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Protect response to the government consultation on confidentiality clauses: measures to prevent misuse in situations of workplace harassment or discrimination

Introduction

Protect (formerly Public Concern at Work) is the UK's leading whistleblowing charity. At the heart of our work is our free and confidential advice line, on which our advisers help almost 3000 individuals each year. We advise workers who have witnessed wrongdoing in their workplace and are unsure how, or whether, to raise their concerns. Where a worker has been victimised for whistleblowing, we advise on the statutory employment protections afforded to whistleblowers. We aim to encourage safe and effective whistleblowing in the public interest. We are regularly asked to advise on the limitations of confidentiality clauses in settlement agreements, where an individual has left employment and remains concerned about the wrongdoing that they have witnessed.

Alongside the advice line, Protect helps organisations to create a safe environment in which staff can raise concerns at the earliest opportunity. The charity supports hundreds of organisations to ensure their whistleblowing arrangements are trusted and effective. We work with regulators, professional bodies, commercial, public sector and voluntary organisations including the General Medical Council, The Law Society, John Lewis Partnership, the Bank of England and the British Red Cross.

These two complementary streams of work give us a unique perspective on whistleblowing, encompassing both the challenges facing whistleblowers and those experienced by organisations in listening to and addressing concerns. Protect has employed this experience in a range of policy work on whistleblowing and related issues. Protect assisted in drafting the Public Interest Disclosure Act 1998 (PIDA), the legislation that gives workers rights not to be victimised for whistleblowing.

Our response to this consultation is guided first and foremost by our aim to encourage the uncovering and addressing of wrongdoing in the public interest through responsible whistleblowing. At the same time, thanks to our advice line work, we are acutely aware that whistleblowers' experience of legal processes is often bewildering and stressful, and that finding and paying for appropriate legal advice is difficult. Workers generally desire a speedy resolution to their dispute and this is often facilitated by agreeing confidentiality. This is no truer than in situations where the worker has been personally affected by the issue, such as in cases of harassment and discrimination.

We note and commend the aim of the consultation "to ensure that harassment or discrimination of any sort cannot be tolerated in the workplace". However, changing the nature of confidentiality clauses is unlikely to go far to address widespread problems. A settlement agreement comes after the event when the damage caused by harassment or discrimination is done: there is no guarantee that the workplace can be changed by those who have left it, however vocal they are in speaking

out. Protect supports the recommendation by EHRC and the Women and Equalities Committee for a mandatory duty on employers to prevent harassment as a more powerful tool to tackle this issue.

In summary, our response calls for:

- stronger regulatory framework and better enforcement as the most effective way of tackling toxic workplace cultures
- an exclusion in any confidentiality clause allowing for the disclosure of information about workplace harassment or discrimination to a regulator, not just the police[1]
- making the use of warranties in settlement agreements unlawful
- improved advice for all employees: there is a very low awareness of employment rights around whistleblowing, as well as discrimination and harassment, and obscure wording around settlement agreements does not aid understanding
- a standard document to be handed to all employees who sign a settlement agreement, explaining the limits of all confidentiality clauses in non-legalistic language

For ease of reference, we have attached at annex A to this response, our submission to the Women and Equalities Committee.

Responses to Consultation Questions

Do you have any examples of confidentiality clauses, in employment contracts or settlement agreements, that have sought to cloud a worker's right to make a protected disclosure, or overstretch the extent to which information is confidential? If so, please describe these.

Below are some relevant examples that we are aware of:

<u>Warranties</u>

Warranties require the individual to warrant that the matter they raised has been satisfactorily concluded - thereby meaning that any further disclosure by them will possibly put them in breach of the agreement. This can create an additional hurdle for an individual to overcome when escalating their concern. It also means that if they do go to a regulator, for example, there is a risk of their credibility being undermined, having signed something that says the matter is concluded. It is another reason that it is not surprising that settlement agreements are often the end of the road in terms of getting any oversight of the underlying wrongdoing or malpractice at the heart of whistleblowing or discrimination cases. One such example is set out below:

> The Employee in signing this Agreement warrants that there are no circumstances of which he is aware which would amount to a breach of the regulatory requirements applicable to the Company, the Conduct Rules or Senior Manager Conduct Rules or give rise to concerns regarding his fitness and propriety to be an approved person.

As we note below, Protect recommends that the government makes the inclusion of such warranties in settlement agreements unlawful[2].

[1] This would be an additional provision to s43J Employment Rights Act 1996 which is an anti-gagging provision applying to a broad range of disclosures about workplace wrongdoing

[2] Note that the Financial Conduct Authority already bans the use of warranties in settlement agreements in their rules on whistleblowing (see rule 18.5.3 and rule 18 generally of the FCA handbook)

Combination of Factors

A particularly bad case from our advice line combined not only wording keeping the agreement, the circumstances leading up to the settlement and the settlement itself secret, but involved the adviser (in this case, shockingly a union rep) telling the client that they could only read the terms of the agreement at a short meeting and were thereafter expected to sign and not retain a copy of the agreement itself. The client declined this suggestion and in the end a settlement was reached with a redrafted agreement, and a copy was retained by the client. In the earlier agreement, the individual was also expected to confirm that they would not apply for a job with that employer in future. The warranties included that the individual had withdrawn all appeals/grievances and data protection requests and any complaints to any ombudsman or similar authority as well as more standard warranties regarding the return of the employer's property/passwords etc. The agreement also sought a warranty that none of the confidentiality clauses of the agreement had been breached pre- signature. The agreement expressly provided that the employer had entered into the agreement on the basis of the warranties provided and that the payment was conditional on the warranties being true as at the date of the agreement. While the agreement confirmed that the individual was not prevented from making a disclosure under PIDA, it also stated that the client had to comply with the employer's whistleblowing policy for the disclosure - hence probably keeping the information internal to the employer. Finally, there was an automatic indemnity if the individual exercised or attempted to exercise any of the statutory rights referred to in the agreement.

Indemnities

We have seen agreements where there is a clause that suggests that any breach of the agreement renders it void with an automatic indemnity to repay the settlement sums. Where this is combined with confidentiality clauses forbidding any reference to the existence of the agreement or the circumstances surrounding the end of the employment, it is easy to see how this could silence the victim, as to take matters anywhere else would risk an action for repayment of the settlement sum as a debt.

Limited disclosures

We have been told by another organisation advising in this area, that often the reference to a 'disclosure' is limited to criminal or regulatory matters, so the wider application of PIDA is narrowed in the terms of the NDA/settlement agreement. This is designed to prevent a further disclosure to, say, the media or MPs.

In your view, should all disclosures to the police be clearly excluded from confidentiality clauses? Why?

We see little reason to oppose the proposal that disclosures to the police should always be excluded from confidentiality clauses. However, this proposal raises two issues.

First it is an unambitious exclusion from confidentiality clauses. The law already protects disclosures to the police about potential crime no matter their contractual obligations. We cannot foresee any circumstances in which it would be appropriate for the law to facilitate the silencing of a victim of or witness to potentially criminal behaviour. The public interest in making disclosures about potentially criminal behaviour will always outweigh any interest in confidentiality.

More importantly, such an exclusion seems unlikely to produce much change in practice. Confidentiality clauses generally do not seek explicitly to prevent disclosures to the police. Rather, the problem is that confidentiality provisions tend to have vaguer wording which leaves the worker with enough uncertainty that the practical effect is to chill the making of disclosures, such as to the police. Clauses may require the complainant to use their "best endeavours" not to disclose details of events in criminal (and civil) proceedings. Those sorts of vaguely drafted clauses prompt workers to err on the side of caution by not disclosing at all. Others have made the point that, in some circumstances, the very proposal of such clauses may amount to perverting the course of justice. This sort of opacity – and potentially criminal behaviour – will not be tackled by a straightforward exclusion of disclosures to the police. Proposals to require agreements and employment particulars to set out the limits to confidentiality are more likely to deal with this problem.

The SRA's recent warning notice to lawyers has made it clear that they would consider that NDAs would be improperly used where a lawyer sought to:

- "use an NDA as a means of preventing, or seeking to impede or deter, a person from:
    - reporting misconduct, or a serious breach of our regulatory requirements to us, or making an equivalent report to any other body responsible for supervising or regulating the matters in question
    - making a protected disclosure under the Public Interest Disclosure Act 1998
    - reporting an offence to a law enforcement agency
    - co-operating with a criminal investigation or prosecution."

It is important that this guidance is accompanied by decisive enforcement action where solicitors are found to have abused confidentiality clauses.

A further issue raised by this proposal is that it may mislead complainants about what the appropriate routes for resolution may be in harassment and discrimination cases. Harassment and discrimination are much more often challengeable as a breach of the Equality Act 2010 than as criminal behaviour. The police, then, will usually not be the right place for the complainant to go. A focus on disclosures to the police gives victims the impression that the police can investigate and prosecute when, in most cases, the worker's remedy will be through assertion of rights in an Employment Tribunal.

From the perspective of whistleblowing, disclosures to the police are unlikely to lead to a holistic response to a culture of harassment. Where allegations of harassment amount to allegations of criminal behaviour, the police can investigate with a view to prosecution. This may deal with the worst individual incidences of abuse but it will not tackle a wider discriminatory culture.

The real difficulty in tackling sexual harassment and discrimination through the law is that each individual, unless aware of what has happened to their colleagues, must bring a private claim. Only the employer may know that there are six similar cases within one organisation: the "culture" of sexual harassment cannot easily be seen by the employee, particularly if confidentiality clauses silence the other five. What is needed is an ability for victims to make disclosures to a body that is

able to investigate such a culture. We suggest a regulatory body would be best placed to receive such disclosures, with both the powers and resources to then investigate systematic breaches of sexual harassment and discrimination that fall short of the criminal threshold needed for the police to get involved. If this was accepted, then disclosures to this body could also be excluded from confidentiality agreements as we set out below. Our fear is that without an effective and resourced regulatory body the proposals open up a means for victims and whistleblowers to pass on allegations but with limited prospect, outside of the criminal law, of real enforcement. This will raise expectations but then disappoint many whistleblowers and victims as a result.

Should disclosures to any other people or organisations be excluded?

Protect suggests that if another organisation is to be excluded for the purposes of disclosures about discrimination and harassment, then the most appropriate body would be the Equality and Human Rights Commission (EHRC). Their role is to ensure compliance with equality law, and they are shortly to join the list of prescribed persons for whistleblowing purposes. Excluding a report to the EHRC from any confidentiality clause would allow victims of harassment and discrimination to make their experiences known, without fear of breaching confidentiality, to a body that could collate reports and take action where appropriate.

Endemic sexual harassment – the main issue to have shone a light on draconian confidentiality clauses – falls clearly within the EHRC's current remit. It would not, therefore, seem to us appropriate to create a separate body with similar powers to investigate reports of pervasive harassment. We recognise that the EHRC may be best placed to determine the most effective routes to addressing sexual harassment and other workplace discrimination and, as noted above, NDAs and confidentiality agreements play only a very minor role in this.

However, this is a piecemeal approach to reform, and it may be preferable that all confidentiality clauses make it clear that any disclosure of wrongdoing to an appropriate regulator should be excluded from confidentiality clauses.

This would reinforce the whistleblowing provisions of S 43J of the Employment Rights Act 1996 (ERA) which make it clear that workers cannot be prevented by any agreement from making "protected disclosures", as defined elsewhere in the Act. As the government notes, it will often be unclear to a worker whether a proposed disclosure about sexual harassment or discrimination would fall within the whistleblowing protections, particularly on account of the "public interest test". Whether a disclosure about harassment or discrimination passes this test is particularly hard to predict: it depends on assessment of several factors, such as the number of individuals affected, the nature of the interest and the identity of the wrongdoer.[3] This legal uncertainty means that Section 43J offers little reassurance to the worker raising concerns about a culture of sexual harassment. If all confidentiality agreements permitted disclosures to regulators, this legal uncertainty may be addressed.

For the avoidance of doubt, nothing in this response obviates the need for S43J ERA to apply in all appropriate whistleblowing cases. We would be concerned if any exclusion of disclosures to organisations from the application of confidentiality clauses in individual sexual harassment and discrimination cases, had a narrowing effect on the wide application of the anti-gagging provisions of the whistleblowing legislation.

[3] *Chesterton Global Ltd & Anor v Nurmohamed & Anor* [2017] EWCA Civ 979

Regulatory bodies, with powers to intervene in organisations, can also play an important role in collating individual reports. There is progress in some areas – such as financial services – where the regulator has already identified that single incidents of sexual misconduct are worthy of reporting, where standards of fitness and propriety should apply to the perpetrator. Protect would encourage other regulators to follow suit.

Are there any other limitations you think should be placed on confidentiality clauses, in employment contracts or settlement agreements?

A further issue which a number of parties brought to the attention of the Women and Equalities Committee relates to warranties aimed at circumventing whistleblowing provisions. As noted above, warranties in settlement agreements threaten to undo the effectiveness of current anti-gagging provisions and any future limitations on confidentiality. Therefore, we consider it important that the government propose legislation to prevent workers being pressured into making such warranties.

Do you agree that all confidentiality clauses in settlement agreements, and all written statements of employment particulars, should be required to clearly highlight the disclosures that confidentiality clauses do not prohibit?

It is generally standard practice for settlement agreements to acknowledge that nothing in the agreement prevents a worker from making a protected disclosure under the Public Interest Disclosure Act 1998. Protect welcomes the government's proposal to legislate to require settlement agreements and employment particulars to state the limitations on confidentiality.

The requirement would address the situation, outlined above, in which an employer proposes clauses which are vague about the limitations on confidentiality, such as in respect of disclosures about criminal behaviour, and should always refer to the ability to make protected disclosures including to an appropriate regulator.

The inclusion of limitations on confidentiality in employment particulars would be an especially encouraging proposal. Our own research has shown that a large proportion of workers are unaware of the existence of whistleblowing protections, not least the anti-gagging provision at Section 43J. To require those protections to be set out in employment particulars would improve awareness and allow the legislation to better perform its function of encouraging workers to speak up about wrongdoing. Workers would be aware from the outset that they cannot be prevented from making certain disclosures.

As part of this requirement, should the Government set a specific form of words?

Protect is of the view that the government should not set a specific form of words to set out a worker's rights to make disclosures, but would encourage the inclusion of a suggested form of words in the template available to employers of written particulars on the gov.uk website. As the consultation paper notes, confidentiality clauses are often tailored to the specific nature of the business, covering aspects such as trade secrets, creative ownership and patents. If the government was to set a rigid form of words that was broad enough that it could apply to all settlement agreements, this might produce overly complex wording, inappropriate to most workplaces.

Instead we recommend that regulators should be tasked with setting the wording either for the sector or profession they oversee. This has the benefit of being a tailored approach to a sector, for

instance the Financial Conduct Authority (FCA) have required all settlement agreements from entities they regulate to follow their approved wording. This approach is much more nimble and would avoid a one-size-fits all approach of statutory wording that would be harder to alter over time.

Another reform to consider alongside our proposal is for the Government to amend the wording of Section 43J of the Employment Rights Act 1996 so that it is a clearer expression of protection for whistleblowers signing settlement agreements. We believe the following wording should be adopted:

"no agreement made before, during or after employment, between a worker and an employer may preclude a worker from making a protected disclosure."

This change would reassure whistleblowers and victims of the protection afforded to them if they escalate their concerns, while not creating a situation where statute is expected to spell out all the exceptions expected from the confidentiality agreement.

Do you agree that the independent advice a worker receives on a settlement agreement should be specifically required to cover any confidentiality provisions?

It has long been our view that these obligations should be bolstered so that workers receive fuller legal advice about limitations on confidentiality. In our experience, advice is often limited to the broad terms of the agreement as opposed to any specific advice on the existence and meaning of Section 43J, or how it would apply to that worker's situation. Coupled with low awareness of the law among the UK workforce, this means that too many whistleblowers are left with the impression that a confidentiality agreement or non-disparagment clause prevents them from further raising their concerns.

A requirement on lawyers to provide advice on the limits of this clause (including what information can be disclosed to external bodies) is a good way forward to better inform whistleblowers of their rights but this change should be accompanied by other reforms. For instance we support an additional form of wording – and would be happy to work with government on drafting this – that employees would receive alongside their settlement agreement, explaining what whistleblowing is, and how it interacts with the settlement, and where to go for advice.

Finally, to combat low awareness among workers about their whistleblowing rights there should be a public information campaign to increase this awareness.

These changes may help workers better understand that a settlement agreement cannot prevent them from whistleblowing. However, for an individual there remains the difficulty of knowing when an individual concern about harassment may fall within whistleblowing law (ie when the public interest test is met), which our proposal about reporting any incident of harassment or discrimination to an appropriate regulatory body seeks to address.

Do you agree with our proposed enforcement mechanism for confidentiality clauses within employment contracts? What would be the positive and negative consequences of this?

If the government does introduce new required wording for all settlement agreements, then we agree that any clause that fails to meet the requirements should be made void. However, there is a risk to both employer and employee if such a failure invalidates the whole agreement. For the employee, voiding a settlement agreement may mean that they are unable to obtain all the benefits of that agreement, such as long term pensions or other benefits which the employer has agreed to pay for some period of time.

If the government introduces wording to written statements of particulars, the enforcement mechanism set out in the consultation is weak: it is only when a tribunal claim is brought that an employee could challenge the wording, the remedy is only four weeks pay, and the employee cannot bring a standalone claim for this breach – there must also be a more substantive claim. While there should be a remedy, the chances of this being a successful route to enforcement is limited.

April 2019

ANNEX A

January 2019

The Women's and Equalities Committee Inquiry into Non-Disclosure Agreements in discrimination cases inquiry

We provide this short submission to the above-mentioned inquiry which is supplementary to our Chief Executive's (Francesca West's) appearance before the committee on 25 April 2018 in connection with the broader inquiry into sexual harassment in the workplace.

Introduction

1. Protect (formerly Public Concern at Work) is the UK's leading authority on whistleblowing. Set up 25 years ago, at the heart of the charity's work is the free, confidential Advice Line, which helps over 2,500 individuals each year. The advice line helps workers who have witnessed wrongdoing, risk or malpractice in the workplace but are unsure whether or how to raise their concern. Protect has advised over 40,000 individuals to date, and this in turn informs its approach to policy and campaigns for legal reform.

2. All of the charity's work is aimed at protecting the public interest by encouraging workplace whistleblowing. Over and above the work with individuals on the advice-line, the charity helps organisations to create a safe environment in which staff can raise concerns at the earliest opportunity. The charity supports hundreds of organisations to help ensure their whistleblowing arrangements are trusted and effective. We currently work with many regulators, professional bodies, commercial, public sector and voluntary organisations including: CIPD, AAT, General Medical Council (GMC), The Law Society, John Lewis Partnership, Barclays, the Bank of England, ITV and the British Red Cross.

3. These two complementary streams of work give us a unique perspective on whistleblowing, including the challenges faced by individuals in speaking up, and those experienced by organisations in listening to and addressing concerns. Protect has employed this experience in a wide array of policy work which has shaped the frameworks in which individuals raise concerns, and how organisations handle them. This includes: helping to draft the primary piece of legal protection for whistleblowers, the Public Interest Disclosure Act (PIDA); drafting the British Standard Institution's Guidance on Whistleblowing Arrangements; establishing the Whistleblowing Commission which developed a Code of Practice for whistleblowing arrangements, a guide used by many organisations in creating their whistleblowing processes; ongoing involvement in sectoral developments within the NHS and Financial Services; and long-standing collaboration with government on numerous initiatives which have touched on the wider world of whistleblowing.

The different regimes for whistleblowing and discrimination

4. Many of the issues raised by the committee and witnesses in the inquiry into sexual

harassment have themes that are common to those experienced by whistleblowers seeking help on the advice line. A key distinguishing factor is that the whistleblower is a witness to the wrongdoing and the victim of sexual harassment or abuse in the workplace is self-evidently a victim. There are different routes for redress available to those facing discrimination or harassment as a victim and to those who *witness* inappropriate conduct, or other wrongdoing in the workplace. There is obviously also the potential for both statutory regimes to come into play when an individual wishes to pursue a complaint about sexual harassment or abuse.

5. The legislative regimes protecting whistleblowers (mainly found in PIDA) and those preventing discrimination (mainly to be found in the Equality Act) operate quite differently and we are concerned that without thorough review, there will be unintended consequences of piecemeal reform. While we welcome the various reforms suggested by the committee and by the government as a result of the sexual harassment inquiry, we worry that with the current approach the two regimes in discrimination and whistleblowing protection are being interwoven without any further review of how the law works in practice. We expand upon and provide our reasons for this below.

6. It is worth stating that while NDAs are often used legitimately, the committee's previous inquiry into sexual harassment has shown that they are open to abuse by unscrupulous employers and their lawyers. What's more we believe there is a problem of perception among the general public.

7. As an NGO that has worked on whistleblowing law and protection for over 25 years, we can provide a view on how the anti- gagging provisions in the whistleblowing legislation[4] are little known and little understood and how this affects the likelihood of an individual feeling gagged and effectively being silenced. This is the case even though they might have a remedy if pursued by a former employer for breach of a settlement agreement or other confidentiality provisions in contract. Notwithstanding that the anti-gagging provision in whistleblowing law has been on the UK statute book for over 20 years, due to low awareness of their rights under PIDA and the struggle to find legal advice, many individuals who are subjected to an NDA often feel prevented from further raising their concerns.[5]

8. Fear often drives the individual's approach in this area and while NDAs can be helpful for an individual in moving forward and prevent the need for a long and protracted dispute there is very often an inequality of arms. This makes the individual's position still more vulnerable.

The anti-gagging provision in PIDA

9. For whistleblowers the anti-gagging provision can be found in 43J of PIDA as follows:

"(1) Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure.

[4] To be found in s43J PIDA – full text to be set out later in this response at para 9

(2) This section applies to any agreement between a worker and his employer (whether a worker's contract or not), including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract."

10. S43J is potentially a powerful tool against the use of inappropriate gagging clauses in the employment context, but it has not been tested in practice. As can be seen it is framed as a defence against any attempt to prevent a worker from making a disclosure that would normally be protected under the legislation. A protected disclosure is one which tends to show that one of the categories of concern are engaged (crime, breach of a legal obligation, miscarriage of justice, health and safety, damage to the environment or cover up of any of these) and meets the test that it is in the public interest. It is the last point which particularly distinguishes an individual complaint of sexual harassment or other discrimination from a whistleblower complaint. While case law sets out some guidance about when the public interest is engaged it is difficult to identify when a disclosure of a single breach/ discrimination against an individual would be seen to be in the public interest (see also paragraphs 29-31 below).

11. We have found in practice that it is difficult to advise individuals as to the strength of the operation of this provision because it has never been tested by the courts as against the sanctity of contract law (in that the confidentiality provision is in the contract of employment or in a signed settlement agreement). There is also an implied term in every employment contract of mutual trust and confidence, and the confidentiality provisions may extend beyond the termination of the employment itself. The strength of the statutory anti gagging provision as against the strength of the contractual term and the public interest issues engaged as a result have not been legally tested.

12. Nevertheless, the S43J provision has its foundations in the law of confidentiality and was built upon the common law principle and case law precedent that there is no confidence in iniquity. While recent case law has looked at the tension between competing rights under the law of confidence, the Human Rights Act and freedom of the press (see *ABC &others v Telegraph Media Group Limited [2018] EWCA Civ 2329*), there is no corresponding legal precedent dealing with s43J PIDA.

13. In our view there are several reasons for this. By their nature whistleblowing cases involve sensitive issues for all involved. From the individual's perspective, by the time they are considering signing a settlement agreement, they may well have been through an incredibly stressful situation, potentially involving the end of their employment and are looking at the end of an (often lengthy) dispute. They are likely to have been offered a sum of money in settlement. Having negotiated the settlement of the dispute, it is understandable that an individual may think twice about taking any risk that might open up further legal entanglement or the risk that their hard-won damages may be at risk. The fact that there is

[5] Survey results from 2018 show 63% of UK workers were either unaware or incorrectly believed there was no protection for whistleblowers, Protect and YouGov survey results 2011-2018, https://www.protect-advice.org.uk/attitudes-to-whistleblowing/

no legal precedent of the provision makes it all the more uncertain and less likely that the individual will decide to take the risk of breaching an agreement with draconian confidentiality provisions in NDAs. We suspect exactly the same issues arise when an individual is dealing with the settlement of a sexual discrimination or harassment claim. Without a clear understanding of the wider context of their employment situation – for example evidence of a workplace culture which tolerated sexual harassment – the individual disclosing their own case also risks a challenge from the employer that the disclosure was not in the public interest.

14. For the organisation the issues involved may well impact upon their reputation. If they have settled the dispute confidentially with an individual, it is not an attractive option for this to be revisited in an action in breach of confidence. While this sort of action is often threatened, in 20 years of litigated cases testing the principles in PIDA, we have not seen any litigated cases where 43J has been fully considered by the courts. Perhaps this is because to follow through on a threatened action in breach of a confidentiality clause this would further damage the organisation's reputation (to sue a whistleblower for breaching a legal provision that attempted to silence them), as well as the allegation that the organisation may have been trying to cover up the wrongdoing, makes the likelihood of an action against the whistleblower very unlikely in practice. A sensible organisation (or their advisers) will also see that pursuing the whistleblower is much more damaging than dealing with the public interest issue - perhaps apologising for the wrong doing and avoiding further publicity.

15. Add to this the fact that it takes a very brave individual to take such a risk in the first place and it is not, perhaps, so surprising that the issue has not been litigated by an organisation testing the boundaries of s43J in the same way that the media have pushed the boundaries of the law of confidence, the Human Rights Act and the principles of freedom of speech and the press.

16. This lack of legal precedent creates an unacceptable level of uncertainty among whistleblowers and their lawyers and feeds into the sense that to disclose the wrongdoing any further by the whistleblower is a risk that is not worth taking.

17. The lack of regulatory oversight in this area and the often overly legalistic approach to the wording in settlement agreements make this all the more difficult for the individual. It is easy to see why in many whistleblowing cases the public interest issue becomes buried in the settlement agreement and the matter goes no further than the end of the employment dispute. We have long argued that this creates a very real risk that settlement agreements have enabled the cover up of wrongdoing – see our attempts to make the operation of PIDA claims more open to public scrutiny here: Briefing note on the Department of Business Innovation and Skills consultation: Employment tribunal claims and the Public Interest Disclosure Act (PIDA), and here: Parliamentary Briefing on amendments to the Employment Bill (HL) 2008 Extended briefing for MPs

18. We would argue that the same principles apply to the cover up of sexual harassment and abuse. Effective mechanisms are needed to prevent these matters being shrouded in secrecy and to ensure that open justice principles apply across all employment protection legislation.

19. We would agree with comments made by witnesses to the inquiry that the way in which the law develops in this area too often relies on the individual taking forward an individual employment right and that to effect change there needs to be good system related responses as well as strong employment related rights.

20. There is a paradox at work here – how can society prevent the creeping culture of secrecy if these agreements are so effectively cloaked in secrecy. This is the reason s43J was included in the whistleblowing legislation in the first place. It is clear from the #metoo movement that the issue has not had enough attention and that a creeping culture of secrecy has been allowed to develop. We hope that the attention that the committee has brought to the issue will, in and of itself, result in lawyers, unions and the professions becoming more aware of the dangers of unscrupulous practice. The ongoing work in this area and can also help keep the issue alive and moving forward.

Proof of Abuse and NAO research

21. It is incredibly difficult to assess how widespread the misuse of NDAs is, given the confidential nature of such agreements. A problem we have seen on the Advice Line is that often workers feel they cannot either make a disclosure or even take legal advice about the effect of an agreement due to the legalistic or opaque wording of the confidentiality clause. This is further complicated by non- disparagement clauses and restrictions on allowing an individual to refer to the fact that such an agreement even exists. We know this is a problem from countless cases on our advice line.

22. In many such cases, we will ask to see a copy of the agreement (given that we operate under legal professional privilege), and often the agreement will on the face of it comply with or refer to s43J PIDA or to Part IVA ERA – the relevant section of the Employment Rights Act containing s43J. But the effect of all of the provisions in these agreements, taken together, are such that most people, unversed in the technicalities of employment protection legislation, would not understand the effect of S43J, or that it exists at all.

23. In 2013 NAO research looked at 50 settlement agreements from the public sector, and 49 were found to include a confidentiality clause which stopped the person discussing the terms of the agreement. The NAO judged none to be in breach of s43J PIDA, in other words none of the agreements stopped a whistleblower raising their concern further.

24. The research provided a number of examples of the type of opaque wording used by employers in NDA agreements and identified a number of issues as contributing to the belief

that they could not make further disclosures: 1) the events leading up to the signing of the agreement, including the culture of the workplace and the attitude towards whistleblowing 2) the wording of the agreement itself 3) despite getting legal advice (a prerequisite of accepting an agreement) it was generally not made clear to individuals that the confidentiality clauses would not prevent them blowing the whistle on a public interest concern.[6]

25. The NAO found in two agreements clauses that prevented the employee from further raising concerns with external bodies such as the Care Quality Commission. In one case a whistleblower had already raised their concern which was being investigated internally, and in another the NAO judged that the situation to not be a whistleblowing one.[7]

26. In the case where the concerns were being investigated internally the following clause prevented the whistleblower escalating their concern:

> *' [the Employee] will not bring or pursue any further internal complaint or grievance with the Employer in connection with any aspect of the Employer's business which the Employee is aware of as at the date of this agreement, whether in accordance with the Employer's grievance procedure or otherwise, or bring or pursue any further complaint or grievance against the following organisations in connection with any aspect of the Employer's business which the Employee is aware of as at the date of the agreement: The Information Commissioner; The Care Quality Commission; The Audit Commission; NHS London and/or; The Department of Health.'*[8]

27. The NAO judged that this clause did not breach s.c.43J. With respect, we disagree with this analysis as it makes no distinction between a private grievance issue or a public interest concern with the wording '*any aspect of the Employer's business which the Employee is aware of as at the date of the agreement'.*

28. The research established what we have long held to be true – namely that NDAs too often represent a barrier to a whistleblower who tries to raise their concern with an external regulatory body or with the police. This would be equally true for an individual reporting matters involving sexual harassment. The reasons for this are as follows:

- **Low awareness among workers of their rights:** in survey research from 2015 67% of respondents (in this case UK workers) were either unaware or believed there was no legal protection for whistleblowing.[9]
- **The lack of clarity around the exact form of defence provided by PIDA:** the lack of guidance or case law creates a real lack of clarity as to whether or not the anti-gagging

[6] Confidentiality clauses and special severance payments – follow up, NAO report, October 2013.
[7] Ibid p.g. 10
[8] Ibid
[9] Ibid.

provisions can be relied upon under PIDA. This situation has not been helped by the unclear wording of 43J itself.

- **The opaque wording of many agreements:** many NDAs involving whistleblowers have unclear or opaque wording. The Financial Conduct Authority and the Prudential Regulatory Authority have taken action on this by requiring financial service firms to use specific wording in settlement agreements making it clear that a worker can approach them with concerns normally protected by PIDA.[10] The following wording has been used by the FCA: "*for the avoidance of doubt, nothing shall preclude [the employee's name] from making a "protected disclosure" within the meaning of Part 4A (Protected Disclosures) of the Employment Rights Act 1996. This includes protected disclosures about topics previously disclosed to another recipient."*
- **Lack of legal advice:** as has been highlighted in previous evidence sessions with the committee there is often a disparity of arms between an employer and worker. Independent advice on the effect of the anti-gagging provisions in PIDA (or elsewhere) would remove some of the uncertainty and reassure a whistleblower that a settlement agreement will not stop them from taking their concerns to a regulatory body or to the police or exposing the issue more widely. **We have suggested adding to the requirement in S203(3)(c) ERA that an individual receives independent advice not only on the terms and effect of the settlement agreement, but that anti-gagging provisions are specifically included in this advice.**[11]

Public interest test

29. We are pleased that the government's response to the original inquiry by the committee includes provisions to strengthen the regulatory environment for those who wish to report sexual harassment, but we are concerned, as mentioned above, by the piecemeal approach of this amendment. While the government claims that "the employment protections for whistleblowers can already cover disclosures of workplace sexual harassment", we need to be clear that this is not quite as simple as the government suggests. [12] When an individual suffers sexual harassment in the workplace, their usual remedy is through the internal grievance process. To fall within the protection of the Public Interest Disclosure Act (PIDA), the individual raising a concern has to have a reasonable belief that the employer is breaching a legal obligation and that the disclosure is *in the public interest*. It may seem self-evident that telling an external organisation – such as the EHRC – that sexual harassment has occurred should be a protected act – but it isn't.

30. The law was changed to include the public interest test to stop individuals using PIDA to raise concerns about their own employment rights. Testing whether or not an individual is covered by PIDA in sexual harassment or discrimination claims may not always be straightforward and will rest on the number of people affected, the seriousness of the

[10] https://www.handbook.fca.org.uk/handbook/SYSC/18/5.html?date=2018-08-08
[11] See Whistleblowing Commission report p22-23
[12] Sexual harassment in the workplace: Government Response to the Committee's Fifth Report of Session 2017–19

harassment, who the harasser is and how seriously the individual is affected.[13] While it is likely the test will have a broad application it is an additional hurdle for victims that does not exist in the Equality Act. If the test is not met, a private grievance followed by an individual claim to the tribunal is still their only employment remedy.

31. This illustrates why the government's 'copy and paste' approach to this issue could have unintended consequences – assuming that someone reporting sexual harassment issues to the EHRC will have the same protection as, for example, an individual reporting financial misconduct to the FCA, without properly reviewing how the Equality Act and PIDA operate and making sure they operate effectively may mean that workers are under the impression that they are protected, when they are not.

Code of practice

32. Again, we welcome the proposal to introduce a statutory code in sexual harassment cases, to give a strong steer to employers about what they should be doing to prevent sexual harassment in the workplace. However, this should adequately consider how to support and encourage whistleblowers who speak up on behalf of victims. We have drafted an appropriate code of practice in whistleblowing arrangements which could be added to the code proposed (see Whistleblowing Commission Code of Practice).

33. We would add that without an enforcement mechanism, it remains with the individual to complain if the Code is not being followed. The government have proposed a wait-and-see approach to how tribunals respond to the Code – which is unlikely to make bad employers tremble. Even the threat of an uplift in a tribunal award for failure to prevent sexual harassment pales into insignificance when contrasted with the fines employers might face for breaching, say, GDPR requirements.

34. We agree with the committee that the government's failure to include a mandatory duty on employers to prevent harassment – a breach of which could lead to enforcement action by EHRC - is disappointing. It is also therefore disappointing that the good practice in some sectors in making whistleblowing arrangements mandatory – such as in Financial Services – have not been followed here.

Awareness campaign

35. We look forward to the proposals that will emerge surrounding the need for a wider public information campaign about legal rights in the employment sphere. We hope that the government and policy makers will include awareness around whistleblower rights – not just in the sphere of sexual harassment but the in the public interest more widely.

36. There have been sensible calls from others to the committee for guidance to be produced for lawyers, employers and workers around the use of NDAs and defences or exceptions that exist around their use. We agree. We also welcome the Solicitor's Regulation

[13] See the leading case for more details Chesterton Global Ltd & Anor v Nurmohamed [2017] EWCA Civ 314

Authority's warning notice on NDA's and confidentiality clauses and the Law Society's recent practice note.[14] It is vital that there is better public awareness around employment protection legislation generally.

37. As can be seen from our experience in the whistleblowing sphere, even where there is a sensible anti-gagging provision included in statutory protection, individuals do not feel protected by it, and it is on their shoulders to test the boundaries of the legislation. This is simply not good enough and the measures suggested by the committee as well as a requirement that individuals are provided with independent advice on the effect of proposed anti gagging provisions should proceed as soon as possible.[15]

Costs and threats

38. We believe there is a creeping cost culture in the employment tribunal and this has the effect of dissuading individuals from enforcing their rights and seeing claims through to conclusion. While we agree that there is a public interest in the prompt settlement of disputes, we believe that the threat of costs is too often used by employers to threaten and effectively silence individuals pursuing claims. This should be considered carefully by the ETS and by the government and should be included as a specific issue in the public awareness campaign.

Conclusions and Recommendations

39. In conclusion we believe there are some reforms that can be undertaken to reassure whistleblowers of their rights in relation to NDAs, and actions that can be taken to reinforce the legal framework that already exists:

- While we do not support the outright ban of NDAs, we do not think it would ever be appropriate to use an NDA to prevent the disclosure of an unlawful act that has not yet taken place.
- We would like to ensure that other clauses in settlement agreements (such as warranties or non-disparagement clauses) are not used to circumvent the anti-gagging provisions in PIDA (or other soon to be proposed anti gagging provisions).
- An employee who is the subject of a NDA should always be permitted to keep a copy of the NDA.
- More could be done to provide guidance for lawyers, employers and workers on the exemptions that exist in relation to NDAs and we welcome ACAS's intention to publish guidance.
- We welcome the recent publication of a practice note by the Law Society reminding lawyers that the public interest in the proper administration of justice takes precedence over the duty of acting in the client's best interests and to consider the SRA's warning notice on the use of NDAs. However, the guidance also recognises that whistleblowing in

[14] SRA warning notice and law society practice note

[15] S203(3)(c) ERA should be amended so that an individual receives independent advice not only on the terms and effect of the settlement agreement, but that anti-gagging provisions are specifically included in this advice.

the public interest is a complex matter and that it is often legally uncertain whether a person can talk about how they have been treated because they made the disclosure (and refers to Protect for those needing support).

- To publicise and underpin fresh guidance there should be a public awareness campaign around workers' rights under PIDA as well as anti-discrimination law in the Equality Act.
- Section 43J should be amended with more robust language, **we suggest the following wording: *"no agreement made before, during or after employment, between a worker and an employer may preclude a worker from making a protected disclosure."***
- There should be a requirement on lawyers when advising on settlement agreements (see S203(3) ERA) to explain the meaning and effect of 43J PIDA (and any additional anti-gagging provisions brought forward by the government).
- Any development of NDAs should carefully consider the balance between existing whistleblowing law and the desire to see stronger protections for those who have been the victim of sexual harassment at work. A stronger role for the EHRC to investigate concerns, rather than amendments to post-employment protections, may be a better way to change workplace cultures.

Protect
January 2019

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