obligations in law. It is understandable why an employer might wish to keep confidential the size of the financial settlements. It should, however, be for individuals to decide whether to tell a third party or a new employer why they left a previous employment if the case involved allegations of unlawful discrimination. NDAs should not be used to silence victims of discrimination and harassment, and employers and their legal advisers should not be complicit in using NDAs to cover up allegations of unlawful behaviour. (Paragraph 77)

17. *The Government should legislate to ensure that NDAs cannot be used to prevent legitimate discussion of allegations of unlawful discrimination or harassment, and in the public interest consider how to stop their use to cover up allegations of unlawful discrimination, while still protecting the rights of victims to be able to make the choice to move on with their lives. Legitimate purposes include discussing potential claims with other alleged victims, or supporting such victims through the trauma of raising a complaint of discrimination and harassment.* (Paragraph 78)

18. We welcome the Government's undertaking to add the EHRC to the list of prescribed persons for the purposes of employment protections for whistleblowers. We look forward to hearing whether it plans to add any other regulators or relevant authorities to the list, as we previously recommended. However, we also acknowledge the concerns raised by Protect about taking a piecemeal approach to amending whistleblowing legislation. Our concerns about the complexity of whistleblowing law and the lack of clarity about when the public interest test would be met in workplace discrimination cases have been amplified by the evidence we have heard in this inquiry. If employment lawyers, HR practitioners, whistleblowing experts and others are all telling us that they are not clear about the circumstances in which the public interest test is likely to be met—and if those laws are consequently not being tested—then greater clarity is needed. We consider that the legislation needs to be simplified and clarified. (Paragraph 87)

19. *The Government should review the operation of measures under the Public Interest Disclosure Act 1998 and the Employment Rights Act 1996. In particular, they should clarify the extent to which these measures can provide protection to those who wish to raise concerns with regulators and other relevant bodies or people about workplace*

discrimination or harassment. The review should consider: how best to simplify and clarify existing legislation; how whistleblowing law interacts with other relevant legislation such as the Equality Act; and whether the public interest test is workable. (Paragraph 88)

20. There is clearly potential for NDA agreements to be negotiated, drafted, and/or enforced in ways which may amount to perverting the course of justice. It would be helpful for the Crown Prosecution Service to recognise this. Further guidance from the CPS on the type of cases in which it might be appropriate to prosecute would also be helpful. (Paragraph 91)

21. We are disappointed that our recommendation that the Government "should make it an offence for an employer or their professional adviser to propose a confidentiality clause designed or intended to prevent or limit the making of a protected disclosure or disclosure of a criminal offence" is not being taken forward. The Government's argument that this "could be difficult to enforce" is weak. Failure to tackle poor and unethical practice in this area leaves workers insufficiently protected and facilitates the covering up of discriminatory and, in some cases criminal, behaviour. The Government must show that it is taking this issue seriously. *We therefore reiterate our recommendation that the Government should make it an offence for an employer or their professional adviser to propose a confidentiality clause designed or intended to prevent or limit the making of a protected disclosure or disclosure of a criminal offence.* (Paragraph 93)

22. We are gravely concerned that NDAs are being used to silence victims of discrimination and can make it more difficult for other victims to obtain supporting evidence for similar complaints. *The Government should legislate to ensure that NDAs cannot prevent signatories from sharing information that may be helpful to a potential discrimination or harassment complaint or claim by another employee. Such legislation could build on existing protections in the Equality Act 2010 regarding pay secrecy clauses and victimisation. And we restate that employers and their legal advisers should not be complicit in using NDAs to cover up allegations of unlawful behaviour and that it is in the public interest that the Government considers how to stop the use of NDAs to cover up allegations of unlawful discrimination whilst protecting the rights of victims to be able to move on with their lives.* (Paragraph 97)

23. We are deeply disappointed by the Government's suggestion that simply making NDA clauses unenforceable if they do not meet wording requirements will be sufficient encouragement to ensure that employers draft clauses correctly. We have highlighted the evidence that unenforceable clauses are widely used to deter disclosure of discrimination and harassment. Currently there is little risk to employers and legal practitioners in using such clauses, and considerable risk to the individual in challenging them. Other enforcement measures will be required to bring about a change in practice. We discuss enforcement in more detail in the next chapter. *We restate our previous recommendation that the use of provisions in confidentiality agreements that can reasonably be regarded as potentially unenforceable should be clearly understood to be a professional disciplinary offence for lawyers advising on such agreements.* (Paragraph 102)

24. Employees without legal representation may be severely disadvantaged in the lead-up to an NDA being signed, as they have very little opportunity to negotiate the terms of the proposed settlement. Minimum requirements for legal advice on settlement agreements are insufficient to ensure that individuals are properly advised on confidentiality and similar clauses. We are concerned that this leaves them vulnerable and particularly at risk of feeling unable to challenge NDA terms that they are uneasy about. It is in the public interest to address this imbalance of power and ensure that individuals are not left feeling that they have no choice but to accept unfair NDAs. (Paragraph 105)

25. We welcome the Government's proposal to require that the independent advice a worker receives on a settlement agreement must cover the nature and limitations of any confidentiality clause in the agreement, and the disclosures that a worker is still able to make. This advice should also cover any concerns about the reasonableness and enforceability of the terms. However, the cost of this additional requirement for legal advice cannot be allowed to fall on the employee. (Paragraph 106)

26. *The Government should require employers to make a financial contribution sufficient to cover the costs of the worker's legal advice on any settlement agreement proposed by the employer. This advice should cover, as a minimum, the content and effect of any confidentiality, non-derogatory or similar clauses, and any concerns about the reasonableness or enforceability of those clauses. Where the worker wishes to negotiate the terms of those clauses, further contributions should also be payable by the employer to cover the costs of legal advice and representation for those negotiations. These contributions should be payable regardless of whether the employee signs the agreement.* (Paragraph 107)

27. There is a clear need for action to ensure that confidentiality, non-derogatory and other clauses cannot be drafted in such a way that they lack clarity about what the effect of the clauses are and, importantly, about the types of disclosure that they cannot prevent. Clauses must be suitably specific, without being overly stringent, and their limits should be clearly set out. We are not convinced by the Government's arguments against the need for standard clauses. We have found wide support for this idea and believe it has the potential to bring an immediate step change in lawyer and employer practice in this area. (Paragraph 110)

28. *We welcome the Government's consultation on the use of confidentiality clauses. However, we note that other types of clause can also have a gagging or chilling effect. We recommend that the Government should legislate, within the next two years, to ensure that any clause in a settlement agreement that has the effect of controlling what information an individual can share with other people, organisations or bodies should:*

    - *be clear and specific about what information cannot be shared and with whom;*
    - *contain agreements about acceptable forms of wording that the signatory can use, for example in job interviews or to respond to queries by colleagues, family and friends;*
    - *contain clear, plain English explanations of the effect of clauses and their limits, for example in relation to whistleblowing.* (Paragraph 111)

29. *We further recommend that the Government should legislate, within the next two years, to require the use of standard, plain English, confidentiality, non-derogatory and similar clauses where these are used in settlement agreements, with additional guidance on suitable forms of wording to ensure that they are clear and specific. Standard clauses on the damages that can be reclaimed for the breach of confidentiality, non-derogatory and similar clauses should also be included. Non-standard clauses of this type should be legally unenforceable unless the relevant party can show a clear need for alternative clauses. This reasoning should be provided with the draft agreement to enable those giving legal advice on the effect of such clauses to advise on their propriety. The direction of travel of the Government should be towards assessing in the public interest how to stop the use of NDAs where there are allegations of unlawful discrimination whilst still protecting the rights of victims to move on with their lives.* (Paragraph 112)

Compliance and enforcement

30. We agree that the Law Society's guidance on NDAs needs revisiting. (Paragraph 120)

31. *Regulators of members of the legal profession must make it clear to those they regulate that they will take rigorous enforcement action in this area if they become aware of actions and behaviours that do not meet the high ethical standards expected of legal professionals. This should be set out in guidance and followed up by appropriate action.* (Paragraph 121)

32. Effective enforcement of workplace protections requires a careful balance of encouraging compliance and delivering enforcement. The evidence is clear that currently there simply is not enough enforcement in the mix. We have repeatedly highlighted the lack of regulation and dearth of meaningful sanctions around employer action to protect workers from discrimination. The Government has failed to ensure that there is sufficient incentive to encourage employers to take appropriate action to tackle and prevent discrimination and to ensure that complaints about discriminatory behaviour are handled and, where appropriate, settled in a responsible way. As a result, the law as it stands is not working as Parliament intended it to in providing protection from unlawful discrimination and harassment. (Paragraph 124)

33. We welcome the forthcoming introduction of a statutory code of practice on sexual harassment and harassment at work. The code will provide important guidance for employers, but we are sceptical as to how effective the code will be without a corresponding duty requiring employers to take appropriate action to tackle these issues. *We repeat our previous recommendation from our 2018 Report that the Government should place a mandatory duty on employers to protect workers from harassment and victimisation in the workplace. Breach of the duty should be an unlawful act enforceable by the Commission and carrying substantial financial penalties. Consideration should also be given to whether the duty should be widened to cover any form of unlawful discrimination or harassment.* (Paragraph 125)

34. *The Government should require employers to appoint:*

    - *a named senior manager at board level or similar to oversee anti-discrimination and harassment policies and procedures*
    - *a named senior manager at board level or similar to oversee the use of NDAs in discrimination and harassment cases.*

These roles should not be seen as the responsibility of an HR or support function but should be given to a manager with responsibility for a business function within the organisation. (Paragraph 126)

35. Guidance from regulators and other trusted sources such as Acas must do more to highlight the responsibilities of lawyers, professionals and managers to "report up" to senior managers and boards any concerns they may have about systemic issues with culture and discrimination, or about repeated or especially worrying allegations of improper behaviour by a particular individual or in a particular business area. *The SRA should consider drafting guidance for lawyers on reporting up within their own firm and their client organisations, including on how to balance this with their other professional obligations. EHRC, Acas and other guidance and codes of practice on the use of NDAs in discrimination and harassment cases should highlight the responsibilities of HR professionals and line managers to report such concerns to senior managers and board members.* (Paragraph 127)

36. We welcome the appointment of Sir David Metcalf as Director of Labour Enforcement and the proposed consultation on a new single labour market enforcement body. We will consider further in our Enforcing the Equality Act inquiry how this work could interact with that of the EHRC on enforcing employers' actions to protect workers from discrimination and harassment. (Paragraph 128)

37. We can see the potential merits of requiring employers to collect data, and potentially report, on the use of NDAs in settlement agreements, and on complaints and grievances about discrimination and harassment. However, we think it important to consider further how such data could be used, what kind of qualitative oversight could be provided and by whom, and any potential unintended consequences. (Paragraph 130)

38. *The Government should consider requiring employers to collect data and report annually on:*

    - *the number and type of discrimination and harassment complaints/grievances and the outcome of such complaints*
    - *the number of settlement agreements containing confidentiality, non-derogatory and similar clauses they have agreed, and the type of dispute they relate to. (Paragraph 131)*

39. *We have already called on the Government to introduce employer reporting on maternity retention rates in our response to its recent consultation on pregnancy and maternity discrimination. We restate that call here.* (Paragraph 133)

40. We are convinced of the need for boards of public and private companies to take greater responsibility in overseeing their organisation's use of NDAs in settling harassment and discrimination cases, as well as its action to tackle and prevent improper behaviour. Current corporate governance requirements simply do not go far enough to require companies to meet their responsibilities to protect employees from discrimination and harassment. (Paragraph 137)

41. *The Government must strengthen corporate governance requirements on all companies—public and private—to require them to meet their responsibilities to protect those they employ from discrimination and harassment. These should include:*

    - *requiring companies to nominate a director to hold responsibility for overseeing the use of NDAs and ensuring that where they are used in settling discrimination and harassment cases, their use is appropriate;*
    - *requiring companies to nominate a director to hold responsibility for reviewing settlement sums and monitoring whether these are an appropriate use of company resources;*
    - *requiring companies to nominate a director to hold responsibility for overseeing anti-discrimination and harassment policies, procedure and training, including learning lessons from how previous such cases were handled.* (Paragraph 138)

42. *The Government should strengthen regulation of companies' adherence with their corporate governance responsibilities, including by ensuring that there are appropriate sanctions for poor practice.* (Paragraph 139)

Conclusion

43. The evidence clearly shows that there needs to be a package of measures: the misuse of NDAs is one element of a wider system of legislative, regulatory and judicial measures and processes that are failing to protect employees from discrimination and abuse of power. Individuals who have experienced discrimination can feel that they have no option but to reach a settlement, which will routinely include secrecy clauses. We have seen that the use of unethical, vague or excessively restrictive NDAs can create long-lasting fear for those who sign them and can curtail their career. (Paragraph 146)

44. We are encouraged to see that some employers, particularly in the public sector, now routinely settle discrimination cases without using NDAs, demonstrating that confidentiality clauses are not intrinsic to settlement agreements. Other public sector employers must now take the lead in ensuring that NDAs are not used to cover up discrimination and harassment, allowing such behaviour to go unchecked. Lawyers and employers must think more carefully about why they are requesting confidentiality and whether it is needed at all, and individuals should never feel forced into signing an NDA. (Paragraph 147)

45. There is a clear public interest case for changing the law to provide more protection for employees who face job loss because of discrimination at work. Something more radical than tinkering with the wording of NDAs is required. The Government must ensure that legislative, regulatory and judicial systems do more to prevent

harassment and discrimination and to support individuals who find themselves subjected to such behaviours. Our recommendations set out the actions that the Government and regulators should take to bring about a step change in the use of NDAs in discrimination cases. (Paragraph 148)

Formal minutes

Wednesday 5 June 2019

Members present:

Mrs Maria Miller, in the Chair

Tonia Antoniazzi	Stephanie Peacock
Angela Crawley	Jess Phillips
Philip Davies	

The following declarations of interests relating to the inquiry were made:

12 December 2018

Specialist Advisor, Marian Bloodworth, declared the following interests: *Deputy Chair, Employment Lawyers Association. Co-Chair, Consultation, Legislation Advice Committee for CityHR, a London-based association for HR Professionals.*

3 April 2019

Chair of the Committee Mrs Maria Miller, declared the following interest: *Her husband, Iain Miller, is a partner at Kingsley Napley LLP, is a recognised expert in legal services regulation and has in the past acted for the Solicitors Regulation Authority and now advises solicitors and law firms on their regulatory obligations.*

Draft Report (*The use of non-disclosure agreements in discrimination cases*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 148 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Ninth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available (Standing Order No. 134).

Part of the following written evidence was ordered to be reported to the House for publication.

NDA0103 A member of the public

NDA0102 A member of the public

NDA0101 A member of the public

NDA0100 A member of the public

NDA0099 A member of the public

NDA0098 Pregnant then screwed

NDA0094 Melanie Newman

NDA0093 ACAS

NDA0060 Mrs Elizabeth Sullivan

NDA0048 1752 Group

NDA0043 A member of the public

[Adjourned till Wednesday 12 June 2019 at 9.30 a.m.

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the inquiry publications page of the Committee's website.

Wednesday 19 December 2018	*Question number*
Joeli Brearley, Founder, Pregnant Then Screwed, **Rosalind Bragg**, Director, Maternity Action, **Séamus Dooley**, Assistant General Secretary, National Union of Journalists, **Emma Webster**, Joint CEO, Your Employment Settlement Service	Q1–59
Peter Rukin, Partner, Rukin Hyland & Riggin LLP (via videolink)	Q60–83

Wednesday 23 January 2019	
Kiran Daurka, Discrimination Law Association and Partner, Leigh Day, **Baroness Kennedy of The Shaws QC**, Director, International Bar Association Human Rights Institute, **Jane Mann**, Partner and Head of Employment Group, Fox Williams LLP, **Julie Morris**, Employment Solicitor and Head of Personal Legal Services, Slater and Gordon	Q84–168

Wednesday 13 February 2019	
Myfanwy Barrett, Managing Director, Corporate Resources, House of Commons, **Saira Salimi**, Speaker's Counsel, House of Commons, and **Rupert McNeil**, Government Chief People Officer, Civil Service	Q169–246
Sarah Jones, Group General Counsel, BBC, Anna Purchas, Head of People, KPMG, **Larissa Reed**, Executive Director Neighbourhoods, Communities and Housing, Brighton and Hove Council, and **John Rumney**, Solicitor, South Tyneside Council	Q247–299

Wednesday 6 March 2019	
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, CIPD	Q300–357
Emma Codd, Managing Partner for Talent, Deloitte, **Tracy Vegro**, Executive Director of Strategy and Resources, Financial Reporting Council, **Professor Richard Moorhead**, Professor of Law and Professional Ethics, University College London	Q358–409

Wednesday 13 March 2019	
Witness A	Q410–483

Wednesday 19 March 2019

Witness B	Q484–524

Wednesday 20 March 2019

Dr Emma Chapman	Q525–578
Witness C and **Witness D**	Q579–626

Wednesday 27 March 2019

Witness E	Q627–688

Wednesday 3 April 2019

Rebecca Hilsenrath, Chief Executive, Equality and Human Rights Commission, **Matthew Smith**, Principal (Legal), Equality and Human Rights Commission, **Paul Philip**, Chief Executive, Solicitors Regulation Authority	Q689–753
Lucy Frazer QC MP, Parliamentary Under-Secretary of State, Ministry of Justice, **Andrew Walden**, Deputy Director Courts Reform Policy Division, Ministry of Justice, **Kelly Tolhurst MP**, Parliamentary Under-Secretary of State, Department for Business, Energy and Industrial Strategy, **Joanna Warner**, Deputy Director, Individual Rights and Migration in Labour Markets, Department for Business, Energy and Industrial Strategy	Q754–824

Wednesday 24 April 2019

Witness F	Q825–251

Published written evidence

The following written evidence was received and can be viewed on the inquiry publications page of the Committee's website.

NDA numbers are generated by the evidence processing system and so may not be complete.

1 A member of the public (NDA0006)
2 A member of the public (NDA0022)
3 A member of the public (NDA0042)
4 A member of the public (NDA0043)
5 A member of the public (NDA0044)
6 A member of the public (NDA0046)
7 A member of the public (NDA0085)
8 A member of the public (NDA0086)
9 A member of the public (NDA0091)
10 A member of the public (NDA0099)
11 A member of the public (NDA0100)
12 A member of the public (NDA0101)
13 A member of the public (NDA0102)
14 A member of the public (NDA0103)
15 A Member of the Public (NDA0082)
16 A Member of The Public (NDA0041)
17 Acas (NDA0021)
18 BBC (NDA0052)
19 BBC Women (NDA0057)
20 Brahams Dutt Badrick French LLP (NDA0016)
21 Brighton & Hove City Council (NDA0036)
22 CBI (NDA0059)
23 Centre for Women's Justice (NDA0065)
24 CIPD (NDA0025)
25 Civil Service (NDA0084)
26 Clifford Chance LLP (NDA0010)
27 Dame Vera Baird QC, Police and Crime Commissioner for Nortumbria (NDA0007)
28 Deloitte (NDA0068)
29 Department for Business, Energy and Industrial Strategy (NDA0030)
30 Department for Work and Pensions (NDA0067)
31 Dr Charlotte Riley (NDA0032)
32 Dr Emma Chapman (NDA0031)
33 Employment Lawyers Association (NDA0017)

34 Equality and Diversity Forum (NDA0013)
35 Equality and Human Rights Commission (NDA0011)
36 Equity (NDA0047)
37 EY (NDA0055)
38 Farore Law (NDA0020)
39 Gowling WLG (NDA0012)
40 Guardian News and Media (NDA0063)
41 House of Commons (NDA0062)
42 KPMG (NDA0064)
43 Maternity Action and YESS (NDA0005)
44 McAllister Olivarius (NDA0056)
45 Melanie Newman (NDA0094)
46 Ministry of Justice (NDA0081)
47 Mr Derrick Young (NDA0066)
48 Mr Mark Anderson (NDA0035)
49 Mrs Elisabeth Sullivan (NDA0060)
50 National Alliance of Women's Organisations (NDA0050)
51 National Education Union (NDA0049)
52 Pregnant then Screwed (NDA0098, NDA0019, NDA0033)
53 Professor Abigaël Candelas de la Ossa and Selena Phillips-Boyle (NDA0051)
54 Professor Dominic Regan (NDA0073)
55 Professor Richard Moorhead (NDA0069)
56 Prospect Trade Union (NDA0009)
57 Protect (NDA0038)
58 Slater and Gordon (NDA0053)
59 Solicitors Regulation Authority (NDA0027, NDA0076)
60 South Tyneside Council (NDA0058)
61 The 1752 Group (NDA0048)
62 The Law Society of England and Wales (NDA0008)
63 Thompsons Solicitors Scotland (NDA0015)
64 TUC (NDA0024)
65 Universities UK (NDA0075)
66 University College London (NDA0061)
67 Witness A (NDA0014, NDA0090)
68 Zelda Perkins (NDA0080)

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the publications page of the Committee's website. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2017–19

First Report	Fathers and the workplace	HC 358 (HC 1076)
Second Report	The role of Minister for Women and Equalities and the place of GEO in government	HC 365 (HC 1546)
Third Report	Race Disparity Audit	HC 562 (HC 1537)
Fourth Report	Older people and employment	HC 359 (HC 1585)
Fifth Report	Sexual harassment in the workplace	HC 725 (HC 1801)
Sixth Report	Sexual harassment of women and girls in public places	HC 701 (HC 2148)
Seventh Report	Tackling inequalities faced by Gypsy, Roma and Traveller communities	HC 360
Eighth Report	Abortion law in Northern Ireland	HC 1584
First Special Report	Ensuring strong equalities legislation after the EU exit: Government Response to the Committee's Seventh Report of Session 2016–17	HC 385
Second Special Report	Implementation of Sustainable Development Goal 5 in the UK: Government and Office for National Statistics Responses to the Committee's Eighth Report of Session 2016–17	HC 426
Third Special Report	Fathers and the workplace: Government Response to the Committee's First Report of Session 2017–19	HC 1076
Fourth Special Report	Race Disparity Audit: Government, Equality and Human Rights Commission and Office for National Statistics responses to the Committee's Third Report of Session 2017–19	HC 1537
Fifth Special Report	The role of the Minister for Women and Equalities and the place of GEO in government: Government Response to the Committee's Second Report of Session 2017–19	HC 1546
Sixth Special Report	Older people and employment: Government and Equality and Human Rights Commission Responses to the Committee's Fourth Report of Session 2017–19	HC 1585
Seventh Special Report	Sexual harassment in the workplace: Government Response to the Committee's Fifth Report of Session 2017–19	HC 1801

Eighth Special Report	Sexual harassment of women and girls in public places: Government response to the Committee's Sixth Report of Session 2017–19	HC 2148