House of Commons

Women and Equalities Committee

The use of non-disclosure agreements in discrimination cases: Government response to the Committee's Ninth Report of Session 2017–19

Second Special Report of Session 2019

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Women and Equalities Committee

The Women and Equalities Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Government Equalities Office (GEO).

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The Committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No. 152. These are available on the internet via www.parliament.uk.

Publication

Committee reports are published on the Committee's website at www.parliament.uk/womenandequalities and in print by Order of the House.

Committee staff

The current staff of the Committee are Jyoti Chandola (Clerk), Ellie Goodchild (Senior Committee Assistant), Radhika Handa (Second Clerk), Tansy Hutchinson, Shai Jacobs, Mariam Keating (Committee Specialists), Liz Parratt (Media Officer), and Mandy Sullivan (Committee Assistant).

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Second Special Report

The Women and Equalities Committee published its Ninth Report of Session 2017–19, The use of non-disclosure agreements in discrimination cases (HC 1720) on 11 June 2019. The Government's response was received on 15 October 2019 and is appended to this report.

Appendix: Government Response

Introduction

The Government welcomes the Committee's report on the use of non-disclosure agreements in discrimination cases and agrees with the Committee that it is unacceptable that cases of sexual harassment and discrimination in the workplace are covered up by the use of confidentiality clauses or non-disclosure agreements (NDAs). The Government also believes that there is a legitimate place for non-disclosure agreements signed as part of an employment contract or a settlement agreement. However, using these agreements to silence and intimidate victims of harassment and discrimination cannot be tolerated.

The Committee gathered oral and written evidence from a wide range of people and organisations, including individuals, employers and lawyers. The Government has used this evidence, alongside the evidence gathered from the Government's own consultation[1] on the use of confidentiality clauses in cases of sexual harassment and discrimination, to develop proposals that will prevent the misuse of confidentiality clauses or NDAs. The Government responded to its consultation on 21 July 2019, setting out proposals to:

- legislate so that no provision in a non-disclosure agreement can prevent disclosures to the police, regulated health and care professionals and legal professionals;
- legislate so that limitations in non-disclosure agreements are clearly set out in employment contracts and settlement agreements;
- produce guidance for solicitors and legal professionals responsible for drafting settlement agreements;
- legislate to enhance the independent legal advice received by individuals signing non-disclosure agreements; and,
- introduce enforcement measures for non-disclosure agreements that do not comply with legal requirements in written statements of employment particulars and settlement agreements.

The proposals aim to strike the right balance between continuing to allow the legitimate use of NDAs and preventing their misuse.

The Committees report raised forty-five recommendations and concerns for the Government in relation to the misuse of non-disclosure agreements in discrimination cases. The Government's response to these recommendations is set out below.

1 https://www.gov.uk/government/consultations/confidentiality-clauses-measures-to-prevent-misuse-in-situations-of-workplace-harassment-or-discrimination

The Government consultation and consultation response referred to confidentiality clauses, rather than NDAs. However, in this response they are referred to as non-disclosure agreements (NDAs) to be consistent with the Committee's terminology.

WESC 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)**

Government Response

The Government agrees that the use of NDAs to cover up unlawful discrimination and harassment complaints is unacceptable. In response to its consultation the Government committed to introducing reforms that would prevent employers from mis-using NDAs. The Government is also aware however, that there is support for the use of NDAs in settling employment disputes where an individual wishes to move on with their lives. Evidence from the consultation showed that if employers did not have the option of settling with an NDA, a case may go unsettled. For example, in many cases it is unlikely that the case would be taken to an employment tribunal, and individuals would be left without remedy.

Individuals are already permitted to disclose information related to a suspected crime to the police. In response to the Committee's concern that employers are using NDAs to cover up unlawful discrimination and harassment, the Government has committed to legislate to clarify that NDAs must not include provisions that prevent or imply an individual cannot disclose information to the police or regulated health and care professionals and legal professionals. The Government intends to legislate to require non-disclosure agreements within settlement agreements to clearly set out their limitations. The written statement of employment particulars will also be required to clearly outline the limitations of any confidentiality agreement that a person has entered into.

The aim is to increase the signatories' understanding of the NDA limitations and prevent employers from limiting a signatory's right to disclose.

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)**

Government Response

The Acas Code of Practice on disciplinary and grievance procedures provides practical guidance to employers, employees and their representatives and sets out the principles for handling disciplinary and grievance situations in the workplace. The Code also encourages employers to carry out necessary investigations of potential disciplinary matters (including misconduct) without unreasonable delay to establish the facts of a case. Whilst a failure to follow the Code does not in itself make a person or organisation liable to claims, an employment tribunal will take it into account where relevant and if the tribunal feels that an employer has unreasonably failed to follow the guidance set out in the Code they can increase any award they have made by up to 25 per cent.

Acas also have a comprehensive non-statutory guide: Discipline and grievances at work: The Acas guide which complements the Acas Code of Practice and provides more detailed advice and guidance. Acas also offers a range of training courses, workshops and projects to support businesses and individuals dealing with grievance issues.

Furthermore, Acas also provide a comprehensive guide on handling bullying and harassment in the workplace and as part of this suggest that employers should have a separate workplace policy in place to tackle these issues early on.

In Government's response to its consultation on confidentiality clauses the Government committed to strengthen protections to prevent misuse of NDAs. Once these strengthened protections are in place Government intends to raise awareness of these changes and in doing so will highlight to employers the guidance available in relation to discrimination and harassment and handling grievances.

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

Government Response

The Government shares concerns that the repeated inappropriate use of NDAs within an organisation may prevent it from recognising, and therefore addressing, significant underlying problems.

The Equality and Human Rights Commission's (EHRC) upcoming Technical Guidance on NDAs will make it clear that an employer should investigate an allegation of discrimination regardless of whether a settlement agreement is reached:

> "To rely on the reasonable steps defence it therefore follows that, where a settlement agreement has been used to settle a claim, the employer must not treat this as the end of the matter. The employer must still investigate the allegations where it is possible and reasonable to do so, take any reasonable further steps to address the discrimination and take reasonable steps to prevent discrimination occurring again in the future."

While the Government agrees that employers should investigate all discrimination and harassment complaints, the level of investigation required will vary from case to case. If a formal requirement were introduced, it would be very difficult for it to appropriately

dictate the level of investigation required in each case; and if a simple requirement existed simply 'to investigate' it would be unlikely to be effective, as an employer could choose to carry out an inappropriately superficial level of investigation and still technically comply. It is therefore be preferable to maintain some flexibility.

However, the Government will consider this proposal further in consultation with stakeholders, as part of its ongoing work to tackle the problem of sexual harassment in the workplace, as referenced in the response to Recommendation 34.

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)**

Government Response

There is currently no general statutory obligation on an employer to provide an employment reference, although it is possible that the employee may have a contractual entitlement to one if their contract of employment contained an express term to this effect. With the exception of certain regulated sectors, it is a matter for individual employers whether to provide a reference, however the Government can understand why this could pose a problem for victims of sex or other discrimination.

We think there is merit in considering this idea further and will consult on this matter in due course.

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)**

Government Response

The Government agrees that online publication of tribunal judgments should not lead to blacklisting by future employers and must not be a barrier to potential claimants bringing discrimination claims. We are investigating this issue and are exploring what potential safeguards it might be appropriate to put in place where judgments are published by the Government. The judiciary publish judgments on their own website at their discretion and retain their independence on this matter.

Employment Tribunals have discretionary powers to protect the identity of parties to proceedings, including powers which have effect after judgment. These powers apply

to written judgments published online. However, before taking steps to anonymise judgments, the Employment Tribunal must consider the principle of open justice and the right to freedom of expression in the European Convention on Human Rights. The Employment Tribunal must carefully balance the individual right to privacy with these wider principles. In many proceedings, the principle of open justice outweighs the individual right to privacy.

HM Courts & Tribunals staff are already taking steps to ensure that hearing participants and other involved parties are aware that they are able to apply to have written judgments anonymised. The Government is working to ensure these actions are consistently and effectively applied.

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)**

Government Response

Following the Committee's 2018 report on sexual harassment in the workplace, the Government committed to "*consult specifically on extending Employment Tribunal time limits in the Act from three to six months, to explore the evidence for doing this*".[2] This consultation closed on 2 October, and the Government is assessing the responses received.

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)**

Government Response

The Government is conscious of the particular challenges associated with discrimination claims, and have made efforts to ensure the system accounts for these; this includes through the provision of legal aid, in the form of early advice and assistance, that is available for claims brought under the Equality Act 2010, subject to the statutory means and merits criteria.

2 https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1801/180101.htm

Following our review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, we are making changes to enhance the breadth of legal support available that will benefit everyone in society, focusing on what works, as addressed in more detail under Recommendation 9.

We are also investing over £1bn in the modernisation of the courts and tribunals to make it simpler and more straightforward for those who use them. For those who do not find going online easy, we are offering help and support, yet keeping (and improving) paper alternatives too. The Assisted Digital Service provides tailored support to its users based on their needs and abilities, by telephone or face-to-face.

Nonetheless the Government recognises that this is a question that requires ongoing consideration and are therefore in the process of reviewing the legal aid means test to ensure that support is targeted to those who most need it, as addressed in more detail under Recommendation 9.

The Government has also consulted on the appropriate time limits for Employment Tribunal cases brought under the Equality Act 2010, to ensure that these do not present a barrier to justice for people with protected characteristics. The consultation closed on 2 October. In addition, the Government agrees that online publication of Tribunal judgments should not disadvantage claimants, as addressed in more detail under Recommendation 5.

As demonstrated by the ongoing work mentioned above, the Government takes seriously any suggestion that the tribunal system is disadvantaging certain groups of individuals. We will therefore work to better understand the nature of the concerns raised and assess whether there are any which are not being addressed by the various improvements set out above. The Committee will, of course, appreciate that the judiciary is independent of the Executive, and the scope of this exercise will not therefore include reviewing judicial decisions in individual cases.

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. *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)**

Government Response

In our *Legal Support: The Way Ahead action plan*, published in February 2019 we committed to launch a campaign to improve awareness of how people can access legal support, including legal aid, to help them resolve their legal problems. We are currently working to determine the focus areas of the campaign and will be working closely with the advice sector in delivering this commitment. We will publish more detailed information in due course.

Publicly funded advice and assistance continues to be available for Employment Tribunal discrimination claims, and legally aided representation may be available under the exceptional case funding scheme if there is a breach, or risk of a breach, of the applicant's ECHR rights or enforceable EU rights if legal aid is not provided. The Ministry of Justice recently committed to work with legal practitioners to review and simplify the Exceptional Case Funding application forms and guidance and ensure that funding is provided in as timely a manner as possible. As part of this work, we will consider setting out considerations relevant to an application for discrimination cases.

The Ministry of Justice has announced that it will be conducting a review into Legal Aid Means Testing. The review of the legal aid eligibility regime will study the thresholds for legal aid entitlement and assess the effectiveness with which the means testing arrangements appropriately protect access to justice, particularly with respect to those who are vulnerable. The comprehensive review of the legal aid eligibility regime is expected to conclude by Summer 2020.

The awareness campaign and review of the legal aid eligibility regime will both apply to England and Wales only.

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)**

Government Response

Tribunals are intended to be less formal and intimidating than a court and users often appear without legal representation. The rules of procedure were specifically revised in 2013 to use plain, simple language where possible. Panel members are trained to assist unrepresented parties by helping them to frame their questions where necessary. The role of the employment tribunal is to ensure that in line with the overriding objective that parties are on an equal footing and avoid unnecessary formality.

However, the Government is aware that some people may find the tribunal system daunting, particularly those seeking to bring complex discrimination claims. The legal aid scheme for England and Wales is administered by the Legal Aid Agency which delivers a range of services through a network of contracted providers. Further details of review to legal aid and the support available can be found in the response to Recommendation 9.

Legal aid is available for legal advice and representation for cases alleging unlawful discrimination, harassment or victimisation under the Equality Act 2010, or a previous discrimination enactment, which can arise in a variety of contexts – for example, consumer, education or employment matters. Legal aid for cases of this type must usually first be sought through the Civil Legal Advice (CLA) telephone gateway, before being referred

onwards for face-to-face advice. Following concerns being raised around the low number of cases being referred to face-to-face advice, we committed in the Legal Support Action Plan to remove this requirement, reinstating access to face-to-face advice in these cases.

Publicly funded advice and assistance continues to be available for Employment Tribunal discrimination claims, and legally aided representation may be available under the exceptional case funding scheme if there is a risk of a breach of the applicant's ECHR rights if legal aid is not provided.

The Government also recognises that awareness of employment tribunal powers and how they are used is low. Confusion about how powers such as cost orders work can affect whether people choose to go to an employment tribunal to enforce their rights. To address this, the Government published guidance earlier this year to help provide an accessible explanation of the powers available and highlight examples of how tribunals have used them.

The Government believes that this, in addition to existing employment tribunal process guidance, should help reassure litigants in person about the purpose and limits of these powers, so that people are not dissuaded from proceeding with a claim or putting forward a defence, and all parties are aware of the potential consequences of either breaching employment law or the conduct of a claim or response.

As stated in the response to Recommendations 7 and 8, the Government will further consider the concerns raised and assess how to improve existing support material and guidance to better meet the needs of users.

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)**

Government Response

The Government notes the Committee's concerns on costs. Employment tribunals are meant to be a more informal venue than the civil courts system and for this reason there is a different approach to costs. They are not automatically payable by the unsuccessful party and are awarded on the basis of behaviour in bringing or conducting proceedings. The Government recognises that awareness of tribunal powers, including powers to award costs, is low. That is why the Government recently published new guidance providing examples of how current powers, including costs orders (in Scotland, expenses) and aggravated breach penalties are used. The Government believes this will help all users understand the options available and ensure that employers are aware of the potential consequences of their actions.

In terms of guidance to litigants, in its response to the confidentiality clauses consultation, the Government committed to legislating to improve independent legal advice available to an individual when signing a settlement agreement. We also commit to raise awareness of these changes, when they are enacted.

It would not be appropriate (given the principle of judicial independence) for the Government to issue guidance to the judiciary on the grounds on which a refusal to settle a claim may be considered unreasonable. This would be a matter for the senior judiciary and Judicial College to consider, and Government will draw the Committee's report to the attention of the Senior President of Tribunals.

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)**

Government Response

The Government believes that individuals enforcing their employment rights should feel confident that any breaches found will be properly penalised whether that is by means of remedy or penalties where appropriate. The Government also recognises the importance of considering these recommendations alongside Recommendation 8 of this

report. Therefore, the Government will consider these concerns further as part of a wider assessment of the employment tribunal system as set out in response to Recommendation 8.

The Government has taken recent action in this area. Earlier this year the Government quadrupled the maximum limit of an aggravated breach penalty from £5,000–£20,000.

Additionally, the Government has committed to introducing a tougher enforcement regime where employment rights are breached repeatedly, on the same issue, by the same employer. The Government will bring forward legislation to allow employment tribunals to impose tougher sanctions where an employer has been found to repeatedly breach employment rights. These sanctions will include uplifts in compensation, costs orders and aggravated breach penalties.

The Government notes the Committee's concerns on costs. Employment tribunals are meant to be a more informal venue than the civil courts system and for this reason there is a different approach to costs. They are not automatically payable by the unsuccessful party and are awarded on the basis of behaviour in bringing or conducting proceedings. The Government recognises that awareness of tribunal powers, including powers to award costs, is low. That is why the Government recently published new guidance providing examples of how current powers, including costs orders (in Scotland, expenses) and aggravated breach penalties are used. The Government believes this will help all users understand the options available and ensure that employers are aware of the potential consequences of their actions.

The Committee also recommends the introduction of punitive damages. Employment tribunals have the powers to award aggravated damages and to order aggravated breach penalties. Aggravated breach penalties are punitive and as mentioned above the maximum limit has recently been increased. Aggravated damages are compensatory, and the amount awarded is subject to judicial discretion. The Government believes it is also important to note that potential discrimination awards are uncapped, and so will vary depending on the facts of the case. In addition, tribunals typically make additional awards for 'injury to feelings' in discrimination cases, with levels of award depending on the seriousness of the employer's behaviour.

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.**

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)**

Government Response

The Government shares the Committee's concern that confidentiality clauses could inhibit an individual's ability to move on with their lives if they believe a crime has been committed. The Government consulted on introducing a provision that would make it clear that confidentiality clauses could not prevent disclosures to the police. This proposal was well supported, and the Government has now committed to bring forward this legislation.

The Government also agrees with the Committee that individuals should be able to move on with their lives, in whatever form that may take. This is why the Government has also proposed to go further and extend this provision so individuals will also be able to disclose confidential information to legal professionals and health and care professionals. This was following evidence from organisations and individuals who said that they would benefit from speaking to these professions to support them either moving on with their lives or seeking further advice. These professions are regulated with built-in codes of confidentiality, which will ensure information passed on remains confidential, other than in limited circumstances.

The Government believes this will provide individuals with secure outlets to seek advice and ensure their physical and mental wellbeing. The Government has not gone further to include friends, family or victims as someone you can disclose confidentiality information to as they are not subject to confidentiality requirements and as such would therefore not be held accountable if they disclose the information further, undermining the purpose of the NDA.

The Government believes extending permitted disclosures to legal and health care professionals will allow victims to seek support while not undermining the use of NDAs in legitimate circumstances.

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)**

Government Response

Whistleblowers play an important role in bringing to light wrongdoing in the workplace. The Employment Rights Act 1996, amended by the Public Interest Disclosure Act 1998, gives legal protection to those who whistleblow in the public interest. The legislation is intended to build openness and trust in workplaces by ensuring that workers who hold their employers to account are treated fairly.

Over recent years, the Government has taken steps to support a cultural change in relation to whistleblowing in all sectors. A number of statutory and non-statutory improvements have been made. This includes guidance for whistleblowers on what they need to do to make disclosures while preserving their employment protections; and guidance for employers including a non-statutory code of practice. The scope of those protected by whistleblowing laws has been increased, by extending protections to NHS student nurses and midwives; and the introduction of whistleblowing protections for job applicants in the health sector.

The Government has also fulfilled the commitment to keep the Prescribed Persons list up to date. This is the list of individuals and bodies that a whistleblower can approach outside their workplace to make a disclosure. Prescribed Persons are principally sector regulators but also include others such as MPs.

In response to the recommendation from the Women's and Equalities Committee, the Government has committed to add the Equalities and Human Rights Commission to the list of prescribed persons in its next annual update. Subject to parliamentary time, the Government aims to present the update to the House before the end of the year.

The most recent reform was a new legislative requirement for most prescribed persons to produce an annual report on whistleblowing disclosures made to them by workers. Relevant prescribed persons were required to publish the first of these reports by the end of September 2018, and these were added to Parliament's libraries. The second annual reports were due by the end of September 2019 and will be subsequently added to the libraries by the end of the year. The reporting duty increases confidence in the actions taken by prescribed persons through greater transparency about how disclosures are handled.

It is right and proper that Government reviews the whistleblowing framework. Government commits to carrying out its review once the reforms have been in place for 2–3 years and we have built the necessary evidence of their impact.

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)**

Government Response

In its response to the consultation on confidentiality clauses, the Government announced two enforcement measures for NDAs that do not comply with legal requirements. If an NDA in a settlement agreement does not follow new legislative requirements, the confidentiality clause itself will be void. The Government will also be legislating to introduce a requirement to be clear on the limits of non-disclosure agreements within the written statement of employment particulars. A worker who receives a written statement of employment particulars which does not outline the limits of any non-disclosure agreement will be entitled to receive additional compensation in an employment tribunal award, if they are successful in their claim. The Government believes the proposed enforcement mechanisms are appropriate in light of the measures taken to legislate on the limitations of NDAs.

We have considered carefully whether we should go further and make it a criminal offence to propose a confidentiality clause designed or intended to prevent or limit the making of a protected disclosure or disclosure of a criminal offence. Given the current sanctions available where a lawyer is complicit in such conduct, and that we will now mandate the receiving of independent legal advice for the person signing an NDA, there is already an increased risk of action when deliberate malpractice occurs. The Government therefore believes that existing and proposed measures represent a proportionate response to the concerns identified but remains open to considering stronger sanctions in the future if these measures to encourage or enforce appropriate behaviour prove ineffective.

Finally, the Crown Prosecution Service (CPS) publishes legal guidance which covers a range of offences against public justice, including the common law offence of perverting the course of justice. The CPS recognises the potential for NDA agreements to be misused in a way that that is capable of perverting the course of public justice and is grateful to the Committee for shining a light on this issue. The CPS does not comment on hypothetical scenarios in its guidance but will review the principles and practice set out therein. This will ensure that it remains responsive to the matters highlighted by the Committee, including within Professor Moorhead's written evidence, and in due course to take account of any further legislative changes arising from the Government's proposals.

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)**

Government Response

The legal profession in England and Wales is independent of Government and solicitors in England and Wales are regulated by the Solicitors Regulation Authority (SRA). The SRA has been taking enforcement action against solicitors over the misuse of NDAs. The SRA Warning Notice already states that they consider NDAs to be improperly used if they prevent a person from reporting misconduct, making a protected disclosure, reporting an offence or cooperating with criminal activity.

The SRA has also committed to update its guidance to solicitors on the use of confidentiality clauses once our proposals are published, to align it with any legislative changes.

Finally, the Government will be legislating to ensure that an individual's independent legal advice before entering a settlement agreement must cover the limitation of the NDA, which will also increase the onus on solicitors and significantly deter rogue practice.

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)**

Government Response

The Government agrees that individuals should have access to sufficient legal advice when they sign an NDA. The Government has committed to extend Section 203(3) of the Employment Rights Act 1996, so that independent legal advice covers the limitations of the NDA. This strikes the right balance between providing individuals with the correct information, without placing a significant burden on legal professionals and potential increasing legal fees.

Employers do frequently pay for the independent legal advice received by an individual before a settlement agreement and we believe employers should contribute appropriately. However, it would not be correct or feasible for the Government to dictate the parameters of this payments as it may vary according to geographical location, case, legal availability and client requirements.

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)**

Government Response

The Government has committed to legislate that all confidentiality clauses must specify their limitations. The Government will be legislating to make clear that non-disclosure agreements cannot preclude disclosures to the police, legal professionals and healthcare professionals.

These groups have built in professional codes of confidentiality which will not risk confidentiality information being disclosed further unnecessarily.

The Government also consulted on a proposal to use specific wording in a confidentiality clause/non-disclosure agreement. This proposal garnered mixed responses as individuals felt it would be beneficial to have specific wording, whereas employers and legal professionals responded that it would be difficult to find wording that covered all uses of non-disclosure agreements and could increase complexity.

The Government understands the benefits of including a standard form of words in a settlement agreement for both individuals and businesses. However, as the Government will legislate to ensure that legal professionals must provide clarity on the details in a settlement agreement in order for it to be valid, this should help to ensure there are no misunderstandings. Furthermore, different wording would be needed in different circumstances, for example in health sector where additional whistleblowing protections exist. Therefore, rather than adding clarity it may cause further confusion and risk under-informing some individuals of their rights.

Therefore, instead of requiring standard text. the Government has committed to produce guidance, in consultation with key stakeholders, on the drafting requirements for non-disclosure agreements. This will provide advice for individuals and drafting professionals, to ensure they comply with new legislation. The guidance could include examples of good practice, which can cover including agreed wording, but which should only be included as the wishes of both the employer and the signatory.

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)**

Government Response

Under the framework established by the Legal Services Act 2007, the legal profession in England and Wales is regulated independently of government. This is an important constitutional principle. Solicitors in England and Wales are regulated by the Solicitors Regulation Authority (SRA), the regulatory arm of the Law Society of England and Wales.

As an independent professional body, it is a matter for the Law Society what guidance it provides for its members. However, the Government have highlighted the report's recommendations to the Law Society. They have confirmed that they have already taken action on this issue, including publishing guidance to the public to detail their rights and dispel popular misconceptions, and will consider rewriting their practice note once the SRA has updated its guidance.

The legal services regulators in England and Wales are clear that enforcement action will be taken against lawyers who fail to uphold conduct rules and the high ethical standards

expected of legal professionals. The SRA has also committed to update its guidance on drafting non-disclosure agreements and continues to take enforcement action where breaches of its Code of Conduct occur.

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)**

Government Response

The Government's consultation on sexual harassment in the workplace, which closed on 2 October, invited views on whether additional transparency measures are required to ensure organisations take the prevention of sexual harassment seriously. The Government will therefore consider these recommendations alongside that consultation and has held meetings to explore these options in more detail. A final view on the proposals will therefore be provided when the Government publishes its response to the consultation.

The Government is also considering Equality Act enforcement issues in the context of its forthcoming response to the Select Committee's recent report on this.

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)**

Government Response

The legal profession in England and Wales is regulated independently of government. Solicitors must comply with a detailed Code of Conduct, which ensures that high standards of conduct are met. Failure to comply may lead to disciplinary action. The Solicitors Regulation Authority (SRA) Handbook includes rules on conduct within law firms. Furthermore, the SRA has issued guidance via a warning notice to all regulated individuals and entities on the use of non-disclosure agreements.

The SRA's Code of Conduct is relevant to all those the SRA regulates, and in particular, managers and employees of law firms, those responsible for managing human resources and complaints in law firms, and practitioners advising clients on the use of NDAs.

The Equality and Human Rights Commission (EHRC) is producing guidance in order to clarify the law relating to confidentiality agreements in cases of discrimination in employment and set out good practice in relation to their use. The Advisory, Conciliation and Arbitration Service (ACAS) is also planning to produce guidance to help employers, workers and their representatives be clearer about the law and good practice around confidentiality clauses. The SRA has also committed to update its guidance to solicitors on the use of confidentiality clauses once our proposals are published, to align it with any legislative changes.

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)**

Government Response

On 16 July 2019 Government launched a consultation on proposals for a new single labour market enforcement body. The consultation sought stakeholder views on what role a new enforcement body could play in relation to tackling harassment and discrimination in the workplace. It also considers the role a new body could play in supporting compliance and the provision of information and guidance more generally. We will use the responses and views gathered through stakeholder roundtables to inform the Government response.

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)**

Government Response

Monitoring and reporting the use of settlement agreements and confidentiality clauses was a recurring theme in the response to the Government consultation on confidentiality clauses. Individuals supported increased monitoring on the use of NDAs in cases of sexual harassment and discrimination, however legal professionals and employers were concerned about the burden this could have on businesses and the benefit this data would have.

Whilst we are sympathetic to the desire to have better information about the use of non-disclosure agreements, the Government has a number of questions about how a reporting duty would work in practice. The Government is doubtful that simply knowing the number of non-disclosure agreements used by a company would be useful. Requiring all confidentiality clauses to be submitted for scrutiny would be burdensome, and even then, may not be meaningful without detail about the reasons why an employee leaves an organisation or where a non-disclosure agreement is activated.

There is also a risk that a requirement to report would discourage their use in situations in which they would be welcome and beneficial to victims, who would like to reach a private settlement and move on with their lives.

The Government Equalities Office (GEO) consultation on sexual harassment in the workplace, acknowledged previous recommendations on monitoring and reporting and welcomed views on interventions that would ensure organisations take the problem of sexual harassment and discrimination seriously. As set out in response to Recommendation 34, engagement on this consultation has built in consideration of recommendations in this report. Any work taken forward in this space will help to build on the Corporate Governance Code without jeopardising the use of confidentiality clauses in circumstances in which victims want to move on in their lives from these unfortunate circumstances.

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)**

Government Response

The Government is committed to tackling gender equality and the gender pay gap and the requirement for large employers to publish information on this is a key first step. The transparency generated by these regulations should motivate employers to identify barriers to women's progression in the workplace, and to take action to address them. Research has shown that maternity plays a fundamental role in contributing to the gender pay gap; examining women's experiences on their return from maternity leave is therefore likely to unlock many of the contributing factors—and potential solutions—to the gender pay gap. A requirement for employers to monitor and report on maternity retention rates could help guarantee that this analysis takes place, and we are considering the proposal carefully.

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)**

Government Response

The Government strongly believes that one of Britain's biggest assets in competing in the global economy is our reputation for being a dependable and confident place in which to do business. Our legal system, our framework of company law and our standards of corporate governance have long been admired around the world.

One of the reasons we have maintained this reputation is that we have kept our corporate governance framework up to date with reviews and improvements being made from time

to time. This includes the recent significant updating of the UK Corporate Governance Code and the introduction of the Wates Corporate Governance Principles for Large Private Companies in 2018.

GEO's consultation on sexual harassment welcomed suggestions of alternative interventions to prevent and better monitor cases. Its outcomes will ensure we do not jeopardise the use of confidentiality clauses in circumstances where victims want to move on in their lives from these unfortunate circumstances. We will need to consider the form and timings of any proposals put forward in response to the consultation, as it will be important to allow time to assess the effects of the current tranche of reforms before implementing any other major changes.

Boards already have a responsibility, set out in the UK Corporate Governance Code and the Wates Corporate Governance Principles for Large Private Companies to ensure that company values, strategy and culture align with a company's purpose. Boards must ensure that workforce policies and practices are consistent with the company's values and support its long-term sustainable success and these would include processes for dealing with anti-harassment and discrimination. Provision 6 of the Corporate Governance Code in particular states: "*There should be a means for the workforce to raise concerns in confidence and—if they wish- anonymously. The board should routinely review this and the reports arising from its operation. It should ensure that arrangements are in place for proportionate and independent investigation of such matters and for follow-up action*".

In addition, directors have a legal duty under section 172 of the Companies Act 2006 to promote the success of the company for the benefit of shareholders, and in so doing to have regard, amongst other matters to "*the interests of the company's employees*" and "*the desirability of the company maintaining a reputation for high standards of business conduct*". Recent reforms to both legislation and the UK Corporate Governance Code have placed additional responsibility on the Board to engage with employees and take their views into account in the Board's decision making, and companies are now required to report on how the directors have had regard to the matters listed in s.172 when carrying out their duty under this section.

One of the strengths of the UK system is the unitary board structure where there is collective responsibility for decisions and the running of the company. Government believes that there is a risk that identifying specific responsibilities for specific board members undermines the principle of collective responsibility and risks creating two classes of director, particularly if directors no longer share a common purpose. Government therefore does not support identifying a specific director for the particular roles identified by the Committee but believes the whole Board should have a responsibility for overseeing anti-discrimination and harassment policies, procedure and training.

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)**

Government Response

The Government is very grateful for the work the committee has done on this very important issue. The recommendations in the WESC inquiry have been wide-ranging and have touched on a large number of policy areas including legal aid, the employment tribunal system and corporate governance.

The Government has already committed to increasing protections for individuals signing an NDA and has committed to take further action resulting from the committee's report. We will also continue to consider whether further action is needed as we see the impact of our reforms.