

Women and Equalities Committee

Oral evidence: [Sexual harassment in the workplace](#),
HC 725

Wednesday 25 April 2018

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[Watch the meeting](#)

Members present: Maria Miller (Chair); Tonia Antoniazzi; Angela Crawley; Philip Davies; Eddie Hughes; Jess Phillips.

Questions 195–274

Witnesses

[I](#): Paul Philip, Chief Executive, Solicitors Regulation Authority; Andrew Taggart, Partner for Employment, Pensions and Incentives, Herbert Smith Freehills LLP; Francesca West, Chief Executive, Public Concern at Work.

[II](#): Susan Clews, Chief Operations Manager, Acas; Diana Holland, Assistant General Secretary for Transport, Equalities, Food and Agriculture, Unite; Marion Scovell, Head of Legal, Prospect.

Written evidence from witnesses:

- [Solicitors Regulation Authority](#)
- [Unite the Union](#)
- [Acas](#)

Examination of witnesses

Witnesses: Paul Philip, Andrew Taggart and Francesca West.

Q195 **Chair:** Can I welcome our witnesses, people who are joining us in the Gallery and anybody who is watching online as well? This is the second evidence session in our inquiry into sexual harassment in the workplace. Today we are following up issues that were raised in our first session on 28 March, when we considered the use of non-disclosure agreements in settlements reached by employees and employers, and what problems they pose in cases where sexual harassment has been alleged. We are going to continue to examine those issues today and go on to look at specific issues around whistleblowing, the role played by trade unions and Acas in concluding settlements as well, because we have two panels of witnesses today.

Before we begin the questioning, I would like to declare that my husband, Iain Miller, is a partner at Kingsley Napley, which is a law firm, and is an expert in legal services regulation and has, in the past, acted for the SRA, although I understand he has not acted for them in the last year or so. It is the usual starting here: I would love you to just introduce yourselves and the organisation that you come from.

Francesca West: Hello, I am Francesca West from Public Concern at Work.

Andrew Taggart: I am Andrew Taggart from Herbert Smith Freehills, a law firm in the City and around the world.

Paul Philip: Good morning. I am Paul Philip; I am the chief executive of the Solicitors Regulation Authority.

Q196 **Eddie Hughes:** Do you have any concerns that NDAs are routinely used to cover up sexual harassment, wrongdoing and criminality in the workplace or more generally?

Paul Philip: If I can kick off, the answer to that must be yes, because there is anecdotal evidence, if not hard evidence, that sexual harassment in the workplace is quite widespread. If you look at reports to us as a regulator in relation to issues in relation to sexual harassment or sexual assault, actually they are very few and far between. Our statistics show that, since the end of 2011, we have had something in the order of 45 cases that have been referred to us in relation to sexual harassment. I suspect that, in any sector of this size—we have 184,000 practising solicitors and 10,500 law firms or thereabouts—that it is probably more prevalent than that. Therefore, one has to ask oneself why there is not further reporting. I suspect, although I have no evidence, that it must be because those matters are being settled in other ways.

Andrew Taggart: Those agreements tend to be used relatively regularly for settlement purposes. It is very unusual to find a settlement agreement that does not have some kind of confidentiality or non-



HOUSE OF COMMONS

disclosure within it. I do not have first-hand experience of them being used to cover up criminal wrongdoing, for example. My experience of acting with financial services companies is that there will be specific regulatory notification obligations, so if some wrongdoing has happened, often they will have to make a notification anyway, so there is an expectation that, although they may not want the individual—

Chair: The Victorians were not good at acoustics. Could I ask everybody to speak slightly louder than feels comfortable?

Andrew Taggart: Looking at the financial services sector, for example, where there are a lot of these non-disclosure and confidentiality agreements, the expectation on the employer is that there would have to be some kind of notification anyway from a regulatory perspective. I do not think they are used to cover up wrongdoing; they are designed to try to control the communication of information that perhaps the employer does not want to disclose itself, rather than have an individual disclose it.

Francesca West: We run an advice line for UK workers. That is designed to assist people who have witnessed some wrongdoing in the workplace and are looking to raise that concern. Sexual harassment is on the periphery of the issues that we would advise on and we would normally do it from a witness perspective anyway. What we hear on the advice line is from those individuals who feel able to talk about these agreements, which is obviously a small number of individuals anyway. The very nature of these agreements stops people discussing it with anybody.

What I would describe as a classic situation that we would see on the advice line is someone calling, telling us that they cannot tell us what has been happening because of the settlement agreement. We will ask them to forward that agreement so we can take a look at it. What we would normally see is quite a heavy-handed confidentiality clause on one page and then, maybe a few pages later, a reference to part IVA of the Employment Rights Act and that “nothing in this agreement shall affect your rights under that Act”. To most individuals that wording is totally opaque, but it is referring to the whistleblowing provisions and the anti-gagging section as well. A lawyer may feel that they have covered their obligation to flag that, but an individual, particularly a litigant in person, who is looking at these two competing statements is quite understandably totally confused as to whether or not they can go on to make a disclosure. That is something that we see regularly, but is not the dominant reason why people call us.

Q197 **Eddie Hughes:** What do you think of the suggestion that they should be banned or restricted with regard to sexual harassment?

Francesca West: I would view 43J of the Public Interest Disclosure Act, which says that anything that purports to prevent someone from making what would be a protected disclosure is void, as applying to a great number of sexual harassment cases, whether you looked at it from a breach of the legal obligation part of the whistleblowing legislation or as



an out-and-out criminal act because the sexual harassment had reached that particular level. The problem is that if you have an individual who has been subjected to sexual harassment, they are not looking in the Public Interest Disclosure Act to try to understand what their rights are moving forward, in terms of what they can disclose. It is the myriad laws and the lack of potential read-across between the two pieces of legislation that is unhelpful for the vast majority of individuals.

Andrew Taggart: I would agree with that. Although we primarily act for employers, we do act for individuals on a pro bono basis. There is a lack of understanding on the part of the individual as to what the real effect of the non-disclosure or confidentiality provision is. As Francesca rightly says, most of them have never heard of the legislation. It is not spelled out sufficiently clearly in the documentation, so that they would know that it does not prevent them from going to a regulatory authority or indeed taking legal advice, as many of them may think. I have had experience on phone lines acting for charities where the individual says, "I don't know if I can even speak to you about this matter. I have signed up to a confidentiality agreement."

We wondered whether there is a way of communicating more clearly, perhaps through Government websites, charity websites or Acas websites, to explain what the effect of non-disclosure and confidentiality agreements really is and that there are real limitations to them. That might have an impact on the knowledge of individuals. They can, in fact, call up a charity to ask advice. I suspect there are many individuals who think, "I can't speak to anyone about this. This is what it says. I can speak to my partner about it, but that's it."

Q198 **Eddie Hughes:** Why not just do away with that ambiguity altogether and prevent their use for sexual harassment cases then? Do you think, if we did that, it would affect the number of sexual harassment cases that are reported?

Francesca West: There is an ability to put the wording in 42J in much more positive language. At the moment, it talks about voiding a clause. It could be an out-and-out, "You should not prevent someone from making a protected disclosure." There is definitely room to improve that, but it is essentially there in the legislation and it is about promotion of that. The reality of what we see for individuals, in any event, is that it is such a hard-won thing to get to that settlement phase. To then be in a position to say, "Right, I'm going to go on to disclose." very few lawyers, cautious in the nature of their advice, are going to say, "Go on, make that disclosure. You are going to be fine. You are not going to lose your settlement money." No lawyer is really going to do that.

What we have on the advice line is saying, "Look, there is this bit of legislation. We think it is sound. If you go on and make a disclosure, and your employer attempts to claw back that money through an action in restitution or whatever it is that they may threaten, we will support you and do what we can to find some legal support for you." I have had really



senior individuals have a complete breakdown in relief that someone is going to back them up and say, "Go on, do it." The reality is that it is untested at the moment. That lack of case law and a lack of precedents to point to creates a massive uncertainty for individuals.

Andrew Taggart: There is still a place for non-disclosure and confidentiality provisions, and often it is the individuals as well as the employers who want to draw a line in the sand. They want the certainty and the confidentiality on a mutual basis. They have had to go through a miserable experience with their employer. They are agreeing to enter into a settlement agreement and they want that to be the end of it.

What we are driving at is that individuals may think, "Actually, if a criminal offence has been committed," for example, "then I should still be free to make that point." Otherwise, most individuals will enter into settlement agreements saying, "I don't want to take this to court. I do not want the publicity. I want to move on." It is a bit like the right to be forgotten. I will enter into the agreement, take my money and that is the end of it. That certainty and confidence that that pretty much is going to be the end of it is a real advantage. If you took that away, you might end up with more cases going to court or you might get individuals who think, "I do not want to go to court. This has been so traumatic for me already that I do not then have a remedy." There is a place for those sorts of provisions, but the effect of them needs to be properly communicated.

Q199 **Chair:** There is a slight conundrum for you, Paul, is there not? You potentially have individuals who may not want to take forward allegations of sexual misconduct or other forms of misconduct because of the impact on them, but you as a professional regulator might want to know about it because of the character of the individuals. How do you square that circle?

Paul Philip: While I agree with Andrew on the previous question, more could be done to make less opaque the types of things that are allowed to be disclosed within these arrangements. I agree with Francesca in relation to that. The lawyer's lot in this particular scenario is quite tricky. Obviously they have obligations to the client and obligations of confidentiality, but they also have obligations to act independently as officers of the court and to uphold the rule of law and the administration of justice.

As I said earlier, I would agree with Andrew that NDAs or compromise agreements are useful tools. We just need to be clear about what they cannot cover. That is why we issued the warning notice to the profession in the first half of March. Although there is nothing new in that warning notice at all, we wanted to make clear that there are certain things that we would expect lawyers not to put into confidentiality agreements or NDAs. Those particularly cover any ban on reporting criminal offences or any ban on reporting any unprofessional conduct by a solicitor to the regulator or indeed to the Legal Ombudsman. Although there is nothing new, we think it was really important.



HOUSE OF COMMONS

It is part of how we do business, so we see a theme in the market, such as investment fraud. We issued a warning notice to the profession and to the public about what was going on there and what they should be aware of. We reiterated professional obligations. We saw a theme in relation to inappropriate holiday sickness claims; we did the same thing. Here, probably because of the Weinstein issue and the Me Too campaign, we see an increased, heightening awareness of sexual inappropriateness in the workplace generally. We just responded to that by reminding you of the types of things that we would not expect to see in a non-disclosure agreement. Going back to Francesca's point, if it was made clearer, then the lawyer might turn their mind to that, at that point in time. Yes, you are right: we have a position whereby we expect solicitors to act independently and to consider their obligations to the rule, first and foremost, above their obligations to the client.

Q200 Chair: Just before we move on to Jess, I want to ask Francesca one question. This inquiry is entirely about sexual harassment, though the Committee has done an inquiry on maternity discrimination. Given that I have you in front of me, I cannot resist asking the question. In your experience with calls to your helpline, have you also come across concerns about non-disclosure agreements being used to conceal maternity discrimination cases, because that possibly appeared to be a problem when we looked at this a couple of years ago?

Francesca West: If it was an individual being concerned about whether they had experienced maternity discrimination, it is likely we would see that as a private employment case and we would refer them to the appropriate employment services for advice around that point. We normally advise individuals who are witnesses or who are trying to raise it because it is a risk to others. For example, if it was a person in HR who was saying, "We are deliberately doing things that are making pregnant women redundant," that would be the kind of case in which we would step in and advise, where we can say there is an impact on more than one person. We then see scope for us. I could not out-and-out say that we have not had a case about that, but we have about 2,500 cases a year and it is not something we specifically capture as a category.

Andrew Taggart: I think there is a fair amount of that. One of the charities that I mentioned earlier is Working Families. I am sure a high proportion of calls that it receives are from individuals who are suffering discrimination by reason of pregnancy or maternity. Indeed, we are doing a case on that at this very moment, where an individual has been discriminated against, so we are taking it on for the charity. One can hardly believe one's eyes that employers behave in that way in the 21st century. There is a real issue, in that sense.

Q201 Chair: They are potentially using non-disclosure agreements.

Andrew Taggart: They are using non-disclosure agreements to try to conceal the fact that that is going on.



HOUSE OF COMMONS

Q202 **Jess Phillips:** You have all quite clearly said there potentially needs to be more clarity or that, since March, you have needed to reassert the clarity in the law around whistleblowing and protected disclosure. What aspects of those laws should specifically be clarified and how?

Paul Philip: I am no expert in employment law, unfortunately. Andrew is probably sitting in the hot seat, but we have already touched on one, which is to make much clearer the types of disclosures that would not be prohibited by an NDA. That might be something that could be considered.

Q203 **Jess Phillips:** From your perspective at the SRA, what would you do if you found that people were not doing that?

Paul Philip: If we found that there was an NDA that attempted to prohibit a protected disclosure or particularly prohibit the reporting of a crime, it would be professional misconduct.

Q204 **Jess Phillips:** Is that just the reporting of a crime or is it seeking medical help or other issues?

Paul Philip: Sorry, I do not understand your question.

Q205 **Jess Phillips:** If your non-disclosure said that you would have to seek permission to go to a counsellor or seek specific medical help, would that be considered wrong?

Paul Philip: We would need to look at the specific instance. We would have to look at the non-disclosure agreement and see how reasonable it was in the circumstances. This is trying to protect the rights of both parties. If it was reasonable that the individual sought medical help and it was an attempt to prohibit that, we would certainly consider that to be unusual.

Q206 **Jess Phillips:** Is there a situation in which you think it is not reasonable for a person to seek medical help?

Paul Philip: No.

Q207 **Chair:** Just probing that a little more, how would you find out that a non-disclosure agreement was potentially being used inappropriately? We had an excellent submission from Richard Moorhead, who I believe is an expert in these areas, who said that the impact of these sorts of non-disclosure agreements is "likely to inhibit disclosure completely". People are under the impression—and certainly that is the evidence we had had to our Committee—that in talking about things that are covered by a non-disclosure agreement, they even believe that they might end up in prison. How are you as a regulator going to know that this sort of activity is going on?

Paul Philip: That is the problem. As a regulator, we can do stuff before the event—for instance, a warning notice reiterating the obligations of lawyers. That is essentially saying what we expect of a professional solicitor. If we were to see that, we would treat it as a breach of our code of conduct and as actionable. The problem would be when it would ever



HOUSE OF COMMONS

be brought to attention, unless we go back to the point about the individual in question breaching a potential contract and therefore raising it with us. In many ways, the NDAs are there to make sure that people abide by them. Therefore, if you look at our caseload from the last seven or eight years, we can only find three cases in relation to potential NDAs that might not be appropriate.

Q208 Jess Phillips: If I was to put out a call to action—if I was to say on Twitter now, “I want everyone who has ever signed an NDA to come forward and tell me if they felt that it was clear”—would the Solicitors Regulatory Authority take action against everybody, if they found to be in breach of the guidance that you reissued in March?

Paul Philip: We would investigate each and every one of those.

Q209 Jess Phillips: I am not going to do that, don’t worry, although maybe I just did. We will see. Andrew and Francesca, are there specific clarities in the law that you would wish to see?

Andrew Taggart: Paul makes a good point, specifically on trying to ensure that there is an agreed form of words. Regulators, the Law Society or the Solicitors Regulation Authority might say what form of words they would expect to see in a settlement agreement, that explains what the effect of a non-disclosure clause is. Going to Francesca’s very good point, it should not be at the other end of the agreement, hidden away in the smallest typeface possible.

In fact, we could take a lead from financial services regulation. This sort of concealment or maybe even unintended concealment is a very hot topic on both sides of the Atlantic. There is a case from 2015 where the Securities and Exchange Commission imposed a substantial fine on an employer for a confidentiality restriction that could have had the effect of limiting an individual’s ability to go to regulatory authorities to report wrongdoing. Maybe that is the sort of action that would have a public impact, so people would realise the effect of putting these sorts of things in an agreement: that they could be subject to regulatory sanction and fining.

Francesca West: Just building on the point, I think the anti-gagging provisions in the Public Interest Disclosure Act could be clearer. They could be more positive in terms of how they are framed. They are about preventing, as mentioned. The new Financial Conduct Authority rules on whistleblowing specifically prohibit anything in a settlement agreement around anti-gagging as well, and they go into some detail on that.

Now, we all know the kind of ripple effect it would have if the regulator was to find out that someone was routinely using them in the wrong way and decided to take regulatory action about that, and that then led to fines, investigations and so on. That approach could certainly be emulated by a number of other regulators. That would be quite effective, but my anxiety with that would be that, at the moment, the Public



HOUSE OF COMMONS

Interest Disclosure Act sits as a cross-sector, cross-issue piece of legislation. The piecemeal development of it in different sectors carries with it a degree of risk and even more uncertainty for individuals who may not always work in one particular regulated sector. That harks back to the point that there is no central provision that says how this must be carried out. There is no one place where regulators are given guidance and requirements around what they must do in relation to whistleblowing provisions, such as the FCA has recently put into place. That is a real gap in terms of making sure there is harmonisation and consistency in the UK when it comes to a really important topic.

In terms of whether the law could be improved in a wider sense, the read-across from the sexual harassment piece into the Public Interest Disclosure Act has an issue with the fact that the discrimination law has a wider reach than just your immediate employment. It applies to many other different spheres. If a public body has discriminated against you for these reason, that is something that you can also pursue. That does not apply in the whistleblowing legislation and it is a major gap. If you are relying on the anti-gagging provisions in PIDA and you are falling outside the employment scope in the other piece, you may have a problem. The reality is that PIDA needs its own review to make sure that you can take an action against the actual discriminator and not just against your employer. A lot of recent case law has highlighted a problem with that.

Q210 Jess Phillips: Do you think that there should be a prescribed list, in cases of sexual harassment, of people the witness is safely protected when talking to, so that it clearly says in any agreement that you can talk to the doctor or to the police? It is not about who you cannot talk to, but who you can talk to.

Francesca West: I would feel very anxious if I saw a settlement agreement that precluded someone from seeking the very important welfare support that they would need moving forward.

Jess Phillips: We all feel anxious about it.

Francesca West: That would be quite frightening for that individual. It would be extremely helpful if the Equality and Human Rights Commission was one of the prescribed persons under the legislation.

Q211 Jess Phillips: We have covered most of my questions. Given that solicitors, barristers and other advisers are subject to different guidance and regulation, what is the risk of the different regulatory approaches? You have said that you fall between the cracks.

Francesca West: At the moment, the financial services regulator, the Financial Conduct Authority, has something very specific on that. In terms of the different profession regulators, I would imagine this issue does not touch on them in the same way.

Andrew Taggart: It is probably also worth bearing in mind that it is not always solicitors who are advising on these agreements for the employer,



HOUSE OF COMMONS

although a settlement agreement, in order to be binding to waive statutory employer rights, will need to have the individual advised by an independent legal adviser. Lots of these agreements, perhaps a very significant proportion of them, are drafted for the company by someone who is not a lawyer; it might be an employee relations or human resources consultant, either internal or external. There is not necessarily a regulatory body that can impose sanctions on them.

Again, it is going into how you are communicating as broadly as possible what the effect of the agreement is and having a specified body. The Equality and Human Rights Commission is a good one and perhaps there are also some of the whistleblower charities, Public Concern at Work and others, that could be prescribed bodies. There is nothing in this agreement that prevents you from taking advice either from them or other professional advice. That would go to the point on medical benefits and related advice.

Q212 Philip Davies: Mr Philip, you recently sent out a warning notice on the use of non-disclosure agreements, which I have in front of me here. To what extent is this guidance new?

Paul Philip: As we say at the end of the third bullet point of the first paragraph, the warning notice provides a reminder. There is nothing new in this warning notice. We are highlighting to the profession their professional responsibilities in this area.

Philip Davies: There is nothing new here.

Paul Philip: There is nothing new here.

Q213 Philip Davies: Why did you feel it was necessary, then, to remind solicitors of their ethical responsibilities in this area, given that there is nothing new in it?

Paul Philip: As I said earlier, we regularly issue warning notices to the profession. We issue them in a variety of different areas where we see an emerging theme of risk to the public interest. We issued one not so long ago in relation to investment fraud, because there was a theme emerging in relation to a risk to the public vis-à-vis investment fraud. We issued one recently in relation to holiday sickness claims, because there was a real issue in terms of solicitors becoming embroiled in what, on the face of it, looked like unmeritorious claims. We issued one in relation to this mainly because of its increased profile over the last few months. In all of those, it is arguable that there is no new law or indeed no new professional obligation. We are highlighting to the profession that they need to be cognisant of the issues in a particular context.

Q214 Philip Davies: There is nothing new. You issued it because you are aware that there was an issue. In how many cases have you taken enforcement action regarding the inappropriate, unlawful or unethical use of non-disclosure agreements, in the last three years, say?



Paul Philip: As I mentioned earlier, we can only find three open cases on non-disclosure agreements. There have been a number, although like colleagues we have problems with our information systems. If you go back to 2016, we disciplined a solicitor in front of the Solicitors Disciplinary Tribunal for a compromise agreement that sought to stop reporting of particular behaviour to the regulator. Not very much.

Q215 **Philip Davies:** The bit I am confused about, if I am perfectly frank, is that in your answer to Jess earlier, when she particularly asked about a non-disclosure agreement including provisions not to report matters to the police, you said that that would be quite clearly an issue of professional misconduct, which would seem to be clear-cut. Yet last week or whenever our last evidence session was—and I presume you have read the transcript of the evidence session regarding Zelda Perkins and Allen & Overy—we published the non-disclosure agreement. It is there for everybody to see. That agreement quite clearly stated in it—there is nothing hidden in there—about people not referring matters to the police and not, as Jess said, referring people for medical assessment and not being given a copy of the transcript. All of those things are in your guidance and your warning notice. It is all in there; you have said that those things are completely unacceptable. That was there for you to see.

We asked the solicitors' firm concerned whether that was referred to the SRA and they said it was. They also said, as a result of that, the SRA had decided not to take any action and had closed the matter. How on earth can you sit before us today, saying all these warm words, when you have, right in front of your nose, the clearest example of the things that breach your warning notice? You have said yourself, in front of the Committee, that this is professional conduct and yet, outside of this room, you see a big law firm and do not decide to take any action about them. How can you sit there and look us in the eye about this particular issue, when you have singlehandedly done nothing about a case that is right in front of your nose?

Chair: Philip, before Paul answers, I would like to ask him if he is aware of a letter that we were sent—which we decided as a Committee not to publish, because we were told it was strictly private and confidential—from Mr Mansell to us, when we asked him that question. We asked Allen & Overy if they should self-refer the case, and we were told that the compliance officer had “met with the SRA in order to discuss in detail the issues that you mention in your letter”—that is the letter from the Committee—“Following that meeting, the SRA communicated that they did not intend to take any further action. They did not provide any more information”. We contacted the SRA yesterday and we had slightly contradictory information coming back from your organisation. I just wanted to make you aware of that before you answer the question. The slightly contradictory information was that there may be an open case. We are therefore quite concerned that Allen & Overy is unaware of this; I would hate to think that they have misled the Committee.



Paul Philip: I doubt they have misled the Committee. It is fair to say that we have a number of ongoing informal discussions with firms before we decide to open a formal investigation. The answer to the question is that we have an open investigation in relation to this matter. We have exercised our statutory powers to seek the relevant documentation from the firm, and it is ongoing. If we find that any lawyers in the firm have seriously breached our guidance, we will take action against them.

Q216 **Philip Davies:** What is the “if”? Which bit of the non-disclosure agreement is it? It is pretty obvious for everyone to read; it is all there in front of you. With which bit of it is there any doubt about whether it breaches your guidance or not?

Paul Philip: I can see that. I have an open investigation in relation to a firm and I think the due process should be followed. It is not appropriate for me to continue discussing an open investigation I have in relation to an English law firm.

Q217 **Philip Davies:** How long will this investigation take to conclude?

Paul Philip: It will take a matter of weeks, perhaps months. These matters take time. They take time because they deal with legalities. They take time because the information that it relates to is 20 years old. If we find that there has been inappropriate behaviour by a solicitor of a law firm, we will take action; that is why we have an open investigation.

Q218 **Chair:** Paul, I can understand and totally respect the need to complete an investigation before you might want to answer some of Philip’s questions, but I remain somewhat puzzled that we have had a letter that very clearly states that “the SRA communicated they did not intend to take any further action”. We are not aware of when that conversation happened, but presumably it must have happened sometime between now and last November. I would hate to think that the SRA was only now deciding to take action because there had been further light shed on the case as a result of the work of this Committee.

Paul Philip: As I understand it—and I have to clarify I am not heavily involved in this particular case—we spoke to the firm on 28 November last year. We spoke to the compliance officer. They very usefully gave us all sorts of information about the types of procedures you would expect to be in place in relation to this type of thing in a large law firm today, but this matter happened 20 years ago. We decided at that point in time that we would wait to see what further information came to light. Further information subsequently came to light and we opened up a case.

Q219 **Chair:** When you had that meeting on 28 November, were you given a copy of the non-disclosure agreement on which you could base that assessment?

Paul Philip: I do not believe we were, no.

Q220 **Chair:** How could you come to that conclusion?



HOUSE OF COMMONS

Paul Philip: We have asked for it now. I am not too sure we asked for it on 28 November and I am more than happy to update the Committee on the specifics of this, but I do not have them at my fingertips right now.

Q221 **Philip Davies:** Is there any reason why you would not have asked for it?

Paul Philip: I suspect at the time the issue was whether or not taking action against the law firm was proportionate, given the age and given the seriousness of the concerns. I think, at that point in time, we should have asked for it; I agree with you.

Q222 **Philip Davies:** You have just said that there is nothing new in this guidance, so surely the age should not be relevant. Should it? You are the one who said there is nothing new in the guidance that has been put out. It is not as if you are applying something retrospectively.

Paul Philip: That is correct. We should have received the non-disclosure agreement and we are seeking various pieces of information from the firm. Once the firm has had an opportunity to make its representations to us, we will make a decision.

Q223 **Philip Davies:** It leaves a taste in the mouth that the SRA's relationship with solicitors is like some sort of cosy old boys' network kind of thing, where you are scratching each other's backs and not really taking anything seriously. Are you not rather embarrassed about this?

Paul Philip: The fact is that we receive 12,000 complaints about solicitors every single year. We take action in relation to about 1,000 of those and about 200 to 300 of those are prosecuted in front of the Solicitors Disciplinary Tribunal. I doubt, if you were to ask the average solicitor if they felt that the SRA was a cosy organisation that acted in their interest, they would.

Q224 **Philip Davies:** Maybe it is just a cosy organisation for big solicitors' firms. If I was to ask the average solicitor, maybe they would not say that. Maybe if I was to ask the big solicitors' firms, they would think it was a bit more of a cosy old boys' club.

Paul Philip: Indeed, and if you were to so do, you would find that we have taken a number of significant pieces of action against large solicitor firms in the past three years.

Q225 **Philip Davies:** Will you give us an update on the progress of this particular case, the outcome of it and an explanation of the reasons for the outcome of it?

Paul Philip: We will update the Committee on the progress once the matter is concluded, absolutely.

Q226 **Philip Davies:** Do you fear that sometimes lawyers seem to have a great deal of knowledge about acting in the best interests of their clients, but not often about how to act ethically?



Paul Philip: If there is an issue—and Andrew and I were discussing this outside—lawyers are very clear about acting in the best interests of their client. At times, I personally think they need to be clearer about their obligations to the court and to the rule of law. This is a case in point. The bottom line is, where there has been a crime committed, a sexual offence committed, that should be reported to the police. The real issue that the lawyer needs to ask themselves is why it would not be reported to the police.

Q227 **Chair:** Before we move on to the next set of questions, I want to ask something. As I say, we had some really interesting evidence from Richard Moorhead, who had particularly looked at the last session that we had held, where we heard personal evidence on the Perkins case. I know it is only one case and we are not here just to look at one case, but his analysis—and he is an expert—is that the non-disclosure agreement had the effect of pressing Zelda Perkins from instigating or co-operating in criminal investigations, and that there was a significant risk that that could well have caused a situation that perverted the course of justice.

I find it curious, given we found that out, that when in November you were discussing the case with Allen & Overy you did not seek information from the individuals concerned, so that you could have found it out as well. That is quite a serious allegation. It is a criminal allegation. Presumably that is beyond limitations, but it is not beyond what you can act on. Would you not consider in the future talking to those who have been affected, rather than just the law firms themselves?

Paul Philip: The real issue is the point that was raised earlier: once we see the nature of the agreement that has been signed, more or less all of the information that we need would be contained therein. What we need to do is ask the lawyer in question or give them the opportunity to respond to that and set it in context. That is what we need to do and we should have done that, in my opinion, last November. I agree with that.

Chair: It is curious that it is not an integral part of your process that you ask for a copy of the agreement that you are judging the firm on.

Paul Philip: We should have asked for that last November. We have now asked for it.

Q228 **Tonia Antoniazzi:** Mr Philip, you set out in your written evidence that there have been 23 reports of sexual misconduct by solicitors relating to their colleagues in the profession since November 2015. Why do you think the number of reports of sexual misconduct is so ridiculously low?

Paul Philip: First of all, I do not know. Secondly, I doubt it is anything particular to the legal profession. I think there is probably under-reporting of sexual misconduct across the board, in all forms of business. I suspect that, if there is sexual impropriety, all of the same issues that relate to prosecutions in the criminal courts arise. Does the woman want to go through the process of trying to prove it and being put in the



HOUSE OF COMMONS

witness box? Do they want to just put it behind them? There are those types of things, plus the issue of whether it has been covered up in a non-disclosure agreement.

Q229 Tonia Antoniazzi: Have you made an assessment of the number of unreported cases that there might be?

Paul Philip: No, I find it very difficult to understand how we would go about doing that.

Q230 Tonia Antoniazzi: What are the barriers to concluding investigations of such complaints? What is getting in the way?

Paul Philip: Basically, we would need the evidence that there is inappropriate behaviour. That would need, ultimately, for those women to come forward and all the issues that brings. It is probably worth while saying that we prosecute cases in front of the Solicitors Disciplinary Tribunal. It is an independent body that uses the criminal standard of proof. We have been saying for some time that we think that is inappropriate. It should use the civil standard of proof—the balance of probabilities—but all of the evidential issues are the main barriers.

Q231 Tonia Antoniazzi: What disciplinary sanctions can an individual solicitor and their firm face in respect of sexual misconduct complaints that are upheld?

Paul Philip: The panoply of outcomes goes from a letter of advice, to a warning, to a fine, to conditions on their practice and certificates, to suspension for a limited period of time, to being struck off the roll of solicitors never to practise again. In relation to sexual misconduct cases, I would suggest that it has to be nearer the top end of that. As a matter of fact, it was reported in the legal press today that we have just appealed a case where a solicitor has acted wholly inappropriately and had been found to do so by the Solicitors Disciplinary Tribunal. The tribunal gave that solicitor a sanction less than being struck off and we think the solicitor should have been struck off.

Q232 Jess Phillips: Going back to some of the barriers, there are hard-won protocols within the criminal justice system, through the provision of trained professionals and policies, to ensure that victims of sexual assaults are dealt with appropriately. I open this to all. Is there a need for these protections and protocols within employment law to ensure that cases involving sexual harassment and potentially sexual offences are dealt with appropriately? The CPS, for example, has a policy of belief, where your evidential issue would be questioned because there is the burden of belief that, if somebody comes forward and says something, we are to believe them. Do you think that this needs to be considered in employment law?

Andrew Taggart: That there should be some new provisions in there that apply in the pursuit of sexual harassment claims, for example—is that the question you are looking at?



Q233 Jess Phillips: The barriers to people coming forward—and I shall speak as an expert now—are things like they do not want to have an audience, they do not want to make a fuss and they do not want to be re-victimised by the situation of coming forward. In criminal law, there have been huge amounts done around different court presences, around videos, around people giving the best evidence without even having to attend court and with changing environments. Has there been any such movement in sexual harassment and sexual violence in employment law, and do you think there needs to be?

Andrew Taggart: If there is evidence that suggests that these sorts of cases are not being brought, absolutely there should be a review done as to whether the employment tribunal system should be modified, so that individuals can give evidence, for example, on a televised screen. That happens already. I have been involved in a case, not for sexual harassment, but where an individual gave evidence over a screen. Sometimes you come up against the principles of open justice, but I do not see why the employment tribunal system cannot look at new ways of allowing individuals to pursue their claims.

Q234 Jess Phillips: What are the principles of open justice? People often say to me, “Natural justice”.

Andrew Taggart: They are normally that the general public is able to see what is going on. For example, if an individual gives evidence by a television link, there has to be a television screen in the employment tribunal that faces the public rows, so that individuals can see who it is who is giving evidence, because they are generally done in public.

Jess Phillips: That is absolutely not a standard in the criminal court, where people are hidden.

Andrew Taggart: Correct. One of the provisions that exists within the employment tribunal system is restricted reporting orders, so that there are restrictions on the reporting of the name of an individual, but they are in themselves often limited to the date at which the decision is promulgated, as I understand it. You are right; it is certainly something that ought to be looked at.

It should not just be sexual harassment or misconduct cases. Why should it not be sexual orientation or racial harassment? The issue is that, given we are looking at this as a concept within employment law and what is in the public interest, it ought to be looked at on a broader basis from a general dignity perspective. All the sorts of protected characteristics ought to be given similar protections. If someone does not want to go through the trauma of giving evidence about how they were harassed on sexual orientation grounds, pregnancy grounds, race, religion or belief grounds, then it is right that courts should look at ways in which they can pursue those claims through a method that does not expose them to even more trauma.



HOUSE OF COMMONS

Q235 **Jess Phillips:** All of you can answer. Do you feel that solicitors ought to have specialist training in order to deal with employment disputes where sexual harassment is alleged to have taken place?

Francesca West: Yes.

Paul Philip: I am not an employment lawyer. If people felt that was appropriate, then we would certainly support it, but we do not deal with the employment tribunal very much at all.

Q236 **Jess Phillips:** I am not just talking about employment tribunals; I am talking about employment law. It is not just employment law; it could certainly be argued to be a problem in other big institutions. If you are to handle a case of sexual harassment, you should have specialist training around how to deal with a case of sexual harassment, because of the complexities and the barriers.

Francesca West: I can only agree, because one of the reasons we are very careful with those cases on our advice line is that our advisers have not had that training. If someone is a victim of sexual violence, we will try to partner up with another advice agency to make sure that that person is being appropriately supported. I have to say that we have had some really challenging cases, where people have been victims of sexual assaults in the workplace, who want to go on to raise them elsewhere. Our concern is that they are a very fragile individual and we do not have the right training in place to make sure that they have the right support and counselling, so that they can survive going through a public disclosure process, which is extremely traumatic.

You cannot control the angle that the media decides to take on it. We know that the individual does not get to tell the story they want to tell; they get to tell the story the media wants to tell. We have some anxiety in those cases around those individuals saying, "Yes, go on. Go for it." Absolutely, I would agree that specialist training is important.

Q237 **Jess Phillips:** If you are a lawyer and you work for a big fancy firm, you may be drafted in to deal with a sexual harassment complaint; you would like to think that there was one person in that firm who was a specialist in dealing with that, just like you might be a specialist in fisheries law. I cannot think of another legal example, because the law I deal with is sexual harassment.

Andrew Taggart: Is it something that a body like the Equality and Human Rights Commission can assist with, because it may be that smaller firms just will not have the resources to deal with that? It is an excellent idea and it should apply not just to sexual harassment but to other harassment, if it is going to facilitate individuals to bring claims who would not otherwise bring them. That is absolutely right and it is something we see regularly in litigation. Individuals do not want to be witnesses in a case, because they do not want to relive the misery that they have had to go through before.



HOUSE OF COMMONS

Q238 **Chair:** I am going to ask a quick question of Andrew. Before I do, there was an analysis done by Richard Moorhead of our last evidence session, where he considered some of the evidence that we had been given. I have to say they were excellent witnesses, but he surmised that there might be a widespread misinterpretation of the professional rules, particularly in terms of the importance of always behaving in a way that maintains the trust that the public places in you and that public interest always takes precedence in terms of the behaviour of a professional. Are you happy with the current state of ethics in the professional legal industry, however you might define that, because not all solicitors practise as solicitors? Do you think ethics is something people take seriously and do they really understand it? Francesca, tell us from your side and give them some time to think.

Francesca West: I am aware that what we see in relation to non-disclosure agreements is probably at the more extreme end of the scale. I have been shocked by the behaviour of solicitors in coming to that settlement agreement. The reality is that it is not always something that can be read from the agreement itself; it is the behaviour of the litigating parties around the individual anyway, where they are saying, "You are signing this agreement and it means you will be silent." That is something that you cannot see from the face of it; it is something the claimant will report as their experience and certainly their perception moving forward.

Outside of this, I have seen such heavy-handed tactics in relation to a last-ditch effort trying to scare someone off their claim by throwing enormous, not really supportable, cost threats at the door of the tribunal to say, "You had better drop that claim or we will be pursuing you for £100,000 worth of costs."

Q239 **Chair:** Do you then report these people to Paul?

Francesca West: No.

Q240 **Chair:** Should you be reporting them?

Francesca West: Yes, based on this and the statements that we are seeing now, I will be. It does not help my person straight away, because they still have to get through litigation. Going to the SRA is not going to help them, at the door of the tribunal, work out whether they are going to drop that claim, because they feel very scared. Definitely, based on recent statements, I would feel more confident doing that.

Q241 **Chair:** Andrew, you have already given us an indication that perhaps some of the maternity discrimination cases you have seen have made your hair curl a bit.

Andrew Taggart: Yes, they really do. You cannot believe you are living in the 21st century, and that individuals would behave like that and try to impose restrictions.

Q242 **Chair:** Would you as a professional feel obliged to report them to Paul?



Andrew Taggart: We probably would if we felt that the tactic was being used and continued, and we were not able to pursue the claim we wanted to for an individual. We would do that.

Q243 **Chair:** That self-policing is quite important. Paul, it would be interesting to know whether you intend to issue further guidance. You have issued a warning notice, have you not? What do you think about the ethics in your profession and whether you should issue any more guidance to make sure that people are really getting this?

Paul Philip: We will continue, as we regularly do, issuing guidance to the profession on a particular context, if I can call it that. It is probably worth bearing in mind that most solicitors do a good job in difficult circumstances. We are always talking about the significant or visible minority, from my perspective.

Solicitors get putting their client first as an important obligation. When that conflicts with their obligations to the rule of law and the administration of justice, they could consider their position more carefully at times. We see a minority of cases that come across our desk—the types of things that Francesca has just talked about—where bullying in a litigation perspective is, quite frankly, unacceptable and an abuse of power. That type of thing should be reported to us, and we will investigate fully and take action if we find that misconduct has occurred.

Q244 **Chair:** The final question is to Andrew. Do you support the EHRC's recommendation that the Government should introduce a mandatory duty on employers to take reasonable steps to protect workers from harassment and victimisation in the workplace?

Andrew Taggart: It depends what those mandatory steps are, and I do not see why it should be restricted to sexual harassment. If you are going to look at this again, you should look at it as a whole. It should not just be sexual harassment; it should be all sorts of harassment. It depends what the mandatory steps are and from a legal perspective. If it encourages individuals, gives them an avenue to pursue claims or, indeed, minimises the circumstances in which these things happen, that is a good thing. The pushback that you will get from some of the smaller and medium-sized organisations is that it is yet more administration that they will not be able to accommodate.

Chair: But it is administration that might protect their employees.

Andrew Taggart: That is all a good thing.

Chair: Thank you so much. I feel we could have gone on for a lot longer. I apologise that we now have to call this to a close, because we have another session to go through, but thank you so much for coming before us. We know how much time it takes to prepare for this sort of session and we are enormously grateful for you coming along today and also for the evidence that you have given us already. It has been extremely useful and we look forward to staying in touch on the specifics of the case



we talked about. Thank you very much.

Examination of witnesses

Witnesses: Susan Clews, Diana Holland and Marion Scovell.

Q245 **Chair:** Good morning. I would like to welcome our second panellists, who have joined us today for our second session in this sexual harassment inquiry. We will quickly run on. Apologies for that, but we want to cover as much ground as we can. I wonder whether you could each just say your name and the organisation that you represent, starting with Susan.

Susan Clews: Hello. I am Susan Clews, operations director at Acas.

Diana Holland: I am Diana Holland, assistant general secretary at Unite the Union, where I am responsible for equalities and also for transport and food sectors.

Marion Scovell: I am Marion Scovell from the trade union Prospect. I am head of the legal team at Prospect.

Jess Phillips: Can I declare that I am a member of Unite the Union, and Diana and I sit on the equalities NEC of the Labour Party together?

Chair: Before I hand over to Eddie, I would remind everybody that the acoustics in this room are appalling. I would encourage everybody to speak with that clarity that can help everybody to hear more of what is said.

Q246 **Eddie Hughes:** Do you have any concerns that non-disclosure agreements are routinely being used to cover up wrongdoing, criminality and sexual harassment in the workplace or other areas?

Marion Scovell: First, there is a difference in terminology here. You have non-disclosure agreements prior to the event happening, which we saw in the Presidents Club and we see in some contracts of employment. They are quite rare, in fact. Within our trade union membership, I have not been asked to advise on a non-disclosure agreement prior to the event. For what it is worth, they are completely indefensible and I think they should be banned. There is a good procedure that you could adopt in doing that, by looking at something like we have under section 77 of the Equality Act, which is about banning pay secrecy clauses. Clauses in a contract that purport to say you cannot disclose your pay for the purposes of somebody looking at bringing an equal pay claim would be unlawful. That seems quite a simple way of legislating to ban non-disclosure agreements in the workplace in respect of discrimination law.

The second point, and the more difficult, really, is non-disclosure agreements that arise as part of a settlement agreement, in terms of settling an event after the event. That is much more difficult and comes into play a lot. It is very common in the private sector that you have fairly strongly worded confidentiality provisions in a settlement



HOUSE OF COMMONS

agreement, almost as a matter of force. There is good practice here from central Government, where the Cabinet Office has issued advice saying that confidentiality provisions in settlement agreements should be the exception and not the norm.

The civil service even goes as far as saying they must be approved by the Minister. Prospect's membership has a high proportion in the civil service, and there we settle cases with the Government legal department on the other side and there is hardly ever any confidentiality provision. That shows that, if you can do that within the civil service, something similar could be rolled out more broadly. That is worth looking at.

I would not necessarily say that confidentiality and settlement agreements should be subject to a blanket ban, because they can work both ways. There are often advantages for the claimant in having confidentiality. Often there are allegations and counter-allegations, and therefore the claimant will often want a clause like that. I also think that, when we are dealing with settlement agreements within the union, we will always try to have a mutual confidentiality provision, so that it is not just one-sided. That is quite important. There are lots of things that could be done around that. I am sure we will go on to look at some of the proposals about codes of practice and mandatory duties.

Diana Holland: Obviously the overall approach is quite similar in different unions. Our general legal advice to our members is not to sign non-disclosure agreements if at all possible. We ask solicitors who work for us to advise our members about seeking to minimise or avoid any such agreements. However, they are absolutely common practice in terms of COT3 agreements as part of reaching a settlement. If you are weighing that agreement versus a tribunal that you may lose, the balance is very difficult for people.

The Equality and Human Rights Commission's proposals in this area are really helpful, because they talk about banning certain non-disclosure agreements, but allowing them in certain circumstances that may be agreed by all parties. That is what we would think is appropriate. At the moment, there are really important things included in those settlements, for example the provision of a reference, which mean that someone can get on with their life and move on. That weighs very heavily with people when they are deciding how they want to proceed. Women who have suffered sexual harassment, in my experience, very often just want it to stop and for them to be able to get on with their lives. That is why there is often pressure to sign something that, later on, can cause problems for people. Having it governed in some way by regulations and a legal provision is really helpful. The Equality and Human Rights Commission's proposals in this area are good.

Q247 **Chair:** You say you advise your members never to sign a non-disclosure agreement.

Diana Holland: That is the advice we give. It is to try to avoid that.



HOUSE OF COMMONS

Q248 **Chair:** Your organisation has never been in a position where they have insisted a non-disclosure agreement is signed.

Diana Holland: That is not our position to take. However, we have to say to people, if the offer is being made only on the grounds you sign this, we obviously have to make sure that we are telling them exactly what the legal position and the background are. We do not recommend that they sign with that included, but we have to say that there is also no guarantee, when you go to tribunal, that you will win or that you will be offered the same amount of financial settlement that is perhaps included in what is being offered there.

Q249 **Philip Davies:** Has Unite the Union ever asked one of its employees to sign a non-disclosure agreement?

Diana Holland: Not to my knowledge.

Q250 **Eddie Hughes:** If there was some restriction or a ban, what do you think that would do with regards to the number of cases reported for sexual harassment?

Diana Holland: If it was done on the basis proposed by the Equality and Human Rights Commission, the kinds of agreements that are positive and everybody mutually agrees to could still go ahead. What would stop happening is the pressure to go along with something inappropriate. Some of the things that very often only come to light when you are involved in a case are things that people have perhaps signed at the beginning of employment. Those sorts of agreements would then be removed and that would be a really positive thing.

Q251 **Eddie Hughes:** From a union point of view, do you have any figures for the number of cases where we have had settlement agreements or COT3s used involving sexual harassment?

Marion Scovell: We do not have any real figures, but I could tell you that it is very few within our union.

Q252 **Eddie Hughes:** Give me a feeling for context. How many is very few? Is it fewer than 10?

Marion Scovell: Yes, there are much fewer than 10 a year. We are probably talking about two or three a year. That is for many different reasons. The union context is very different from non-unionised workplaces. We have lay representatives on the ground who are dealing with a lot of these cases and resolving the issues. As Diana just said, people facing sexual harassment at work usually want to stay in work. They are wanting to have the situation resolved. There is a really positive role that unions play in the workplace, and lots of our full-time officers would say they think they have failed if they come to the legal team wanting to take tribunal cases. As an organisation, we are there to try to deal with things in the workplace, and union officers on the ground do that. We have had a number of cases where grievances have been raised, resolved and settled, so it is a different context.



HOUSE OF COMMONS

Diana Holland: I can provide that information. I was trying to get hold of somebody, because I understood it might be asked, but I will have to send it in after. We have a quarterly report of all legal settlements and prior to legal settlements, broken down into different categories, so I will provide that information after this hearing.

Susan Clews: No, Acas does not record details of the numbers of COT3 settlements that relate to sexual harassment claims, mainly because we follow the tribunal jurisdiction, so we would record cases as discrimination more broadly, rather than sexual harassment specifically. We do not have that information.

Q253 **Eddie Hughes:** Do you not think it would be helpful to record it that way, so you could identify trends?

Susan Clews: We could certainly look at that. We are obviously keen. Our whole ethos as an organisation is to help combat things in the workplace that are not conducive to good relationships and a good atmosphere at work, so that is something we can look at.

Q254 **Jess Phillips:** Can I ask whether, in union representative training for your lay members, there is training around how to handle sexual harassment cases when they are brought to them?

Marion Scovell: Yes. Who wants to go first?

Diana Holland: It is something that I have worked on for 30 years now and in different roles within the union. There is always a mixture of problems that come to you and difficulties that you face, so you need to adjust the training to take account of them. Over years of seeing horrendous issues of sexual harassment, they are not reported in the right way or, when they are reported, the way they are dealt with by the employer or also sometimes by the union has caused problems. We have had to adjust our training and ensure that we have safeguards all the way through to deal with that. We have guidance. We have regular training courses for everybody to back it up and, where we have the possibility of doing it, we make that mandatory.

Q255 **Jess Phillips:** My husband is a member of Unite the Union also. He is a lift engineer in a large company. There are three women who work there and 700 men. If something were to happen and the other person who you are accusing is a union rep or a member of the union who they also have to defend, is there any situation where we give the women a specific representative, so that they do not have to go into a very male environment to a male representative?

Diana Holland: There are two things here and there could be so much more. First of all, we have a provision within the rules of Unite that we seek to get a recognised union equality representative in every workplace, who has the time for training and specialist support. Obviously every rep needs that training but, like safety reps, you need people who really go into the detail of this and who are fully trained in every aspect,



who could then be alongside the shop stewards to provide that. In some workplaces, the employers recognise them and they play a full part. Particularly in male-dominated workplaces it provides an opportunity for women representatives.

There is a fantastic system of women advocates in Canada, which I would draw to your attention. We also see it as unfinished business of the Equality Act to provide that level of statutory recognition of union equality representatives, who could have the same role as safety reps do to prevent difficulties and to help deal with them when they arise. On top of that, we have a regional women and equalities officer in every region, who provides a backup if, for any reason, somebody does not want to go to the immediate person, or there are national people with that title. I was one of the first of those people and it makes a difference to encouraging women, in particular, to come forward.

Q256 Tonia Antoniazzi: What kind of advice and support is offered by union advisers to members in sexual harassment cases and who would typically provide this support?

Marion Scovell: First, to follow on from Diana's last point, this whole thing about equality reps is something that trade unions have been pushing for a while. Most well organised branches will have equality reps. In terms of dealing with cases, it is different in different areas of the union. In some areas, we are strongly organised, recognised by the employer and have a committee with a range of different officers, including personal case officers, equality reps and so on. In other areas, of course, there will be individual members of the union where there is no structure at all and the employer does not recognise them. There are very different situations.

In the main, what we say in terms of seeking advice and assistance is, first, members should go to their local representatives and local committee. Hopefully there is going to be somebody lined up for that, but also our materials point to specialists within the headquarters department. We have full-time officers, so we have people leading on equalities within the union and people can raise issues through that route. Actually, it is a bit of a mix in terms of how people get advice. Some people get it directly through their lay rep and others will go directly to their full-time officer.

The important thing is that, even when they are being dealt with by the lay rep, our publications always say that is with the support of the full-time officer. There will be a full-time employee of the union able to advise and assist. We say to reps that, wherever there is any suggestion by the member of a legal claim, it must go to the full-time officer and must not be dealt with purely in the workplace. Full-time officers would usually seek further advice from the in-house legal team.

Q257 Tonia Antoniazzi: Jess has already asked about training, so how commonly do you or your colleagues see potentially unenforceable



HOUSE OF COMMONS

confidentiality clauses being included in settlement agreements, for example clauses to prevent or deter signatories from speaking out about sexual harassment or reporting matters to appropriate bodies, such as the police?

Susan Clews: From an Acas perspective, if we saw something like that, we would flag it as something undesirable and we would not be a party to brokering a settlement with a clause like that. Just to be clear, a COT3 agreement is something that the parties own, in a way; it is not something Acas imposes on them, but we will oversee the development of the COT3 and work with both parties. We would always explain to them and to a claimant, particularly a claimant who is not represented, exactly what they are signing up to. We would further suggest they should consider taking legal advice if there are confidentiality clauses.

Q258 **Chair:** Would you never have a situation where an Acas-brokered agreement would have a non-disclosure agreement within it that was related to stopping people talking about an incident? You are privy to every aspect of any agreement that is brokered through your offices.

Susan Clews: That is a good question. We are only privy to what has been raised in the context of conciliation by a claimant or by the employer. It might be that there has been some harassment taking place, but that has not been put forward by the individual to us. They might have lodged a claim under something like unfair dismissal and they have not raised that, so I could not say that we always know everything about every scenario. People talk to us confidentially but informally. They are not under oath when they give us information.

Q259 **Chair:** Acas would never oversee an agreement with an NDA within it that was potentially unlawful or potentially stopping people from whistleblowing.

Susan Clews: There could be a confidentiality clause in it, but we would highlight that that does not limit the applicability of the PIDA regulations or other criminal acts. We have some suggested wording that we would offer to the parties to say there is no way that this agreement can take precedent over their legal rights. That would be part of our process in every case.

Q260 **Chair:** There might be a part of an agreement that you did not see, so you cannot categorically say that that would therefore be a lawful part of the agreement. You are just taking it on trust.

Susan Clews: We would see the agreement, so for a COT3 we would see every part of the agreement, but we would not always know whether there was something else that had happened in the workplace that we were not privy to.

Marion Scovell: The difficulty here is that, actually, nearly every agreement with the private sector—and some parts of the public sector, excluding mostly the civil service—will have a confidentiality provision,



HOUSE OF COMMONS

but it simply talks about confidentiality in respect of the facts leading to the agreement. It is not specifically about sexual harassment, but clearly if it is a discrimination claim, that is what it is aimed at. They are very standard and very prevalent. Certainly if you ask me whether I have signed settlement agreements where there has been confidentiality, yes, I have.

The difference, though, is that it is about what people understand that to mean. Generally as a union we will try to avoid any confidentiality provisions. We would certainly always try to ask for the employer to limit it to the terms of the agreement, so looking at the outcome, the money and so on, rather than the facts leading up to it. It then depends on the bargaining power about who is most keen to settle at that point and whether we can get those clauses watered down considerably.

As a standard, there is the point that anything in the agreement does not affect people's rights under the Public Interest Disclosure Act provisions. Actually, as our colleague from Public Concern at Work expressed so clearly, who is going to know what section 43A of PIDA is all about? There needs to be much clearer advice on that. That is fine when you are going through the agreement with somebody who understands that and can explain what that section means and what the limitations are.

The other thing about this is that not every case of sexual harassment would be covered by the Public Interest Disclosure Act provisions. I have a very serious sexual assault case going on at the moment that would be covered by criminal provisions and she is pursuing that through the police, but in the main they are not. If you look at the definition, it is about any unwanted conduct that makes the individual feel that they are not working in a safe environment, so a hostile, degrading or offensive environment. There is a real problem about trying to rely on the PIDA exclusion.

One of the things the commission came up with was about not only the mandatory duty, but having a code of practice. This would be very helpful. It is not going to cure the problem, but if you have a code explaining what the provisions mean, you could have some much clearer wording as a standard that employers are encouraged to use. That would help the problem that you identified in the last panel about solicitors and their professional duties. It would help to make it clearer. It would help for non-regulated advisers like unions. It would help for advisers both in unions and also the voluntary sector, who would be dealing with lots of cases, to push back against employers trying to include very onerous provisions.

There is a lot that could be done about having that code, and the other thing about having the code would be that you could replicate the provisions currently with the Acas code of practice on disciplinary and grievance. Wherever there has been a breach of that code, a tribunal hearing that case later can apply an uplift to the compensation. Often it is



HOUSE OF COMMONS

money and penalties that will affect the employers' behaviour in these situations, so there are some things that can be done there.

Q261 **Tonia Antoniazzi:** When a settlement agreement is being negotiated, who from your union would support a member through this process and advise on the content of the agreement? Would there usually be a certified relevant independent adviser, or would you instruct a solicitor or other adviser, Diana?

Diana Holland: If you are talking about a formal COT3, we would have legal advice. In the vast majority of these cases that you are talking about, where it is likely to be a tribunal case of some sort, in our union, rather than being dealt with by the local representative or the officer, a solicitors' firm would be involved in that. In terms of actually advising to reach a settlement, we would ensure that independent advice was provided at that point.

I suppose I was trying to think about the context in which these kinds of settlements arise. It is important we are not putting so much pressure on individual women to be the ones who are dealing with all of this, because the ability to go public on something places an enormous amount of pressure on somebody. Of course they should have the right to do that and not be prevented from doing that, but the proposal that there should be a duty, as there is on health and safety, to provide a workplace that is free from discrimination and harassment should be the context in which these settlements are being reached. It then means it is collective enforcement as well as the individual person making a choice about what they are going to do in public.

Marion Scovell: I do not want to mislead you on this. Every union is different; ours is very different from Unite. Probably 95% of settlement agreements within Prospect membership will be done internally, in house. It would be a full-time officer of the union, so never a lay representative. They have to have had training, which we run through our external solicitors, before they are signed off by the general secretary to be competent to do settlement agreements. It is a very different situation.

The other difference is that, as a union, we are much smaller than Unite. We will run employment appeal tribunal cases wholly internally, so we will do those cases ourselves. It would then normally be the full-time officer who would sign off the settlement agreement, but with the backup of the legal team. There are often all sorts of strange and wonderful clauses that get thrown in and we would be asked for those, but generally it will be through internal employees. I should say that, while we run tribunal cases internally, in nearly all tribunal cases but particularly every discrimination claim, we would instruct specialist counsel for advocacy and representation at the tribunal, so they may be involved at that stage.

Q262 **Tonia Antoniazzi:** Marion, what criteria does the union use in certifying advisers as relevant independent advisers under Section 203 of the 1996



HOUSE OF COMMONS

Employment Rights Act?

Marion Scovell: They have to be an employee, official, officer or member of a trade union. We only have that for employees, so only full-time officers are certified. As I say, they have to go through training. They would be experienced. Mostly when they join us they would be working with others on these cases and they would not be allowed to do them until they have mandatory training, which might well be a year into their employment.

Q263 **Jess Phillips:** Acas-conciliated COT3 agreements commonly include confidentiality clauses, which we have talked about. I just wondered from all of you if you have seen attempts to void potentially overly stringent confidentiality clauses in COT3 agreements. If so, what was the outcome?

Susan Clews: We do not come across that as often as you might think. Before coming today, we asked a range of conciliators to try to get some anecdotal evidence about the nature of those sorts of activities and, actually, they were very limited. That is probably because by the time we are talking about a potential COT3 settlement, the conciliation process has been going on for a while. We have gathered information and explained the role. Our status and authority, if you see it like that, has been established and that probably wards off some of the excessive behaviour that might take place. Also, as soon as any agreement's confidentiality clause looks like it might end up going into territory that we would consider illegal or inappropriate, we would immediately make that clear to the parties.

Jess Phillips: You would make all parties aware.

Susan Clews: We would make all parties aware. We see it as part of our role to safeguard both parties from entering into any agreement that is restrictive in that way.

Q264 **Jess Phillips:** What I said was, "Overly stringent"; what you said was, "Illegal". Let us assume good faith and that people are not breaking the law, but do you feel that, as Acas, you have a prescribed idea of what "overly stringent" might be?

Susan Clews: It would be any occasion when we think an employer is trying to get an individual to sign up to something with an intent of stopping them raising issues to a regulator, another authority, going to the police or seeking health advice.

Q265 **Jess Phillips:** Should we just write, "Not to the newspapers", into things? Is that your experience, Diana and Marion, from what you have seen?

Diana Holland: I am going to add to what I report to you, if there is any further information on this. In terms of my own experience in drawing up those kinds of clauses, the pressure is always on to put more in there than I would say is appropriate. Often, in discussion, you can get a lot of



it removed, because you can argue it is not related to the issue at hand. Very often, there is a process of putting more in than there should be. If you are used to negotiations and understand that process, it is possible to discuss it. However, I am aware there will be plenty of individuals who do not have that experience and who will then be very reliant on advice they are receiving. Sometimes they will be on their own in these circumstances. The most that can be done to outlaw the inappropriate wording would be extremely helpful to everybody.

Marion Scovell: It is difficult to answer about COT3s, because my experience of dealing with COT3s is as an adviser. Where both sides are professionally advised, Acas's role is minimal, so I would not expect Acas to come back and challenge points in the agreement. It is the same answer as we were saying about settlement agreements. We would try to resist confidentiality; we would try to make it mutual, and it has always got to be "save for" family and professional advisers, as required by law. We would try to look at that. An interesting point about COT3s has been raised in some of your other evidence, about whether they should require legal advice.

Jess Phillips: I was just about to ask about that. It is like one mind.

Marion Scovell: There is an issue there. It really depends on whether people are getting that advice through Acas. Acas's role—and I am sure Susan is able to explain this better than I can—is probably much more limited, because it is not giving individual advice and it is not representing either side. Therefore, there probably is a role for COT3 agreements to also have relevant independent advisers or lawyers advising on them.

Q266 **Jess Phillips:** Lots of people are not even members of unions. Do you all feel that there should be rules around people having independent advice prior to signing a COT3?

Diana Holland: Yes.

Q267 **Jess Phillips:** Obviously you would say that for the union. You would say to join the union, I would imagine, but how would you answer the idea that there is more likelihood that an employer has power in a COT3 situation than an employee, where there is no requirement for legal advice?

Susan Clews: There is clearly potential for that, which is partly why we see our role as making sure that the individual claimant is as fully briefed as they can be and referring them to other sources of advice.

The main issue I see with requiring legal advice as part of the process is that one of the attractions to claimants of the Acas COT3 process is it is free, it is accessible and they do not have to go through contact with legal advisers. That might be beneficial to them, but might be seen as a barrier to some people. I want to be clear that it was not removing



HOUSE OF COMMONS

access to a cheap and free practical solution to disputes, but I understand the point about redressing the balance of power.

Q268 **Jess Phillips:** You would say that, while neutral in all situations, Acas conciliators have to ensure that parties understand the terms.

Susan Clews: Absolutely, and we are not duty-bound to enable a COT3 to be made. If one of our conciliators—and it is only our more senior, experienced colleagues who work on discrimination cases—felt that they had made representations to the parties and there was some prospect of a conciliated agreement being made with unfair and inappropriate confidentiality clauses, we can withdraw from that. It does not happen often, I have to say, but we have a policy team who would advise our people and they would withdraw.

Q269 **Jess Phillips:** You have a specialist team. I am going to ask everybody this question: does Acas have specialist training in sexual harassment for people who handle those cases?

Susan Clews: We do not, and it is something that we need to look at as an organisation.

Diana Holland: It is essential. There are real differences with issues of sexual harassment.

Jess Phillips: It is power.

Diana Holland: Absolutely. It is about power; it is not about anything else.

Q270 **Jess Phillips:** Suzanne McKie QC has suggested that employers should have to pay for employees to get legal advice on a COT3. What would you perceive to be the advantages and disadvantages?

Susan Clews: On a practical level rather than the principle of it, there is a risk that an employer will build that into the cost of the settlement. We have not taken a view on that formally, from the organisational perspective. We have a meeting next week of the Acas council, where we are looking at our response and will look at the EHRC response as well, to make sure we are doing everything we can do. We are generally supportive of anything that will make workplaces better, but it is just thinking through any unintended consequences.

Diana Holland: Obviously I would say that we would hope people will be in a union and they would currently get that support, but ensuring that there is independent legal advice that does not have to be met by an individual on their own, against an employer, seems to me to be a bit of a basic.

Marion Scovell: It is standard in settlement agreements that the employer will include the fees of having the advice on the agreement. The only thing I would say about it is that normally what you see in settlement agreements—and this applies when the union is signing them off as well—is a very limited amount. It is normally no more than £500



HOUSE OF COMMONS

for advice. That is absolutely fine if you just need a lawyer to explain the effect of the agreement, but it is rarely that straightforward. I do not think you are going to get employers agreeing to pay potentially a few thousand pounds for the lawyer to investigate all the details of it. That needs to be thought through. Generally, that is part of a standard settlement agreement.

Q271 **Chair:** Just before we close, just so I am really clear on this, can I just ask for a yes or no answer? I am going to take something that is not sexual harassment but is another area of unlawful discrimination, which is maternity discrimination. What I am hearing today is that none of your organisations would ever allow a woman to sign an agreement that related to maternity discrimination that had a non-disclosure agreement in it that stopped her talking about that. That is what I am hearing from you. You three organisations would never allow a woman who had suffered from maternity discrimination to sign an agreement with her employer that included a non-disclosure agreement in it, which meant she could not talk about it. Is that right, Susan?

Susan Clews: I do not think that is the case for us. There is a possibility that one could be brokered. Can I come back to the Committee in writing, please?

Q272 **Chair:** I am hearing everything is rosy from the unions' side, when we have heard how much the legal profession is struggling. It just seems to me like we may not have been asking the right questions. Diana, can you answer yes or no?

Diana Holland: We would advise them not to, but that does not mean that they will not, at the end of the day, sign it, because it is a balance. Our advice would be not to sign something that has that in and to try to get it removed. If we were unable to achieve that, then it may be that, balancing the point of a settlement against a tribunal where you are not sure of the outcome or where there is a financial settlement that may be lower if you went to tribunal, it is possible they could sign it.

Marion Scovell: We definitely sign off on confidentiality agreements.

Q273 **Chair:** Is that even when they involve discrimination?

Marion Scovell: Yes, even when they involve discrimination. Often it is the fact that the member really wants to settle it. Look at the length of time tribunals take, the stress, the unpredictability of judgments and complexity.

Q274 **Chair:** We have heard today that the legal profession, who are the professionals in this, is struggling enormously in the improper use of non-disclosure agreements, yet we are hearing from you that there are no problems.

Diana Holland: I do not think you are hearing that at all. I really hope you have not heard that. What we are saying is that that is our advice. It



HOUSE OF COMMONS

does not mean we do not have to deal with the real world, which is where we have to reach those agreements. That is why I really want to stress the importance of the context within which these agreements are reached. The proposals around that requirement on employers to create the right environment in the workplace to prevent harassment are absolutely essential. There are things like the questionnaire procedure being reinstated, protection from harassment by third parties being reinstated and not having to be harassed three times before you can have legal rights.

Chair: I am afraid we are going to have to close this, as we are just about to go in quorate. If you are able to provide us with any more on that, I would be grateful. Thank you very much. Our public evidence session is closed. If everybody could leave, I would be grateful. We are just going to have a quick, two-minute wash-up at the end. Thank you very much.