

Women and Equalities Committee

Oral evidence: Sexual Harassment in the Workplace , HC 725

Wednesday 28 March 2018

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[Watch the meeting](#)

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

Questions 47 - 194

Witnesses

[\[I\]](#): Zelda Perkins, former assistant to Harvey Weinstein.

[\[II\]](#): Mark Mansell, Partner, Allen & Overy LLP; Tamara Ludlow, Partner, Simons Muirhead & Burton LLP.

[\[III\]](#): Max Winthrop, Chair of Employment Law Committee, Law Society; Suzanne McKie QC, Founder, Farore Law; Gareth Brahams, Chair, Employment Lawyers Association and Managing Partner at Brahams Dutt Badrick French LLP.

Written evidence from witnesses:

[Zelda Perkins \(SHW0052\)](#)

[Zelda Perkins \(SHW0058\)](#)

[The Law Society \(SHW0042\)](#)

Examination of witness

Witness: Zelda Perkins.

Chair: Welcome to Zelda, our witness, and everybody who is watching in the public gallery and online. Today is the first oral evidence session in our inquiry into sexual harassment in the workplace, and we are looking in particular at the use of non-disclosure agreements. We have three panels today, so we have a lot to get through.

Our first witness is Zelda Perkins, formerly employed by Miramax as an assistant to Harvey Weinstein, who is here to talk about her experience of agreeing a non-disclosure agreement with her former employer, and the effect it had on her. After that, we will hear from a panel of two lawyers about the current law practice and guidance on the use of non-disclosure agreements and the potential for abuse.

Before we start, can I remind everybody who is sitting in the gallery that photography is not permitted within the room or outside in the corridor, and that contributions to the meeting from the public gallery are not allowed? We have a doorkeeper here to help us in the enforcement of that. I would also like to make it clear that the Committee offered an opportunity to Mr Harvey Weinstein, Miramax and Disney to provide evidence to us, but they declined. We will be contacting them again after this meeting to give them a further opportunity to contribute if they wish to do so.

Zelda, the game plan in all these sessions is that colleagues ask questions, and we listen to your answers. We have about 20 minutes for this part of the session, so I apologise that it is relatively brief, but there is always a time pressure on us. Jess is going to lead the questioning here, but there might be supplementaries from others.

Q47 **Jess Phillips:** Hi, Zelda. Do you want to start off with a brief description of what your role at Miramax was when you worked there?

Zelda Perkins: I started there originally to work on script development and as a production assistant. Pretty shortly after I started, I was called in on an occasion when Harvey Weinstein was in town to act as a third assistant, because somebody was AWOL. From that point on, I was then always called in as his assistant.

Q48 **Jess Phillips:** When he was in the UK.

Zelda Perkins: When he was in the UK and Europe, which was pretty much every month. He was usually in the UK and Europe for a week out of every month.

Q49 **Jess Phillips:** You have set out in your written evidence the circumstances that led to the termination of your employment, so there is no need to go into those experiences in particular detail, but can you give us a brief overview of why you resigned from the company?



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Zelda Perkins: I resigned because he sexually assaulted and attempted to rape a colleague of mine, who had recently been employed. She had only been with the company for a month, and had only met him once. Obviously, when somebody comes to you saying that that has happened, there is not much choice in what you should do, so we considered ourselves constructively dismissed at that point.

Q50 **Jess Phillips:** Thank you for your brevity. That is an enormous episode of your life distilled into something very brief. You said in your evidence that you wanted to ensure that Mr Weinstein was prosecuted, but that you were advised that this was not an option, and that you should pursue a financial settlement instead. Can you tell us briefly the reasons you were given as to why this was not an option?

Zelda Perkins: First, because the incident had not happened in the UK, so it was not under UK jurisdiction.

Jess Phillips: That is a problem.

Zelda Perkins: Secondly, because of the disparity of power between the two parties, and because, as we had no physical proof, if we did go to the police in the UK or we tried to take it to court, we would be utterly crushed.

Q51 **Jess Phillips:** Who gave you that advice?

Zelda Perkins: My lawyers at the time, Simons Muirhead and Burton.

Q52 **Jess Phillips:** You described the non-disclosure agreement that you reached with your former employer as "stringent and thoroughly egregious", which I had to practise saying earlier. Which aspects of the agreement have given you the greatest concern?

Zelda Perkins: It is a morally lacking agreement on every level. There are clauses in there that preclude me and my colleague from not only speaking to our friends, colleagues and family about our time at Miramax and what happened, but speaking to any medical practitioner, any legal representative, the Inland Revenue, an accountant or a financial adviser. We can speak to those people, as long as they sign their own non-disclosure agreement before they can enter into any conversation with us about anything. However, even within that, once they had signed that, we were still under pressure to not name anybody with whom any of the events happened.

Q53 **Jess Phillips:** Had your colleague who had been sexually assaulted needed trauma counselling, she would have had to get a trauma counsellor to sign a non-disclosure agreement first.

Zelda Perkins: Yes. She sought counselling, but she never, ever discussed the events, because she was so afraid of this agreement that she felt that she was not allowed to. This also stretches to, if there was any civil or legal case, we were encouraged and asked to use our best endeavours to not disclose anything in a criminal case.



Jess Phillips: Should the police question you—

Zelda Perkins: Yes. It does not say specifically that we cannot speak to the police, but we have to use our best endeavours, and we have to assist the company in keeping a positive environment.

Q54 **Jess Phillips:** You have stated that the process of reaching the settlement agreement involved a week of aggressive interrogation and negotiations by Allen & Overy and the Miramax lawyer from the US office, all at the offices of Allen & Overy. Can you describe the process? What kinds of questions were you being asked, and how many sessions were there?

Zelda Perkins: I have a very thorough record of it, because I noted it all down in my diary at the time. I and my colleague only spent three days in the process; however, for my representative from Simons Muirhead and Burton, it was a week-long process. There were two particular sessions that come to mind. In one, we did a morning session, then went back at 5 o'clock in the afternoon and were kept there until 5 o'clock the following morning.

Q55 **Jess Phillips:** You stayed all night.

Zelda Perkins: Yes. It was a 12-hour session. The day before that, we had had a seven-hour session where we were there consistently for seven hours.

Jess Phillips: Most of us here, and most people, will only ever sit in a lawyer's office for 20 minutes, signing their conveyancing documents.

Zelda Perkins: It is not somewhere you really want to be. It was a reasonable environment up to a certain point, but what was unreasonable about it was the pressure that we were put under collectively. I felt that my lawyer was put under a huge amount of pressure, with me and apart from me.

Q56 **Jess Phillips:** What sort of questions were you being asked?

Zelda Perkins: Some of the more difficult questions, which actually led to the 12-hour session, related to me specifically, because I had shared details of what had happened with other people. They wanted me to name every single person to whom I had made any type of disclosure to do with the process and why I was leaving. I was very adamant that I was not going to do this. We lost some of the obligations that we had wanted for Mr Weinstein during that negotiation process so that I did not have to name people. In the end, there is a schedule in the agreement where I have described every single person I had made any sort of disclosure to, and exactly what disclosure I had made to them, but they are not named.

Q57 **Chair:** To stay through the night is a relatively unusual thing for any of us to do in any circumstance. Did you ask why you were being kept there?



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Zelda Perkins: No. It was a sort of siege mentality. You lose track of time and place, and you are in a battle.

Jess Phillips: I would be like, "It is 3 o'clock in the morning. I am going to bed".

Zelda Perkins: I did. I remember constantly asking for more options. I was like, "Where are my options? Where are our options?" We were never given any options, and because of a lack of options there was endless negotiation. It was not constant questioning during that time. For a lot of that time, we would just be shut in a room and kept waiting while they negotiated.

Q58 **Jess Phillips:** Did you feel that there was a parity in the level of legal resources and expertise available to you and to your former employer? Was there an equality of arms?

Zelda Perkins: No, obviously not. That is a company and societal problem. As an employee, or as a member of society, I did not know my rights, and I did not know where to go for advice or how to get advice. I went to the closest lawyer to my offices, in fact.

Jess Phillips: That is what most people would do.

Zelda Perkins: They were the closest media lawyers to me.

Q59 **Chair:** You mentioned options. You wanted to know what options were available. What options did you think should have been available to you?

Zelda Perkins: I could not fathom, throughout the entire process, that there was no way of going to what I would consider the correct authorities, so that at least there was a judgment. Basically, this was a criminal act, yet I felt that I was not allowed to bring that forward. Obviously, I was, but I did not know that, and I was made to feel like I was not. It all seems very obvious when you look back now, particularly in the environment that we are in, but at 23 and 24 I went to lawyers presuming that they would—

Jess Phillips: Give you the right advice.

Zelda Perkins: Yes.

Q60 **Chair:** Obviously, you had legal representation there to look after your interests. When you asked your lawyer, representing you, looking after your interests, about those options, particularly what you have just outlined, what was their response?

Zelda Perkins: Before we agreed to go into negotiations for a damages claim, the only option would have been to try to go to court. They told me that that was not even worth considering.

Q61 **Chair:** Why not?

Zelda Perkins: Because of the disparity of power between me and Weinstein and Disney. As I put in my submission, naively, I had a



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secondary plan when they said, "It is your word against his word". I thought, when it was one word against another word, we would go to a judge to make that decision. I thought that was what happened when something criminal happened. My secondary plan was that we would go to Disney, because I naively believed that Disney, as the parent company of Miramax, would be horrified by the news that one of its companies had a potential rapist, given it was very openly a Christian company. Again, my naivety was met with hilarity, because that was never going to be possible.

Q62 **Jess Phillips:** On the part of your lawyers.

Zelda Perkins: On the part of my lawyers. I believe they were reflecting the environment at the time, but the law should always be above that, as far as I was concerned.

Q63 **Chair:** Did you believe that your lawyer who was representing you was expert and experienced enough to advise on the options that were available to you?

Zelda Perkins: My initial conversations were with a partner of the company, and I was handed down to a young lawyer who was two years qualified to take my case.

Q64 **Chair:** Do I surmise from that that you do not think they were necessarily qualified enough?

Zelda Perkins: They did an incredible job in the circumstances, but no. I think they were under as much duress as I was.

Q65 **Chair:** From whom?

Zelda Perkins: From the Weinstein camp, and from Allen & Overy. I believe that they were utterly out of their depth. I felt that particularly because I had to lead with the aggressive nature of what I wanted, and I kept being advised by my team, my lawyers, that they were unreasonable requests and I would not get them. I believed that my relationship with, and my knowledge of, Mr Weinstein, the company and the crime were enough for us to do the thing that we needed to do, which was to try to obligations into the agreement that stopped his behaviour.

Q66 **Jess Phillips:** Did you feel pressured into agreeing any terms that you were unhappy with?

Zelda Perkins: Yes. I was unhappy with the entire process and the entire agreement. The only thing that I could do, the only arsenal that I had, was trying to make the agreement restrictive to his behaviour, as restrictive as it was to our non-disclosure.

Q67 **Jess Phillips:** What convinced you to agree with them, if you were so unhappy with them?

Zelda Perkins: Because I believed that we had done the best we could in terms of stopping his behaviour. That was it. Essentially, we were



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defrauded. We signed that agreement with the belief that Miramax and Harvey Weinstein would uphold their obligations.

Q68 **Jess Phillips:** What were their obligations?

Zelda Perkins: They were for him to go to therapy; for a HR system to be brought into the company with three complaint handlers, one of whom had to be an attorney, because I hoped that meant that they could not lie; and that, if a damages claim was sought in the following two years, this would either be disclosed to Disney and our agreement would be disclosed to Disney, or they would fire Harvey from the company.

Q69 **Jess Phillips:** Did you seek any monitoring assurances that you would be told about that in the future?

Zelda Perkins: We had the right to check for the following three years.

Q70 **Jess Phillips:** Did you check?

Zelda Perkins: No. I did for about 12 months afterwards but, to be honest, the whole process was so demoralising.

Jess Phillips: I understand.

Zelda Perkins: I would have thought that they would bend over backwards to uphold their obligations, to be honest.

Q71 **Jess Phillips:** Did your lawyer explain to you the effect of the provisions that you were entering into, and whether they were normal, standard and fair for this sort of non-disclosure?

Zelda Perkins: No, my lawyer was very vociferous about the fact that they had never seen an agreement like this before. I was told very clearly that it was a very broad agreement, and basically I just could not ever say anything about anything to anybody. The safest thing was to erase the entire last four years of my life from my memory. At no point was it made clear to me that it was unenforceable, or could potentially be unenforceable.

Q72 **Tulip Siddiq:** Thanks very much for coming in. You have spoken a bit about how you thought the agreement was morally lacking. Could you briefly describe the impact that the agreement had on your career moving forward, and your personal life?

Zelda Perkins: My career basically came to a halt after this. I attempted several interviews in the couple of months after I had signed the agreement, but you have to understand that the film industry is a very incestuous, small industry, and Harvey at the time was the kingpin of it all. I had been very visibly a close colleague of his and was well known by the industry so, at the interviews I went to, either it was suggested to me by the people interviewing me that I had clearly been having an affair with Harvey, and I was asked whether this was going to cause a problem in the future; or I would be asked pretty much to my face whether having me on board would be advantageous or not.



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For me, the suggestion that there had been any sort of relationship with Harvey other than a professional relationship was possibly the most insulting and upsetting thing that could happen to me at that point. I had just spent a week fighting for my life and fighting to protect other women. To then face a man slightly grinning and saying, "Well, you know, now that you and Harvey are not close" meant that I did not want to be in that environment. I obviously was not offered any of the jobs that I went to interview for.

The same thing happened to my colleague. It was slightly different for her, because she had only been working for a month, but people's fear of being involved with us and the fact that I could not combat any of the rumours that were circulating meant that, ultimately, I did not want to be in that environment. In fact, we both left the country. I left the country for five years. I do not think she has ever returned.

Q73 Tulip Siddiq: You have talked a lot about the legitimacy of NDAs and the lack of regulation around them. What do you think is the main issue around NDAs in sexual harassment cases?

Zelda Perkins: There are a lot of issues, but only one thing is important: the moral judgment. There is nothing else to argue about. It is morally wrong, and there cannot be a legal document that protects criminal or coercive behaviour. It is a question of morality.

Q74 Tulip Siddiq: You have described how you attempted to use the terms of your NDA to secure improvements for future women, as you said, or employees at Miramax. Based on your experience that you have outlined, do you think that NDAs have the potential to be useful in this way?

Zelda Perkins: At this moment, no, I do not, because mine clearly did not do anything. This is the entire point of now having scrutiny about how NDAs are used. If NDAs can be used in a positive, reciprocal way, it is all the better, but the initial problem is that they are used abusively, and within the law. There is not enough regulation, and there is not a framework to protect the victims of the situation. Even if a victim puts in clauses to try to make a positive impact, it does not really matter if there is still such disparity in bargaining, and they are still put in a position where their life is negatively affected. They are trying to positively affect somebody with a problem, but their life is still going to be negatively affected.

Q75 Tulip Siddiq: You have talked about reforming NDAs. You have just now said that, if NDAs could be used in a positive way, you would welcome that. Are there some reforms that you would advocate? I know that you have advocated for some already, but what is the most important reform that could happen to an NDA so that someone who signs one is protected, and it is beneficial to them?

Zelda Perkins: It has to be about criminality. You cannot have an agreement that covers up criminality. There has to be recourse for



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somebody who has had a criminal act committed against them, so that the first and last stop is not a civil, private agreement. It should be made more public, and it should go to the correct authorities to be looked at first.

Q76 Philip Davies: First of all, can I thank you for coming in? It is very brave of you to come and revisit such a traumatic experience in your life. I am sure I read somewhere—and I cannot put my hands on it at the minute, so I just wonder whether you could confirm this—that your lawyers told you that the most you could expect to get was a year's salary. Is that right?

Zelda Perkins: Yes.

Q77 Philip Davies: Could you tell us how much that was at the time?

Zelda Perkins: It was about £20,000 for me, and for my colleague it was about £16,000.

Q78 Philip Davies: But you ended up being paid considerably more than that.

Zelda Perkins: Yes.

Q79 Philip Davies: Am I right in thinking—again, I am pretty sure that I read it—that they eventually paid you the amount that you originally requested? Is that right?

Zelda Perkins: Yes. The whole payment thing was complex, because we were told initially that we had to enter into an agreement. I said, "There is no way that money will change hands in an agreement, because that will not dignify the situation". I was told that that was how you started this sort of agreement, that the only way that I would get any of the things that I wanted to happen was by asking for a financial damages settlement to start with. When we were told that it was traditional to ask for a year's salary, at this point, I said, "If we are asking for money, the money has to be proof. It had to be indicative of the crime. It has to show the guilt of what has happened".

Q80 Philip Davies: Absolutely. This is my final question, on the back of those preliminary ones. During all these hours of negotiations—until 5 o'clock in the morning and what have you—how big of a focus was it for Harvey Weinstein's lawyers to knock down the amount of money that you were requesting? Was it all about the conditions?

Zelda Perkins: No, it was all about the conditions.

Q81 Philip Davies: The money that they were paying, as far as you were concerned, was not an issue to them.

Zelda Perkins: We did not start negotiations until we had agreed on the financial settlement, because we felt that otherwise the negotiations would be about the money. That happened before we even entered negotiations, and that happened over a day's period. My lawyers told



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me, "If you ask for this, the whole thing is going to be taken away", but it was agreed to within 48 hours.

- Q82 **Tulip Siddiq:** I just want to come back on one thing. I just want to know the extent to which the NDA stopped you from speaking. If you went to future interviews and there was a suggestion that you had had a relationship with your boss, which you had not, were you able to say at that point, "That is not what happened", or were you not even allowed to say that, according to the terms of the NDA?

Zelda Perkins: Yes, I could say that I did not have a relationship with him. I was allowed to say that I had worked there, but I was not really allowed to discuss anything else, and not only at Miramax itself. Within the agreement, it talks about the release parties, and the release parties are the subsidiaries. They are everything to do with the company, so I was entirely bound to not discuss, acknowledge or name my colleagues. I could have done in an interview situation. I am sure that it would have been weird if I was talking to somebody in the same industry and I did not use the name of a colleague, but, no, I was entirely bound.

- Q83 **Mr Shuker:** You talked about an incredibly pressured period as it was hammered out. Were you given a cooling-off period at the end of that time before signing the document, or did it happen quite quickly?

Zelda Perkins: That is a very good question, because my memory around that is quite hazy. When I look in my diary, there was a week between us agreeing and us signing, and I do not know whether that was officially a cooling-off period, or whether it was just because I happened to have a week's holiday booked, because I went away in that week. Essentially, we had a cooling-off period.

However, when we came back to sign the agreement, we were brought into a room with Mr Weinstein. This was the first time that my colleague had had to see him again, and he had a long conversation with us, trying to bring us back to the company and apologising for his behaviour. In fact, it was almost a full admission, which my lawyer noted. He was then not allowed to leave the room with that piece of paper unless it was destroyed.

- Q84 **Mr Shuker:** Do you have a sense of what you thought Harvey Weinstein was doing?

Zelda Perkins: He wanted to keep his enemies close. We were much more valuable staying within the company than leaving. He offered us more money, or whatever we wanted. It was a clear admission of guilt throughout the process, really, and this was in front of some pretty respectable legal bodies.

- Q85 **Chair:** Just before we close, you have talked about important ways that we could make sure that NDAs were better in the future, and I just wanted to focus on that a little bit: for instance, making it a breach of the law not to provide copies of NDAs, because you were not given a copy of



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the contract.

Zelda Perkins: Yes. I was not allowed to hold a copy of my own agreement, or any paperwork pertaining to it.

Q86 **Chair:** You have also suggested requiring CEOs or board members to sign off NDAs in their organisations, to make sure that people are fully sighted on the types of agreements that their companies are getting into. Which of those reforms do you think would have the greatest impact, to make sure that things are better in the future for people who are in your situation?

Zelda Perkins: It is a difficult question. In my particular situation, it would not have made any difference if it had gone to the CEO, because the CEO was Mr Weinstein. It would never have got to the board. As I said earlier, when it comes to a criminal offence, it should be a necessity that it is reported to the correct bodies first.

Q87 **Chair:** That is interesting. You have rightly said that, if you have perpetrators in the system who are pretty senior within the company—and we know there is a link, in terms of power—that might not be a good failsafe.

Zelda Perkins: You are still stuck.

Chair: Do you feel let down by your lawyers and the lawyers who were representing Harvey Weinstein?

Zelda Perkins: I feel let down by the lack of law around it. I am sure that the lawyers were all working within legal constraints, and that is more shocking: that they were able to do that.

Q88 **Chair:** It has been suggested that they might not have been working within legal constraints. For instance, limiting your disclosure might be perverting the course of justice.

Zelda Perkins: I would have thought so. I would have thought that pretty much everything in my agreement was of public interest, but I do not know. I am not a lawyer. I do not know what the law was at the time. There were not whistle-blowing protections. It was a very different environment. I feel it is more important that the law is correct around this, that there is a disincentive for lawyers to create this kind of agreement, not just employers. This is not just about employers. It is about creating a disincentive around the whole situation.

Q89 **Vicky Ford:** You have described how, in this agreement, you committed that you would not see a doctor without getting the doctor to sign a non-disclosure themselves, and then you would not have been able to use Mr Weinstein's name; that you would not talk to the police or other authorities about what had happened, or you would try to limit the amount of evidence that you gave to them; and that you would not go and talk to another lawyer without also limiting the disclosure to them. What did you think would happen to you if you breached any of those



assurances?

Zelda Perkins: At that point, I thought that I would probably go to jail. I knew that I would be sued for the damages, for the money, but that was not so much my concern. I thought that I would then be breaking the law. Again, this was my naivete and my ignorance, and that is another point about this: there needs to be information so that people understand what their rights are.

Q90 **Vicky Ford:** Your fear, ever since—and you did not have a copy of the document—was that, if you ever said any of this again, you could end up in jail yourself.

Zelda Perkins: Yes.

Chair: Thank you very much, not only for coming along today, but also for the written evidence that you have given us, which will be published on our website for people to be able to see, and for having the strength to sit in front of us and to answer some pretty hard-hitting questions. We are very grateful to you for that.

Zelda Perkins: Not at all. Thank you very much.

Chair: We will now move on to our next panel. Thank you.

Examination of witnesses

Witnesses: Mark Mansell and Tamara Ludlow.

Q91 **Chair:** We are now going to start our second panel of the morning. Before we start, I will just do a quick preamble. Thank you so much, both of you, for being here this morning. We know how much time it takes out of your day, and we are immensely grateful to you for coming along.

Your two firms—Mark Mansell is from Allen & Overy, and Tamara Ludlow is from Simons Muirhead and Burton—were involved in concluding the settlement agreement reached by Zelda Perkins when she left Miramax. Allen & Overy acted for Miramax and Harvey Weinstein, and Simons Muirhead and Burton acted for Zelda Perkins. I understand that you, Mark, were directly involved in the case. Tamara, you were not, but you are here today representing your firm. Really, thank you for that. We are immensely grateful.

The Committee understands that you are limited in what you are able to say about the specific case because of client confidentiality, and we will respect that. Our questions will aim to address the principles involved in the use of, and process of conducting, non-disclosure agreements in cases of alleged sexual harassment. The usual form is that colleagues will ask questions, although I am just going to kick off with the first one here, to Mark. How long have you been practising employment law, and how many NDAs have you drafted over that time?



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Mark Mansell: I have been practising employment law for over 30 years, and non-disclosure agreements or confidentiality provisions are commonly included in every settlement. It would be fair to say that, throughout my career, those provisions have formed part of the settlements that I have been involved with, both when I have been acting for employers and when I have been acting for individuals.

Q92 **Chair:** Obviously, we are not going to go into the particulars of a case, but we want to understand the type of agreements that you have prepared. How many times have you used the form of agreement that was used in Zelda Perkins' case, and in other cases?

Mark Mansell: As you say, I cannot comment particularly on Ms Perkins's case. In most cases, the confidentiality provisions are less extensive. They would deal with an agreed statement of facts, particularly to allow an individual to move on. They would deal with non-disparagement, and there would not necessarily be the level of detail that there may have been in that particular case.

Q93 **Chair:** Why might there be the more extensive provisions that you have referred to there?

Mark Mansell: Again, without commenting specifically on Ms Perkins's case, if you have an individual who is publicly known, they may be particularly concerned to ensure that certain things are not said, or things are limited.

Q94 **Chair:** As a Committee, we asked you for a copy of the non-disclosure agreement signed by Zelda Perkins, and we requested the same from Bindmans, which also holds a copy. Neither firm was able to provide us with a document. Could you outline the reason why you were not able to provide that to the Committee?

Mark Mansell: Yes, of course. The confidentiality in the agreement belongs to my client, not to me. We wrote both to the lawyers acting for Miramax and to the lawyers acting for Mr Weinstein. Neither of them gave their consent, and Mr Weinstein said he was unwilling to agree to disclosure. As well as client obligations, I am also prohibited by my professional duties from revealing either the agreement, or anything in relation to that case, without my client's prior approval.

Q95 **Eddie Hughes:** Do you think women automatically have the right to be protected from sexual harassment, or do you think sometimes that your client's needs might override that right of protection?

Mark Mansell: No, I think that women always have the right to not be harassed. That is a right for anybody in the workplace, and I do not think a client's needs would ever override that.

Q96 **Philip Davies:** First of all, have you ever pushed back on something that a client asked to be included in an agreement that you thought was unethical?



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Mark Mansell: Yes, I have, if things are being asked for that go against the rules of conduct. There are things that you can or cannot ask for. Again, I think Ms Perkins referred to the whistle-blowing law, which has come in since the agreement she signed was entered into. It is not possible to restrict an individual's ability to raise those protected disclosures. I would always make that clear. I would also advise a client if what they were asking for was not advisable, even if it was permissible. I would advise them that that should not be included. Yes, my obligation to the client would be to go wider than simply doing what they ask me to do.

Q97 **Philip Davies:** You would not allow anything to go into an agreement that you had drawn up that was unethical or against the Solicitors Regulation Authority principles.

Mark Mansell: I would not put anything into an agreement that was unlawful or was against the rules of professional conduct.

Philip Davies: I did not say "unlawful"; I said "unethical".

Mark Mansell: If you mean beyond the rules of professional ethics, no, I would not allow that to go in.

Q98 **Philip Davies:** How often is it that an NDA is drawn up and no copy of the agreement is given to one of the parties? Is that common?

Mark Mansell: That is not common, no.

Q99 **Philip Davies:** In your 30 years of experience, how many times would that have happened?

Mark Mansell: It would be extremely rare—very, very rare.

Q100 **Philip Davies:** Why would it happen at all?

Mark Mansell: It would happen if somebody was concerned that a document that they signed could come into the public domain. They would want to restrict the number of, and access to, those copies.

Q101 **Philip Davies:** Would it be reasonable, in a non-disclosure agreement, for somebody to be told that, in any criminal legal process, the person who had the non-disclosure agreement should use all reasonable endeavours to limit the scope of the disclosure as far as possible? Would that be an appropriate thing to go in a non-disclosure agreement?

Mark Mansell: The first thing to say is that it would not be either reasonable or lawful to prevent somebody from participating in a criminal process. There can be situations where there is the possibility of information being given that goes over and above what strictly needs to be done, and it is possible in those circumstances that someone may try to restrict that, but in terms of stopping or limiting an ability to participate in a criminal process I would not see that as reasonable.

Q102 **Philip Davies:** Just to clarify, is it reasonable to ask somebody in a



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criminal legal process to use reasonable endeavours to limit the scope of the disclosure as far as possible. Do you think that that is a reasonable thing to put in a non-disclosure agreement, or do you not?

Mark Mansell: A non-disclosure agreement should make it clear that nothing within that agreement would prohibit an individual from participating in a criminal process. Where there is the possibility of confidential information being disclosed that is not necessary for that process, the individual who is seeking to protect those interests has an opportunity to be involved.

Q103 **Philip Davies:** I am not a lawyer. I was always brought up as a kid to say that you should tell the truth, the whole truth and nothing but the truth. That is what I was brought up to understand, particularly in a criminal process. I am surprised that you are arguing the toss about this. I would have thought that this was quite a simple question. Surely, if somebody is being asked to use reasonable endeavours to limit the scope of disclosure as far as possible, that flies in the face of telling the truth, the whole truth and nothing but the truth, or am I missing something there?

Mark Mansell: I do not think that I am saying that you should not tell the truth and the whole truth, but there may be information that somebody could voluntarily disclose that they do not necessarily need to. If they are asked a specific question, either by the police or during a criminal process, they should definitely be able to answer that.

Q104 **Chair:** Do you think that provisions on limiting disclosure could, in theory, be seen as perverting the course of justice?

Mark Mansell: I can see how people might see them in that way.

Chair: Say yes or no; it is easier.

Mark Mansell: Yes, I can see why people might view it that way.

Q105 **Chair:** Would you ever draw up an agreement that would potentially be seen as perverting the course of justice?

Mark Mansell: No, I would never do that. In producing an agreement, I would always make it clear that an individual's legal and regulatory obligations were paramount, and that nothing in the agreement would override those.

Q106 **Philip Davies:** How normal is it to ask somebody to not disclose any information if they require treatment from a medical practitioner as a result of what happened to them? How often would that happen? Would that ever happen?

Mark Mansell: In terms of specifics around those particular kinds of cases, no, that is not something that would happen normally, or usually.

Q107 **Philip Davies:** Would it happen at all?



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Mark Mansell: I cannot think of other cases where it might happen.

Q108 **Philip Davies:** This has happened, but only in one case. That is what you are saying.

Mark Mansell: Again, I cannot make particular comments about Ms Perkins's agreement.

Philip Davies: Well, you were making comments. You were taking about "other cases". I did not talk about any cases; I was asking generally. You were talking about other cases.

Mark Mansell: Generally, no, one would not see those clauses.

Q109 **Chair:** Mr Mansell, can I butt in here, sorry? I have just asked for advice from my clerk because I do not want to overstep the mark on this, but we are just about to publish a document signed by you that clearly sets out a provision requiring Zelda to limit her disclosure in cases of civil or criminal legal process, so what you have just said to me is not true. You have sanctioned a document that does that. Do you want to revisit the answer to that question?

Mark Mansell: In terms of answering the question, the point that I was trying to make is that I would not sanction something that prevented someone from participating within a criminal process, but there may be scope for the individual to decide what information is provided voluntarily.

Q110 **Chair:** Do you think that document should have been drafted differently in hindsight?

Mark Mansell: Looking at where are now, as opposed to where we were when that was drafted, and looking at what the SRA has come up with, if a document contained a restriction like that, it should make it clear that nothing would override or limit an individual's legal duties, which would include duties in relation to participating in a criminal process.

Q111 **Chair:** Let us be very clear: the SRA has not come up with anything new. It has simply restated what professional people like you should have been doing for years. Do you regret having drawn up that document in that way?

Mark Mansell: In terms of that particular provision, I do not believe that it would have prevented Ms Perkins from participating in a criminal process. It required certain steps to be gone through. If I were dealing with that today, I would make it clearer that the ability to participate in a criminal process was not in any way restricted.

Q112 **Chair:** We have heard evidence today, just moments before you came in here, from somebody who felt that they would end up in jail if they breached the agreement that you made them sign. How does that make you feel?



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Mark Mansell: I accept that anybody who found themselves in the situation that Ms Perkins did would find it a difficult and stressful situation, and I can understand the effect that the agreement might have on them. In entering into any of those discussions, I would never want to make that situation worse for them, and I would regret if an individual felt that that was the case.

Q113 **Philip Davies:** Do you think that non-disclosure agreements should be used to, in effect, cover up criminal activity?

Mark Mansell: I do not believe that non-disclosure agreements should be used to cover up criminal activity. Again, in my experience acting with both employers and employees, very often both of them want to find a way of resolving that particular issue that allows the individual to move on. The company then has the requirement to deal with that, but certainly not to cover up criminal activity, no.

Q114 **Philip Davies:** How many times would you have done non-disclosure agreements that were designed to stop somebody going to the authorities about criminal behaviour?

Mark Mansell: If there were a situation where there was potential criminal liability, an individual—and these are individuals, whether I am advising the individual or the employer—would always have the option as to whether they decide to go to the authorities, and to do it through the criminal route. I get involved at a point where they have decided that that is not the route that they want to go down, and they want to reach an agreement.

The agreement, then, would deal with things between them and the employer. The agreements that I would draw up would record that it does not affect their legal or regulatory obligations, so it would not prevent them from participating in a criminal process, should they decide to do that. Invariably, their decision is that that is not what they want to do.

Q115 **Philip Davies:** Looking at the Solicitors Regulation Authority principles, the first one is to “uphold the rule of law and the proper administration of justice”. Do you feel that all the non-disclosure agreements that you have drawn up have complied with that?

Mark Mansell: Yes, I do.

Q116 **Philip Davies:** You concede that many people would think that one of the parts of one of the non-disclosure agreements that you drew up could be seen as perverting the course of justice. How can that be compliant with upholding the rule of law and the proper administration of justice?

Mark Mansell: Again, I cannot comment on that particular agreement, but I do not believe that I have ever been involved in drafting an agreement that has sought to pervert the course of justice.

Q117 **Philip Davies:** Or “act with integrity”.



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Mark Mansell: Obviously, I have an obligation to my client, but in terms of dealing with things I do believe that I act, and have acted, with integrity.

Q118 **Philip Davies:** “Behave in a way that maintains the trust the public places in you and in the provision of legal services”. Do you really think that these have been always abided by in the non-disclosure agreements that you have drafted? Are you really, seriously claiming that?

Mark Mansell: I cannot comment on that particular agreement, but with any situation like that, where you have an individual who is legally advised, there is a negotiation, seeking to reconcile the interests of the two parties. I think, in doing that, I am compliant with my obligations.

Q119 **Philip Davies:** You are saying to me that, if there was a case where the copy of the agreement was not given to the person concerned, where they were signing to, in any criminal or legal process, use reasonable endeavours to limit the scope of the disclosure as far as possible, and where they were not even allowed to give the information to an appropriate medical practitioner if treatment was required, any non-disclosure agreement that encapsulated all those points would uphold the rule of law and the proper administration of justice, and behave in a way that maintains the trust the public places in you and the provision of legal services.

Chair: Can I just caution you before you answer that? People who are listening to this will be able to read this agreement. You are in a difficult position. You are not able to comment on it, but we will be publishing the agreement for people to see the provisions that were included in it, and it has your signature at the end of it.

Mark Mansell: If I look at the situation now, compared to the situation 20 years ago, and at the way in which the law has changed, both in terms of public interest disclosure, whistleblowing, and in terms of regulatory obligations, if one were looking at those obligations today, they may well be drafted in a different way.

Q120 **Philip Davies:** But you think that they met the Solicitors Regulation Authority principles back then.

Chair: Those principles have not changed.

Philip Davies: I do not think that they have changed a fat lot in the last 20 years. Those principles are pretty standard. They are timeless principles, aren't they?

Mark Mansell: In terms of the broad principles, yes, those were in place.

Q121 **Philip Davies:** I repeat the question: would the principles in that non-disclosure agreement, if they were in one, meet the requirements of the Solicitors Regulation Authority? I am saying to you today, candidly, that I do not think they do. That is my view, but I want you to say whether you do.



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Mark Mansell: I believe that, at the time I negotiated the agreement, I acted in accordance with my professional duties.

Q122 **Philip Davies:** How much does it cost to get you to draw up these kinds of things?

Mark Mansell: That would depend on the length of negotiations, but it would cost thousands of pounds.

Q123 **Philip Davies:** How many thousands? I am giving you an advertising opportunity here. How much does it cost to get you to draw up something like this? You said yourself that this was exceptional. This was not the norm; this was exceptional. How much would it cost to get something like this drawn up?

Mark Mansell: I cannot recall what the fees were, in terms of drawing that up.

Q124 **Philip Davies:** Were they more than normal?

Mark Mansell: Yes, they would be more than normal.

Chair: Maybe you could write to us on that. Maybe we could get that in writing.

Q125 **Vicky Ford:** In the time that you have worked in this area of law, which is a very long period of time, have there been significant changes in your firm about the use of non-disclosure agreements, and the negotiations leading up to the signature?

Mark Mansell: As I mentioned, the most significant changes have been the whistle-blowing legislation that has come into force, and the fact that it is now impossible to prevent an individual from raising those things within the appropriate framework. We have also seen that regulators across a number of industries have focused much more on the behaviour of individuals, and the requirement to report where that behaviour falls below the particular standards.

The main change that I would see is that, in the past, these agreements would be subject to an individual's legal duties. It would now refer to regulatory duties as well. You would also see a specific exclusion for any whistle-blowing: so, if an individual knew about any wrongdoing, they would not be restricted in raising that. It is also common to have a provision where, if there were any other things that they think could potentially amount to disclosures, they should raise those.

Q126 **Vicky Ford:** What would you consider normal to happen to the person if they did breach the non-disclosure agreement? Would they have to give the money back? Would they have to give the money back plus legal fees? Would they end up, as we heard, at risk of criminal or legal proceedings themselves? What is the norm?

Mark Mansell: In terms of being at risk of criminal proceedings, no, that would never be the case, because it would be a breach of a civil, rather



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than criminal, agreement. There would never be a risk of prosecution or jail. It would be a civil case.

In terms of what the consequences would be, it would be one of two things. If it was a complete failure of the agreement, the amount of money that the individual had received would potentially need to be given back. If it was not a complete failure, it would be damages. The individual complaining about the breach would need to show loss and damage.

Q127 Vicky Ford: In this legal agreement, there is a condition that the signatory cannot go and get further legal advice without having another non-disclosure agreement with that lawyer, and is limited in how much they can disclose to that future lawyer, or another lawyer. Is that normal?

Mark Mansell: No, provisions of that kind would not be normal. Picking up on Mr Davies's comment about an individual retaining a copy of the agreement, it would be more normal for the person to have a copy of the agreement so that they are aware of their legal rights. If they had the copy in their possession, it would be possible for them to seek advice on it from a different lawyer.

Q128 Vicky Ford: Should it be clear in a non-disclosure agreement, in your view, that people should always have a copy of it, and that they should be able to get legal advice on it?

Mark Mansell: Looking at how non-disclosure agreements could be improved, it would be good if the limits of those agreements were made clear. Like with settlement agreements, where you need a lawyer to be involved and to advise you for an agreement to be valid and enforceable, if there was a similar kind of provision where there was a non-disclosure agreement at the time that employment came to an end, it would be a good thing.

Q129 Vicky Ford: We have received evidence, from other people as well, describing some very aggressive and traumatic experiences that they have had during the negotiation of an agreement. Do you advise people on both sides of these agreements?

Mark Mansell: Yes, I do.

Q130 Vicky Ford: What do you think leads to that sort of traumatic experience?

Mark Mansell: Inevitably, it is a traumatic experience. For somebody to go through harassment is traumatic. For somebody to find themselves in a position where they are seeking to report it through the company procedures, however good those procedures are, is traumatic. It is also traumatic to find yourself in a situation where you are negotiating an agreement. It is inherently traumatic.



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The things that are important are, first, as I have mentioned, that the individual has legal advice. With the way in which the requirements on settlement agreements are drafted, that is needed before you can ever have a binding agreement. It is also important that employers, rather than just looking at dealing with the results of harassment, put in place policies and procedures that allow those things to be raised, and individuals to be supported.

Q131 Vicky Ford: Should there be clearer steps necessary for the lawyers to make sure that they try to prevent that negative or traumatic experience in the negotiations themselves? What steps would you take?

Mark Mansell: What steps would I take? I always try to recognise the effect that it would have on the individual. In terms of acting for individuals themselves, I would make sure that they are very clear as to what they want, and that they get support from me as a lawyer. Lawyers acting for employers should be as un-combative and sensitive as they can in the situation. They are soft things, rather than regulated things.

Q132 Vicky Ford: Ms Perkins has described a situation where she was involved in negotiations through the night, literally until 5 o'clock in the morning. How normal is that?

Mark Mansell: On occasion, you will have a situation where the parties are anxious to reach agreement on documentation as quickly as possible. You may also have a situation where people are in different time zones, which again can have an impact on the period during which negotiations take place. In terms of dealing with things over a short timeframe, where individuals are involved until late in the night, that is not at all common.

Q133 Vicky Ford: This non-disclosure agreement involved the victims, if I can call them that, agreeing not to disclose information about a sexual offence. At the time of signing this document, the person they believed to have committed that sexual offence was in the room. Do you think that that is appropriate?

Mark Mansell: I cannot comment on that particular case. In my experience, when the negotiations are on in that way, the only time when the individual and the victim would be in the room together would be in a mediation. You would have a mediator there. You would not have a negotiating meeting.

Q134 Chair: But, Mr Mansell, you are the professional here. You are the professional who is supposed to make sure that the process runs to a professional standard, as we expect in this country. Why would you allow that to happen?

Mark Mansell: If I am acting for an individual, I would advise them against being in a room during the negotiations with the person they say has harassed them. If I was acting for an employer, my advice would



definitely be against having the individual there, together with the victim. That would not be appropriate.

Q135 **Vicky Ford:** To learn good practice from that would be really important. Is it normal to have a cooling-off period before signing?

Mark Mansell: It is normal under agreements that are subject to US law. There needs to be a period of seven days, which gives the person who has signed the agreement the ability to reflect on what the agreement contains and whether they are still willing to go ahead with the settlement. If they feel that they have been put under pressure, it allows them to think again. That is not currently a requirement under English provisions. That may be something, together with a requirement to have legal advice, that could be built into the process to provide greater protection.

Q136 **Eddie Hughes:** With regards to policing adherence to the terms of the non-disclosure, once you have drawn one up for your client, do you care whether they stick to the terms? It feels to me, from the evidence that we heard earlier, that the terms were not adhered to on the part of your client.

Mark Mansell: Yes, absolutely, I would care. My professional duty is not just to deal with the particular incident and to reach a settlement between a particular individual and the organisation that they work for. If inappropriate conduct has happened, my duty is to make sure that that is dealt with appropriately and, if there are cultural issues, to make sure they are identified and addressed. I spend far more time dealing with those sorts of issues than I do dealing with actual events and resolving potential claims.

I would always advise, "This is what you ought to do". If procedures were put in place as part of an agreement, I would also advise on what needed to be done to comply with that. Sometimes, clients do not continue to instruct the lawyers, and then ultimately it is in their hands, but it is important not to see it as an isolated thing, and to look much more widely at what changes need to be made.

Q137 **Chair:** Just before I bring in Tamara, do you think Allen & Overy is pleased that it drew up the Zelda Perkins agreement? Do you think that it is good for your reputation that you did that?

Mark Mansell: I am sorry; I cannot comment on that particular case. One could say that, if you look at a case where behaviour is criticised and a lawyer or law firm is drawn into that, that is never a good thing for the lawyer or for the law firm.

Q138 **Chair:** Tamara, we invited Mr Mireskandari to come along to this evidence session today, but we understand that he declined. Why were you selected to come today?



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Tamara Ludlow: Because I am an employment lawyer. I have done a number of settlement agreements in my time. I think they thought I would be an appropriate person to come and assist, and I hope I am.

Q139 **Chair:** But you were aware of what happened in the Perkins case.

Tamara Ludlow: I am aware, but only since it was published in the media. I was not aware before that.

Q140 **Chair:** In the evidence that we heard earlier, which does relate to the firm that you are with, but I understand that you cannot talk about this, it felt, certainly to me and to other members of the Committee, that Ms Perkins in that instance was put into a very stressful circumstance, in terms of the situation that she was in. Many people might say that one should have just walked away from it. In those sorts of circumstances, why might it not happen that an individual is advised to simply walk away from the negotiation, because it is so stressful and the terms of the agreement are so egregious?

Tamara Ludlow: I can only speak for my own practice, but that is absolutely something that we would advise individuals. There is not a circumstance where you would not say to somebody, "You can just walk away from this, and your other options are these". I heard the evidence earlier. I heard Ms Perkins say that she felt there were no other options. That is not something that I would ever leave my client thinking, I have to say.

Q141 **Chair:** Do you have concerns, given your experience, about the use of NDAs in sexual harassment cases?

Tamara Ludlow: As a lawyer, we would all have concerns about NDAs being used to cover up wrongdoing. I cannot speak for other legal advice that has been given by lawyers around the country, but I speak for my own practice and my colleagues. We advise clients that, if a claim of sexual harassment is made, they must investigate it. That is an employer client. If I am speaking to an employee, I will explain to them what their options are, both civilly and criminally. I am not a criminal lawyer, but I now work in a firm that has criminal lawyers, so I could refer them to a colleague.

Q142 **Chair:** If provisions in a contract or a settlement agreement were of a nature that could be thought of as being unethical at least, if not potentially—to quote what has been said about this case—perverting the course of justice, how would you tackle that in reality, in a room where a negotiation was being drawn out, particularly if you were up against a big, slick operation of a top three law company? I do not know the relative size of your law company, but perhaps it is not quite as slick.

Tamara Ludlow: No, we are a small firm. Can you just repeat the question?

Chair: What would you do if you were in a room, and you were being



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asked to give advice to your client, where the terms of the contract were potentially unethical or perverting the course of justice? What should the advice to a client be?

Tamara Ludlow: If you felt that the document was potentially perverting the course of justice, your advice would be that it is not a lawful document. I would have to raise that as part of the negotiation.

Q143 **Chair:** You would have to tell your client that.

Tamara Ludlow: I would absolutely have to tell my client. It would not be in the room with everyone else. It would be in a room where you are advising your client. You would not give that kind of advice as part of the negotiation, but as part of the negotiation one might say, "I cannot advise my client to sign this document. I do not believe it to be lawful".

Q144 **Chair:** The Solicitors Regulatory Authority has published what it calls a warning notice on the use of non-disclosure agreements. How has your firm reacted to that, particularly given the fact that it states very clearly that copies of agreements should always be given to the people who are involved?

Tamara Ludlow: I have never, in any firm I have worked in, had a situation where the individual for whom I was acting did not have a copy of the agreement. That is exceptional, in my experience.

Q145 **Chair:** What would your advice be to somebody who was told to sign that sort of agreement?

Tamara Ludlow: I would not advise them to sign an agreement where they could not keep a copy.

Q146 **Chair:** What would you think of a contract that had a provision like that within it? How would you characterise it?

Tamara Ludlow: I would be very concerned about it. I do not know that I would characterise it as unlawful. I would have to think that through, but that would not be an agreement that I would advise a client to sign.

Q147 **Chair:** Would you characterise it as unethical?

Tamara Ludlow: Yes, probably.

Q148 **Mr Shuker:** Mr Mansell, obviously, you feel that you cannot talk about the specifics of Ms Perkins's agreement, but have you acted for Mr Weinstein or the Weinstein Company after that agreement was signed?

Mark Mansell: Neither before nor after.

Q149 **Mr Shuker:** You were not retained, in terms of services, at that point. It was just that one piece of work.

Mark Mansell: It was just that one thing.

Q150 **Chair:** That is unusual, is it not? Is it usual to just do a one-off?



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Mark Mansell: It can happen on occasion. For most of the clients I work with, yes, it would be unusual, and they would be people with whom I would have an ongoing involvement. In that particular case, it was only one and nothing further.

Q151 **Mr Shuker:** Lastly, we are about to publish the document that the Chair referred to. There is some quite specific language in that agreement. Would that be language that you had come up with, or would that perhaps be language that was produced elsewhere, which you replicated?

Mark Mansell: I cannot recall the way in which the document was produced and negotiated over 20 years ago. We would have produced the first draft. I cannot remember exactly where the language came from.

Q152 **Chair:** I have a couple of very general questions to both of you, to end with. Why do you think it was necessary for the SRA to remind solicitors of their ethical responsibilities in this area?

Tamara Ludlow: They have obviously been following the news, as we all have, but one of the things that I noted they said was that they felt there were a very low number of reported cases. That warning notice is primarily aimed at how lawyers operate in their own environment, in law firms, and I think they said 21 cases had been reported.

Q153 **Chair:** Sorry, 21 cases of what?

Tamara Ludlow: Sexual harassment. There appears to be a concern from the SRA that matters are not being reported as they should be, and they were letting law firms know that they have to do that, regardless of what might be written into an agreement that has a confidentiality provision.

Mark Mansell: I would agree. I think the primary concern was about our own profession. A number of high-profile things have happened recently, and there has been a suggestion that women lawyers are themselves subjected to harassment within the workplace. It was to make clear, in the way that other regulators have, that behaviour expected of members of the legal profession needs to be properly complied with. I think there is an element of that, and I also think they were making clear what the standards are when we are exercising our professional duties, and what should or should not go into a non-disclosure agreement.

Q154 **Chair:** Is this an area of law that is particularly susceptible to a failure of ethics?

Mark Mansell: In terms of the impact of what the SRA has said, if I look at our own standard-form documentation, it already contained the provisions that the SRA was referring to. There are a number of things that we could make clearer. Tamara has referred to the particular point



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on allowing individuals to retain copies. Those changes could, and should, be made.

For us, in terms of what we would advise our clients, NDAs only come at the end of a process. Rather than focusing on that one thing, it is about looking at what is happening in the work environment as a whole, and making the changes necessary to ensure that, where there are allegations of harassment, they are identified and properly dealt with.

Q155 Chair: How do you both now make sure that the people with whom you are involved, in terms of signing NDAs, are aware of the limitations of an agreement like that and aware of the fact that, if it potentially contains something unlawful, that is not enforceable? How do you make people aware of that? Both of you are on both sides, getting people to sign them and advising companies that want to have them signed. How do you make sure that people are aware of the limitations?

Tamara Ludlow: In the normal course, as one does when one is advising on an agreement, as you say, to employees or employees, you will take them through provisions, and you will explain. I do explain to employers what that confidentiality provision means written down on the piece of paper, but I also talk them through what might happen if it is breached, and what action they may or may not want to take if it is breached. It is similar with employees. I would like to think that no one has left a meeting with me thinking that they would be subject to criminal proceedings if they breached that confidentiality provision.

Q156 Mark Mansell: In terms of advising employers, it would not be so much what would happen if the individual breached the terms of the agreement, but much more what their own obligations are. The NDAs and confidentiality provisions are invariably mutual. I would make it very clear to the employer what its ongoing obligations were to the person who was signing the settlement agreement, in terms of statements made, references given, announcements, and making sure that anybody who is named within the agreement on the employer side, or may be seen as a company representative, complies with those obligations.

Q157 Chair: Unlike Tamara, you have had somebody leave a meeting that you have been in charge of thinking that they would go to jail if they breached their confidentiality agreement. How have you changed your practice to make sure that that does not happen today?

Mark Mansell: Again, I was not aware before I heard Ms Perkins's evidence that anyone had ever left a meeting believing that they would go to jail if they breached the terms of a confidentiality agreement. In those cases where I am advising an individual, I would make that very clear, in terms of what the limits were, what they could and could not do, and what the consequences were.

Q158 Chair: Should NDAs be written differently, in terms that can be understood by ordinary people like us? We are not qualified lawyers and sometimes, when you read these agreements, it is quite difficult to



translate them and decode them.

Mark Mansell: There is always room for lawyers to write in a way that is understood by normal people, rather than lawyers looking at it and saying, "That looks fine to me". There is scope for us to go back and look at our documentation, and try to make it simpler and shorter. That would be a good thing. Where you have something that is more legalese, having seen where we are with the SRA, it is incumbent on all lawyers to explain to their clients very clearly what the clauses do, what the obligations are, and what their limits are.

Q159 **Vicky Ford:** In this particular NDA, one of the things that Ms Perkins wanted to have on her side was a change in corporate policy for the company concerned: introducing a new HR policy. How normal is it, on the other side of the NDA agreement, to have obligations on the company side?

Mark Mansell: You do see situations where, as part of an agreement, an individual will say, as Ms Perkins said, "I am not interested in the money. I am interested in making sure that things are done properly going forwards," or "Even if I am going to take a financial settlement, money is not sufficient to compensate me for what has happened, and I want to make sure that things are done properly". In those circumstances, it would be written in.

As I mentioned to Mr Shuker, I was not retained by Miramax beyond the particular settlement. My experience is that, where those things are agreed, they will be carried through, because employers are serious about complying with their obligations. Even where things are not written in, but it is clear that there are cultural problems or systemic problems, the largest part of my practice is involved in identifying and working with clients to address those. It is not useful just to address a symptom if there are wider causes that go unaddressed.

Q160 **Chair:** Sorry, I have to ask this question. Mark, do you regret any of the feelings that you heard expressed this morning as a result of that agreement, just to put it on the record?

Mark Mansell: As to the feelings that an individual has when they go through the process, on a personal level, if they find it difficult or unnecessarily stressful, that is something that I would regret. Again, as you know, I cannot comment on Ms Perkins's case, but if anybody in a case that I dealt with felt that the process I was engaged with was more difficult and stressful than it should have been, that would never have been my intention, so, yes, that is something I would regret.

Chair: I just thought that it was worth putting that on the record. Thank you both very much. I am sorry we have overrun. We will have to swiftly move on to our third panel. Thank you again very much for the time you have taken to be with us this morning. We really appreciate that.

Examination of witnesses

Witnesses: Max Winthrop, Suzanne McKie and Gareth Brahams.

Q161 **Chair:** Can I first of all thank you very much for agreeing to be our panellists in our third panel here today? Apologies for the fact that we are overrunning. We have our usual process of Committee members asking questions. Before we start that, could I just ask you to say your name and the organisation that you represent, starting with Max?

Max Winthrop: I am Max Winthrop. I am the chair of the Law Society's Employment Law Committee, and a partner with Short Richardson & Forth in Newcastle.

Suzanne McKie: I am Suzanne McKie. I am the founder of a law firm that specialises in discrimination, sexual harassment, sexual abuse, and mental health.

Gareth Brahams: My name is Gareth Brahams. I am here in two capacities. I am here as chair of the Employment Lawyers Association, which is the 6,000-member organisation of employment lawyers, which is pretty much ubiquitous membership for employment lawyers, and I am here as an employment lawyer of 25 years' experience. I am a managing partner at Brahams Dutt Badrick French, which is a leading employment firm, acting primarily for individuals but also for some employers.

Chair: That is brilliant. I remind everybody that the acoustics in these lovely rooms are dreadful, so please project.

Q162 **Jess Phillips:** Thanks very much for coming in. From what we have heard and what you know of your professions—I will start with Gareth, but give everybody the opportunity to answer—do you have concerns about the potential for non-disclosure agreements to prevent or deter reporting of sexual offences or sexual harassment to the police, or to other appropriate authorities?

Gareth Brahams: First of all, could I say that, having heard what I heard today, it is very traumatic listening to Zelda Perkins' evidence? You feel a responsibility as an employment lawyer when you hear this kind of thing. Remind me of your question, sorry.

Jess Phillips: Do you think that the use of non-disclosures is stopping people from reporting to the police, or to other authorities?

Gareth Brahams: As Mark Mansell said, it is probably harder now than it was then, because of the introduction of the rule that you cannot prevent people from making protected disclosures. Generally, a sexual offence would be a protected disclosure.

Q163 **Jess Phillips:** You said "generally".



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Gareth Brahams: I am going to come to that. The issue is on the definition of “protected disclosure”. Something is only a protected disclosure if it is disclosed to certain people in certain circumstances. For example, if you disclose to an MP, that is not ordinarily a protected disclosure. It is limited to certain regulators and suchlike. It is quite complicated, and certainly the law should be reformed to make it clear—as a matter of public policy—that going to the police would never be a breach of an agreement that would be enforceable. That clearly should have been explained to the individual in this case, and I am sure that that would have been the case 20 years ago, as it is now.

There is certainly scope to amend the rule on what can be said, and the extent of a non-disclosure agreement. To be clear—and you may come to this—I have read the EHRC recommendations about non-disclosure agreements, and it would not be my view that they should be more prohibited, either in the public sector or generally. There are some quite complex reasons for this, which I am happy to explain if you want me to, but NDAs generally, taken as a whole, are of benefit to individuals bringing sexual harassment claims.

If you did not have them, there would be fewer claims brought and fewer people raising issues of concern. The upshot would be that more cases would end up in a trial, and if more cases end up in a trial fewer people are going to raise a complaint. As Mark Mansell said—and I have to say that I agree with this—it is far more likely that people will raise complaints if they think that the upshot is that they are going to get a settlement out of it.

Q164 **Jess Phillips:** There is a difference between a settlement and an NDA, though.

Gareth Brahams: There will be no settlement without non-disclosure agreements in many cases.

Q165 **Jess Phillips:** As a layman, let me say that that sounds like we are protecting somebody who has done something wrong, but I understand that that is the case.

Gareth Brahams: It goes much further than that. Let us be honest: we are looking at a very, very extreme situation. It was a very extreme form of sexual harassment. He was undoubtedly guilty. You have to be very careful if you are going to legislate more generally. There would be very severe unintended consequences if you were going to use that as your standard case for sexual harassment.

Q166 **Tulip Siddiq:** You said that, without NDAs, you think that there would be fewer people coming forward. I understand your reasons. Do you have evidence of that?

Gareth Brahams: My evidence, in a way, is my own experience as an employment lawyer. Unlike Mark Mansell, I spend most of my life advising individuals. Even the people who have gone so far as to pick up



the phone and find a lawyer to speak to are probably in the minority. Most people, for a variety of reasons, are very anxious about taking things further, and we can talk about why that is if you want to. Even them picking up the phone is quite a major event for them.

Once I have explained to them what the tribunal process involves, most rational people in that situation might say, "Okay, I am prepared to pursue this, but with the aim of getting a settlement". They will not want to spend a year going through the employment tribunal process, ultimately being cross-examined by barristers about whether they have been sexually harassed, spending huge sums of money, reliving the past, and not getting on with their lives. That is not a healthy thing for most people to do. The reality is that the healthy outcome for most people is to reach a settlement.

Suzanne McKie: My view about NDAs, where they are at the beginning of employment or ahead of an event, is that they should be unlawful. You should not be prevented from disclosing sexual harassment in those sorts of documents. The law, I think, is very clear: such provisions are void, whether it is in a settlement agreement or an NDA, if they prevent you from going to the police or making a public interest disclosure.

Bearing that in mind, this is the key question. Should the NDAs or the settlement agreements make it clear, in bold type: "Nothing in this agreement prevents you going to the police or regulatory bodies, or making a public interest disclosure"? I have had lawyers say to me in the last week, "What if your client, the company, does not want you to mention that? Is that a perversion of the course of justice, because we are keeping that exception out of the agreement?"

The SRA needs to give us better guidance. The CPS needs to give us better guidance on what is perverting the course of justice, because another debate is whether you can pervert the course of justice, or attempt to, if an investigation has not begun. Where a compromise agreement, NDA or settlement agreement stops you, or tries to stop you, going to the police, is that perverting the course of justice if no investigation has yet begun? From my perspective and my clients' perspective, I want it made bold in all settlement agreements: "None of the provisions in this agreement prevent you from going to the police". That has to be done.

Q167 **Chair:** You are just saying that the SRA needs to make it clearer, and I can understand why you might say that, but surely lawyers, professional people, have an ethical code. Why is that ethical code so unclear to you—not you individually, but as a profession?

Suzanne McKie: Because different people have different ethics. I am afraid to say that, in 25 years, I have seen respondent lawyers behave disgracefully towards claimants and claimant lawyers. I am not saying that they all do, by any means, or the majority, but I have seen coercion and pressure placed on people that should not happen.



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We are not just talking about compromise agreements or settlement agreements within the context of a lawyer's office. Some of the worst examples are where the lawyers or the barristers approach the claimant mid-way through a hearing, and this happens quite a lot: "Withdraw now or we will pursue you for costs". The judge is saying, "We need to get going again in half an hour". Then, there is a complete waiver of your rights.

Q168 **Chair:** In the 1990s, was there a more macho—I will not use the term that I am thinking of—culture? What do you call the "big cheese" companies?

Gareth Brahams: The magic circle.

Chair: Yes, the magic circle. Do you think that they were a bit X-swinging about their approach to these things?

Suzanne McKie: I would not necessarily say that. There were boutique law firms 20 years ago that were balanced in their approach to both claimants and respondents, so I would not necessarily say so. The problem with ethics, getting back to your original question, is that it is a subjective thing. If the SRA is going to help the profession, and I think it needs to, there needs to be greater clarity.

Gareth Brahams: Can I say, in response to that, that it is a nuanced thing? Our issue that we have as solicitors is that our obligation is to act in the best interests of clients.

Q169 **Chair:** You are officers of the court.

Gareth Brahams: Of course, that is subject to our professional obligations. If your professional obligations are not clear, your obligation is to act in the best interests of your clients until such a point as you are breaching your professional obligations. In fact, you would be breaching another professional obligation if you were not doing that. Where you get these difficult issues—Suzanne is right—you need very clear guidance as to what your position should be.

Of course, different people will take different views. I would like to think that I would have taken the view, in that case, that they had gone too far, but it is very easy to be judgmental about it. In context, your job is to act for the client, and clients often ask you to do things that you are uncomfortable with. If you are acting for an employer or an employee, you can sometimes end up defending behaviour that you personally find abhorrent, but that is your job.

Q170 **Jess Phillips:** I wanted to get Max to answer the broader question about whether you feel that NDAs stop the law. You have covered some of my other questions that I was going to ask, but I just wanted to give you the opportunity.

Max Winthrop: I broadly agree with what has been said. First, you cannot require people to contract out rights that have yet to be



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crystallised. For example, we go back to what has been alleged to have happened at the Presidents Club: people were presented with an agreement before they started their work assignment that purported to remove their rights to make complaints of sex discrimination, harassment or otherwise. That is void. That has always been void. We have provisions in the Equality Act that specifically void that type of agreement.

Where you can have an agreement that will act to compromise your rights, it is possible, and often both sides will want confidentiality with that. In principle, I do not think that there is anything wrong with confidentiality, as Gareth said. You will often find that claimants are as keen to have confidentiality in those agreements as are respondents.

Q171 **Jess Phillips:** Confidentiality is a different thing to not being able to disclose something.

Max Winthrop: I would agree, and I am not at all happy with this creep of the idea of NDAs. NDAs were commercial law terminology, where two parties at arms' length wanted to enter into a confidential discussion about merging the business or whatever. I do not see how something as broad as that is appropriate in an employer-employee relationship.

Q172 **Jess Phillips:** Suzanne has explicitly said that she wants it red-inked across the thing: "This cannot stop you from going to these authorities". Would you both agree with that?

Max Winthrop: Broadly, yes. Speaking from my own experience of advising both employers and employees, this crops up where an employer comes in with a settlement agreement and goes through those provisions with the employee. At some point, you will generally reach a provision with regards to confidentiality. When I was listening to the other speakers just now, I was trying to think of the last time that I saw something that did not include provisions that said, "This agreement is confidential to the parties, save in the case of the claimant", and then there is usually a list of people to whom you can go.

Q173 **Jess Phillips:** You are allowed to tell your husband and your family, presumably. There is no way that I would sign something that said I was not allowed to tell my husband.

Max Winthrop: 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.

Q174 **Jess Phillips:** Gareth, do you agree with this red-lining across all documents? I mean like a draft thing that goes through it.



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Gareth Brahams: I do. I generally agree with what Max says, but you certainly come across confidentiality provisions that do not make that saving. I remember having a specific argument with the other side, saying they ought to put it in. They said, "Well, you will tell them what the extent of the limitations on this provision is". I do not see any harm in saying that they have to put it in bold, and it is perfectly clear that this does not stop them from going to the police or regulatory authorities.

Q175 **Jess Phillips:** The EHRC, which you have referred to, has recommended that the Government should introduce a statutory code of practice on sexual harassment at work, setting out the circumstances in which confidentiality clauses preventing disclosure of past acts of harassment will be void. Do you support this recommendation?

Max Winthrop: I have seen the EHRC's proposals and, subject to further scrutiny, there is a lot to commend them.

Q176 **Jess Phillips:** Suzanne, do you support that?

Suzanne McKie: I support it. I would suggest that the recommendations do not go far enough to deal with the practical realities. One has to bear in mind that many, many claimants do not want to go to court. One question that the Committee might want to consider is why that is that. Is it the way in which judges handle it? Is it the speed at which cases are dealt with? Is it the cost? One could look across other jurisdictions, such as the family courts and civil courts, and take from that better processes than we have in the employment tribunals.

Q177 **Jess Phillips:** You said "in the family courts".

Suzanne McKie: The family courts, for example, have a dispute resolution hearing in advance of the trial, where the judge sits with the parties for a day or two. It is wholly without prejudice, and the judge expresses opinions on the merits, but it is not binding. It is a very, very effective process. We should have them in employment tribunals. They would speed everything up.

Q178 **Jess Phillips:** Gareth, do you support the recommendations?

Gareth Brahams: I do not know how much time there is to talk about them, because there are a lot of proposals in that, and there is a lot of nuance as to whether some of those proposals are sensible. Generally, I feel supportive of them. The one I feel most against is that the public sector should have a ban on using confidentiality provisions. There are a lot of problems with the way in which employment tribunal proceedings are handled in the public sector.

Jess Phillips: I agree.

Gareth Brahams: You will be aware that you have to get Treasury approval, if you are a public-sector body, before you can settle a claim. The upshot is that very, very few employment tribunal claims are settled,



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and the upshot of that is that it is very unattractive for most rational claimants to want to bring a claim against a public-sector body. The irony is that the effect of it will be to further reduce the number of claims against public sector authorities where people want to raise issues of sexual harassment. I feel quite strongly that the public sector should be treated the same way as the private sector in this regard.

Q179 Vicky Ford: I just wanted to mention that I really understand what you are saying. If I have a grievance with my employer, I may not want to go through a whole court process and therefore I may want to settle privately. There is some benefit to the individual from having that choice. It is more about getting the NDA clear about what I have signed away in terms of confidentiality. I am not saying that the concept of having that out-of-court process, as it were, is a bad thing to do. What we heard again and again from Ms Perkins earlier was about not knowing what the options were. It is an option that has value for many individuals. Is that clear?

Gareth Brahams: Yes, I agree with that. I also agree that it would be worth examining why the employment tribunal process is so unattractive, but some of it is inherent in litigation of any sort. You are seeking to do justice to both parties. This is probably an unpopular thing to say, but there are also people out there who are accused of harassment who have not harassed anyone. Those people are also entitled to, for example, the benefit of a non-disclosure agreement.

Q180 Tonia Antoniazzi: It has been suggested that the use of non-disclosure agreements may facilitate repeated sexual harassment by groups or serial perpetrators. High-profile examples of such an effect, it has been alleged, include the Presidents Club and the Harvey Weinstein cases. To what extent do you think that NDAs are used repeatedly to settle complaints of sexual harassment against the same perpetrator?

Gareth Brahams: The most common situation is rather like in Weinstein, where you have someone who is all-powerful within an organisation who is the perpetrator. I am afraid that I have seen that situation arise in practice.

Suzanne McKie: The other problem is that usually, at least in the City, you have tombstone references: "He worked between these dates. He did this job". The next employer, even if he is released, dismissed or resigns, does not get to know that this person is a repeat offender. Perhaps we need to look at whether there should be an obligation to refer on to a new employer, in certain circumstances, the findings of harassment.

Q181 Chair: What might an employer already be obliged to tell another employer in a reference? Presumably, it would include a criminal offence.

Suzanne McKie: Your only duty is to not mislead in the giving of references. It is a very vague area. If you say nothing at all—if you give a tombstone reference and do not refer to him as a "man of integrity",



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but say nothing—are you misleading by not mentioning serious sexual harassment? That is where the law needs clarity.

Gareth Brahams: To be fair, there are changes to that, because of the senior managers regime. In financial services, there are now rules saying that you have to comment on whether you have concerns about someone's fitness and propriety.

Q182 **Chair:** But that is only in financial services.

Gareth Brahams: You are correct: it is limited to financial services and insurance at the moment. There are probably other regulated sectors that I am not qualified to comment on. Teaching and suchlike, I think, are also covered.

Chair: That is an interesting point.

Q183 **Tonia Antoniazzi:** What potential is there to use clauses in NDAs to limit the potential for covering up this repeat offending: for example, by requiring them to keep records of harassment cases—and I know that you have alluded to this—to prevent future settlements in relation to the same harasser?

Suzanne McKie: There should be an obligation on the employer to keep that data, and that should be taken into account when you are looking at a second, third or fourth offence. You also have to look generally at the HR function in all this, which is not always very good.

Jess Phillips: You do not need to tell us here.

Max Winthrop: Turning that round slightly, if you are looking at harassment other than by the controlling entity behind a body, an employer will have a defence to the actions of an employee harassing another employee if they can show that reasonable steps were taken to prevent harassment in the workplace. Trying to run that defence if, for example, the employee in question was a serial harasser would be frankly impossible.

There may be more, though, to look at. That is a slightly negative approach, saying, "You have a defence if you have taken certain steps". There could be more with regards to positive duties within the workplace, to look at the type of conduct, and to ensure that practices and procedures are in place as a positive, rather than just as a fall-back position.

Gareth Brahams: That is the EHRC proposal. You would have thought the current level of protection would be attractive to employers, and encourage them to take all reasonable steps to prevent harassment, or indeed other forms of discrimination, taking place. I have to tell you that, in the many years I have been fighting discrimination cases, I have very rarely seen that defence advanced, because presumably, when employers look at it, they have not taken sufficient steps to prevent that



kind of discrimination. I am curious as to whether your experience is different, Max.

Max Winthrop: I have run that defence on one occasion, which was successful.

Gareth Brahams: Yes, I have run it once.

Suzanne McKie: But that is the defence to vicarious liability. We are talking about a positive duty that gives rise to a civil remedy, that you take reasonable steps to prevent it, not dissimilar to reasonable adjustments in disability discrimination cases. That should give rise to a separate remedy under the Equality Act. I agree with that recommendation.

Q184 **Tonia Antoniazzi:** In the Presidents Club case, hostesses were allegedly asked to sign non-disclosure agreements preventing them from disclosing events that had not yet occurred. The EHRC has recommended that the Government should legislate to nullify any contractual clause preventing disclosure of future acts of discrimination, harassment or victimisation. Do you support this recommendation?

Gareth Brahams: It is clearly right that people should not be prevented from doing so by signing contracts in advance, but I am not sure that they are effective already. The more interesting thing would be to make it a criminal offence to ask people to sign these agreements that are not valid.

For example, it would be good to make it a criminal offence to not include in a non-disclosure agreement, if you are going to have confidentiality clauses, "This does not stop you referring the matter to the police or the relevant regulatory authority". If you do not include it, unless someone has good legal advice—and I am afraid that, in a settlement agreement, you will always get some legal advice, but it does not necessarily follow that it will be good legal advice—the employee's natural view is to read the wording on the paper and say, "Well, that says that I cannot tell anyone".

Suzanne McKie: If we clarified the law on perverting the course of justice to make it clear that it would include that kind of provision—that it would be perverting the course of justice to do it—I do not think we would need a new part of criminal legislation. We just need clarity on that.

Max Winthrop: Certainly, as far as civil claims are concerned, my view is that the Equality Act already deals with that particular problem. You cannot contract out of your rights before you have them, whether that is the right to be protected from unfair dismissal or the right not to be discriminated against. Just think about it from a common-sense point of view: you have been given a document to say, "You are going to go into



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an event where you may be harassed sexually, but, by the way, sign this to allow yourself to be harassed". It is quite extraordinary.

One of the distressing things about the Presidents Club case was the fact that those agreements were shoved under people's noses, as I understand it. They were asked to sign, and then the document was taken away. From other angle, one of the problems with that type of scenario is: who is doing the harassing? As you are probably aware, section 40 of the Equality Act was repealed. That covered, perhaps imperfectly, third-party harassment. While there are some arguments to say that the law, as we have it, could also cover that situation, section 40 sent a nice, clear message to employers to engage their brains before they put their employees in these situations.

Q185 **Chair:** I would gently point out that, when that was in place, there were still problems with third-party harassment. It may have helped, but it was not that effective, perhaps.

Suzanne McKie: We cannot just rely on the Equality Act, because not everyone falls within the definition of worker, employee or applicant for work.

Chair: Sorry, we are desperately running out of time.

Q186 **Mr Shuker:** Briefly, because we are coming to end, can I just check a couple of bits? Suzanne, you made a strong case for boxing out rights that cannot be abridged by the agreement. If I understood, implicit in that is a level playing field for different lawyers who are drawing up these contracts, so that everyone knows what is expected of them.

Suzanne McKie: It is to cover off the one-year/two-year PQE. I understand that experience is not always linear, but it is to cover off the lawyer who does not actually know that a clause that prevents you is void, and it is so that the claimant understands exactly what they are signing up to. There are other problems, though, where there are claw-back provisions: "You are allowed to go to the police, but we will take the £200,000 back off you if you do". That is more problematic, and those sorts of provisions probably need further consideration.

Q187 **Mr Shuker:** Let me just run through a few things, because essentially that is asking, by whichever route you get there, for more regulation that specifies what is acceptable and what is not. Is it ever acceptable for a party to an NDA to not receive a copy of the agreement?

Suzanne McKie: That is totally wrong. It would never be right.

Mr Shuker: How could you check to see if you were compliant?

Gareth Brahams: I have never experienced it in all my 35 years of practice.

Q188 **Mr Shuker:** What about the lifelong commitments within an NDA? Can you think of circumstances in which those are important?



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Gareth Brahams: You can understand how they might be justifiable: for example, if someone had made a false accusation of rape, and someone wanted that silenced. I did a case once where a junior employee accused a senior employee of sexual harassment, and when you looked at the videotape, which they did not realise was occurring, it was completely the reverse way around. That senior employee was entitled to protection indefinitely, I would suggest. These things are not capable of simple solutions, I am afraid.

Q189 **Mr Shuker:** Finally, are there any other circumstances in which there should be limitations on NDAs being used that I have not mentioned there?

Suzanne McKie: It is a related point, but one of my concerns is that COT3 agreements, which can include NDAs and which go through ACAS, do not require a lawyer to sign them off on behalf of claimants. That seriously needs to be looked at.

Q190 **Mr Shuker:** Can you think of any particular way in which that gap between those two types of agreements might be closed?

Suzanne McKie: Simply to say that you can draw up the COT3, but it requires a lawyer to sign it off. Why are employers not providing more money as part of these settlement agreements? If they want them signed off by the former employee, they can pay for it, and not just £250. Maybe there should be a minimum amount, so that the person can take legal advice.

Q191 **Chair:** Can I just ask a couple of very final questions? Then we will need to close. Gareth, what is the Employment Lawyers Association doing to raise awareness and improve practices by lawyers on the limitations of NDAs, particularly in light of the SRA's warning notice?

Gareth Brahams: The warning notice was pretty recent, to be fair. It seems to me that the focus of the warning notice was on how solicitors manage their own practices, rather than how they deal with these kinds of issues, although I agree that there is something of a side-show in that regard. I will raise this at the next management committee meeting, and we will try to deal with it through that method. Frankly, people can write articles in the ELA briefing, which is like our newspaper, and people can give speeches about it, but that is the extent of it until the law changes.

Q192 **Chair:** Can the law regulate ethical standards?

Gareth Brahams: The Employment Lawyers Association does not regulate its membership, other than by virtue of the fact that everyone within it has to be a lawyer. If someone has breached the Solicitors Regulatory Standards, then they may be struck off or disciplined by the SRA. If they are, they will no longer be able to be a member of the ELA. We coalesce with that.

Q193 **Philip Davies:** Can I just make one point? You might say that, being an



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MP, I am leading with my chin here, but what does it say about the legal profession that you are all very clear on the Solicitors Regulation Authority's principle about acting in the best interests of each client, but you all seem so vague and have no idea what on earth is meant by upholding the rule of law and the proper administration of justice, acting with integrity, and behaving in a way that maintains the trust the public place in you and in the provision of legal services? Is it a reflection of the legal profession that one of those is very clear to you, and you seem to have no idea what any one of the other three means?

Suzanne McKie: I disagree. I have been very clear about my views.

Gareth Brahams: What I was trying to say is that there are sometimes boundary disputes. Before you are not acting in the best interests of your client, you have to be equally sure that you are obliged that you cannot do that.

For example, sometimes you are obliged to disclose a document that might be harmful to the client. If you take the view that you have to disclose that document, you are clearly not acting in your client's best interests, but you have to do it, and I have been in that situation many times. I can assure you that I, and most of the solicitors I have ever known, have exercised the highest level of integrity—not everyone, but most. If I was wrong about that, and I did not have to disclose that document, I have also breached a regulatory obligation.

These are quite fine judgments. In fairness to Mark Mansell, I will say a couple of things. I can be corrected if I am wrong. Back in the 1990s, while I accept the general principles, it used to be that the SRA rules, or the equivalent, the Law Society rules, were very prescriptive. You used to have a very long book with lots of very detailed rules about how you were supposed to behave in lots of different situations. Over time, they have been slimmed down to being about high-level principle. There were always some high-level principles; I cannot remember what they were back in the 1990s, at the time.

I hope that answers your question to some degree. It is not as straightforward as it sounds. I know what you want me to say, which is that we are keener to protect our clients' interests than we are to uphold integrity and the law. That is not my experience of lawyers generally, and certainly not my personal practice.

Q194 **Chair:** Suzanne, although I did not write it down, you said that people's approaches to ethical standards are different, so you acknowledged that there might be a different approach here. I would hope that people's approaches would not be that different. What do you think drives those differences?

Suzanne McKie: I have been doing this job for nearly 30 years. I can see that people's approach to me has changed in that time. Attempts to coerce me into an unfair bargain have radically reduced in that time, but



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my memory—and I see it with junior lawyers now—is that, if you are up against the big guns, they will do what they can to exert influence over you. Whether that is undue influence is a moot point, but we cannot work on the basis that every lawyer is perfect, has the right experience and will do the right thing.

Gareth Brahams: Employers' lawyers will often see their role as to make the employee feel corporate power, and feel the weight and might of people against them. One hopes that, with legal representation, they can resist that. I have had Mark Mansell on the other side of a negotiation. I can tell you that he is certainly no worse than others, and probably better, in that regard. He may be unlucky; I do not know.

Chair: Thank you all so much for being here today. We are really grateful to you for your time, and for the evidence that has been given to the Committee in writing. If there is anything else that you wanted to give to the Committee, based on your extensive expertise, we would be very grateful for it. Thank you very much.