A. INTRODUCTION

1. Over recent months, a number of events have focussed public attention on the misuse of non-disclosure agreements (“NDAs”) to suppress disclosures of serious and indeed criminal wrong-doing. Not least, revelations of repeated allegations of rape, sexual assault and harassment against Harvey Weinstein, which it appears were effectively suppressed over decades through the use of NDAs, have brought to the fore legitimate concerns about the ways in which these agreements may be misused so as to gag individuals who have either suffered or witnessed serious sexual assaults and harassment. The issues raised include not only the concealment of the original wrong-doing but also the ways in which the misuse of NDAs may contribute to a culture of silence and otherwise foster an environment in which wrongdoers feel that they can continue to act with complete impunity. The result is that serious and criminal wrongdoing may go undetected over many years, increasing the pool of victims and otherwise putting individuals unnecessarily at risk. Importantly, the misuse of NDAs can not only serve to conceal very serious abuses of power, but can also constitute a powerful incidence of such abusive behaviour. Put shortly, the misuse of NDAs is substantially contrary to the public interest and is a serious social vice.

2. These issues came to public attention in the UK particularly after Zelda Perkins, Weinstein’s London-based former personal assistant, spoke out about the NDA she signed in relation to her experience with Weinstein and his alleged sexual assault of her colleague. This was followed by the controversy in January this year involving the Presidents’ Club annual charity dinner in London, where a Financial Times journalist reported that women staffing the event had been groped and harassed but had been required to sign NDAs prior to the event, agreements which on their face would prevent those subject to such conduct from speaking out. It appears that the women in question did not have a proper opportunity to read the agreements prior to signing them and were not permitted to retain a copy of what they had signed. This resulted in Prime Minister Theresa May calling for a review of how NDAs are being used in relation to sexual assault and harassment cases.

3. Ms Perkins’ story and the events surrounding the Presidents’ Club Dinner serve to illustrate the potential risks which arise where NDAs are misused. Those risks include not least that individuals will not report serious wrongdoing to the police or other law enforcement authorities; will feel compelled not to assist with law enforcement investigations or prosecutions in connection with such wrongdoing; will feel unable to speak openly and in the public interest about serious wrongdoing, thus inhibiting public awareness and debate; and will themselves have to live under the shadow of an oppressive contractual regime which inhibits their fundamental right of free speech and otherwise perpetuates a relationship which is itself abusive.

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1 See http://www.bbc.co.uk/news/entertainment-arts-42417655
4. The recent controversies have focussed on how NDAs may be used to silence women who have suffered or witnessed sexual harassment or sexual assaults. However, it is important not to overlook the fact that men also can be subject to sexual harassment and assault or may otherwise be required to sign NDAs where they have witnessed such conduct being perpetrated towards others. It is also important to note that the risks posed by the misuse of NDAs are present not only in cases of alleged sexual harassment and sexual assault: they arise wherever NDAs are misused so as to conceal serious or criminal wrongdoing, whether within or outside of the sphere of employee relations. Plainly any protective regime should protect all victims, whatever their gender, and should otherwise be comprehensive in terms of its safeguarding of the right to effect disclosures in the public interest.

5. However, at the same time, it is important to note that agreements including provision for confidentiality are a vitally important dispute resolution tool in a broader commercial and employment context, including potentially for individuals who have suffered sexual harassment in the workplace. Such individuals may, for a variety of reasons, decide against reporting to the authorities or litigating. They may want to protect their own fundamental right to privacy in respect of such conduct. It is potentially problematic if confidentiality is not available as an option for individuals who want to make this choice. There are otherwise important considerations relating to ensuring that the freedom to contract is not unduly inhibited and that the proper use of NDAs is not excessively restricted, particularly where they may assist in the achievement of early resolution of legal disputes.

6. The critical question is: when it comes to the application of legal and regulatory controls, how should the balance be struck so as to ensure that the use of NDAs does not tip into a form of reprehensible and otherwise socially damaging misuse? The aim of these submissions is to assist the Committee in resolving that very difficult question by: (a) examining the ways in which NDAs are potentially used and misused, both within and outside the employment context; (b) reviewing the existing legal and regulatory framework surrounding the use of NDAs and (c) identifying a range of reforms and other measures which the Committee may wish to consider.

B. NON-DISCLOSURE AGREEMENTS

7. NDAs are commonplace in all sorts of areas. They can be used as part of a commercial agreement designed to compromise actual or threatened litigation. Alternatively, they can be used to ‘buy off’ an individual who may otherwise effect potentially damaging disclosures. The nature of the disclosures which may be the subject of an NDA can be hugely varied, ranging from disclosures relating to commercial activities to disclosures concerning conduct in the workplace, environmental torts, regulatory breaches, professional malpractice and criminal conduct.

8. The form that such agreements take can be highly variable, ranging from an indiscriminate and relatively simple non-disclosure provision to a highly complex set of provisions which seeks to discriminate between permissible and impermissible disclosures. Some agreements will plainly contemplate the need to ensure that the individual in question is not unduly gagged. Others will clearly be oriented towards
creating the impression that any type of disclosure will result in the agreement unravelling and the individual being exposed to aggressive litigation.

9. Importantly, NDAs can potentially address not only the extent to which the individual can proactively effect disclosures but also the extent to which individuals feel free to co-operate with police or other law enforcement/regulatory investigations. Plainly any provision which seeks to have the latter inhibitory effect is immediately and substantially contrary to the public interest. As may be appreciated, compliance with such provisions potentially gives rise to the risk that law enforcement and regulatory investigations, which are themselves designed to protect the public, will be impeded or frustrated. Ultimately, there is a risk that the course of justice may be perverted.

10. Additionally, it may be a feature of the NDA that an individual who is subject to its terms is not allowed to hold or even gain access to the agreement in question. Such constraints on access potentially put the individual who is subject to the terms of the NDA in an invidious position, not least in terms of their being able to obtain advice as to the legality and effect of the agreement after it has been entered into.

11. All that said, it is important to remember that there will be circumstances in which NDAs are an important and wholly unobjectionable feature of a commercial dispute resolution process. For example, an employer may well decide for commercial reasons to settle a claim brought by an employee, despite the fact that it appears on investigation to have no merit. Such a situation may arise for example where the claim can be settled for a relatively small sum and fighting it would be costly and take up a disproportionate amount of management time. The employer may well want to insist on a confidentiality clause in order to avoid a situation where employees and ex-employees who learn about the agreement may be encouraged to mount spurious litigation against the employer in the knowledge they will likely receive a pay-out. Moreover, as discussed above, there may be cases where individuals themselves want to agree to a mutually binding confidentiality provision in order to ensure that they enjoy a degree of privacy in respect of the matters in question.

12. However, the risk that, in individual cases, the use of NDAs can tip into a form of misuse is clear and obvious. Moreover, it must be remembered that very often such agreements are being negotiated against the backdrop of a serious inequality of bargaining power and inequality of arms. Certainly, such a situation is entirely typical in the employment sphere. The situation may well be exacerbated where the employer has already abused its dominant position so as to create a climate of fear (including fear of reprisals) for the employee. The risk that the employer may seek to exploit the employee’s vulnerability in these circumstances so as to procure an NDA should not be underestimated. These are issues to which professional representatives on both sides should be alive.

13. As noted above, use of NDAs extends far beyond cases involving sexual harassment in the workplace. We have included in a separate annex an analysis of how issues pertaining to NDAs have arisen in other contexts (see Annex A below).

C. THE CURRENT LEGAL AND REGULATORY LANDSCAPE
14. In determining whether the law on the use of NDAs needs to be reformed, the Committee will inevitably wish to have regard to the legal and regulatory controls which currently apply to the use of NDAs. What follows is a summary account of those controls.

The civil legal landscape

15. The civil law applies in various ways so as to safeguard the rights of individuals who sign NDAs.

Statutory protections

16. The first and probably most pertinent protections to consider are those embodied in UK whistle-blowing legislation.

17. The Public Interest Disclosure Act 1998, the various provisions of which were transposed into the Employment Rights Act 1996 between 1998 and 1999, affords important protections to “workers” who engage in whistleblowing through the making of what the legislation describes as “protected disclosures”. It should be noted here that the relevant provisions which today give some protection to whistleblowers would not have applied in Ms Perkin’s case, as it is understood that her resignation and signature of the NDA pre-dated the coming into force of the relevant provisions.

18. A “worker” is defined by section 230(3) of the 1996 Act as: “an individual who has entered into or works under (or, where the employment has ceased, worked under) –

   a. a contract of employment; or

   b. any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.”

19. Under section 43K of the 1996 Act the usual definition of “worker” is extended in relation to the whistleblowing provisions to include a number of individuals who would not otherwise be covered. This extended definition includes agency workers and individuals supplied via an intermediary, provided that the terms of engagement are not substantially determined by the workers themselves but instead by the person for whom they work (section 43K(1)(a)(ii)). Additional protections also apply to NHS workers and are planned in relation to those involved in children’s social care.4

The relevant protected act

20. The 1996 Act seeks to afford workers protection in respect of any “protected disclosure” which they make. To amount to a “protected disclosure”, the disclosure must amount to a “qualifying disclosure” (as defined in s. 43B) and, further, that

4 Ss. 49B and 49C of the 1996 Act.
disclosure must either: (a) be made to one or more of the persons identified in ss. 43C-F or otherwise (b) fall within the scope of s. 43G (disclosure in other cases) or s. 43H (disclosure of information showing an ‘exceptionally serious failure’).

21. Pursuant to s. 43B, a “qualifying disclosure” is a disclosure of information which, in the reasonable belief of the worker making it, is both made in the public interest and tends to show that one or more of the wrongs listed in section 43B have occurred or are likely to occur. Those wrongs include the following:

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

22. There are a number of important points which should be noted in respect of the definition of a “qualifying disclosure”. First, in order to fall within the scope of s. 43B the worker does not have to prove that the relevant wrongful event has occurred or is likely to occur. Instead, they merely have to have a reasonable belief that the information they are disclosing tends to show that the wrongful event has occurred or is likely to occur. This is important because it shows that Parliament was keen not to set the bar too high for workers in terms of their obtaining protection under the legislation. Second, the regime is not confined merely to criminal wrongdoing. It also seeks to target other forms of social ills, such as environmental damage, non-criminal endangerment of health and safety and miscarriages of justice. Obviously NDAs can potentially be deployed to prevent disclosure relating to all of these public interest matters. Third, and importantly, however, the qualifying disclosure regime is subject to an important constraint in that the worker must have a reasonable belief that the disclosure is in the public interest. The public interest threshold is present in the legislation so as to ensure that workers cannot acquire protected status by making disclosures about matters which are solely of personal interest (that an employer breached the terms of an individual worker’s contract, for example, or failed to comply with a grievance procedure). Allied to this restriction is the requirement that the disclosure be of information, rather than consisting of a mere complaint or allegation.

5 The public interest requirement was arguably inherent in the original legislation but was expressly included by the Enterprise and Regulatory Reform Act 2013, s. 18.
6 See Cavendish Munro Professional Risks Management Ltd v Geduld [2011] IRLR 38, Goode v Marks & Spencer plc UKEAT/0442/09 (15 April 2010, unreported) and Smith v London Metropolitan
Sexual harassment is defined by s. 26 of the Equality Act 2010 ("the 2010 Act") as happening where a person “A” engages in unwanted conduct related to sex, or unwanted conduct of a sexual nature, which has the purpose or effect of violating another person (B’s) dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B”. Sexual harassment will also occur where A engages in unwanted conduct of a sexual nature, or that is related to sex, which has the purpose or effect of violating B’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B, and treats B less favourably than A treated or would treat others because of B's rejection of or submission to the conduct. Under the 2010 Act, it is unlawful for an employer to sexually harass its employees or for a principal to sexually harass a contract worker (2010 Act, ss. 40 and 41). Where the harassment is undertaken by an employee or agent of the employer/principal, both the employee/agent and the employer/principal can potentially be held liable in respect of the harassment (2010 Act. ss. 109-110).

Importantly, many forms of sexual harassment will not meet the threshold of amounting to criminal conduct. Indeed, the tort of sexual harassment is important precisely because it captures, and renders unlawful, socially reprehensible conduct which does not fall within the grasp of the criminal law.

As well as constituting a tort, sexual harassment can in some circumstances constitute criminal conduct pursuant to the Protection from Harassment Act 1997 ("the 1997 Act"). The 1997 Act provides (s. 1) that “A person must not pursue a course of conduct (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other”. It also prohibits the pursuit of a course of conduct which involves the harassment of two or more persons, which the harasser knows or ought to know involves harassment of those persons, and by which he intends to persuade any person not to do something that she is entitled or required to do, or to do something that she is not under any obligation to do.

The 1997 Act does not further define harassment, though it is clear from the requirement for “a course of conduct” that, in this context, by contrast with the position under the Equality Act 2010, more than one act or omission must be complained of. Under the 1997 Act, harassment is both a civil wrong (for which damages may be recovered) and a criminal offence liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both. The 1997 Act also prohibits stalking, which occurs when the acts or omissions amounting to harassment “are ones associated with stalking”, s. 2A providing examples of acts or omissions which, in particular circumstances, are ones associated with stalking which include “following a person”, “contacting, or attempting to contact, a person by any means”, “loitering in any place (whether public or private)”, and “watching or spying on a person”. The offence of stalking is punishable by imprisonment for a term not exceeding 51 weeks, or a fine not exceeding level 5 on the standard scale, or both. Injunctions may also be obtained in respect of harassment and stalking.

University [2011] IRLR 884, EAT.
Apart from the 1997 Act, sexual harassment which amounts to a sexual assault will constitute criminal conduct at common law.

As discussed above, not all sexual harassment will amount to or include any criminal act. However, the disclosure of information concerning sexual harassment can still potentially fall within the scope of 43B(1), particularly under limb (b) (breach of the anti-harassment provisions in the Equality Act 2010) and also possibly under limb (d) (endangerment of health and safety).

It is a matter of debate whether the disclosure of information which tends to show that sexual harassment has occurred or is likely to occur will always be a matter of public interest. Obviously factors which will strongly tend to indicate that disclosures of information concerning sexual harassment are in the public interest include that the harassment is serious, persistent and/or effected by individuals in positions of power.

We have addressed above the question of how the law approaches acts of sexual harassment, and how disclosures relating to such acts fit within the scheme embodied in s. 43B. However, it should be noted that sexual harassment is just one of a number of different types of harassing conduct which the law prohibits. Certainly the 2010 Act seeks to prohibit harassment relating to any one of the characteristics which are protected under that Act, including not only sex but also race, age, religion or belief marital status, sexual orientation, gender reassignment and disability. Once again it should not be assumed that NDAs are only problematic in respect of sexual harassment.

Importantly, it is not all qualifying disclosures which qualify for protection under the 1996 Act. Indeed, such disclosures only qualify for protection if they are made to one of the persons specified in sections 43C to 43F, or s. 43G or s. 43H applies. Sections 43C-F concern disclosures made:

a. to the person’s employer (or a person prescribed under the employer’s procedure) (s. 43C);
b. where the worker reasonably believes that the relevant failure relates solely or mainly to the conduct of a person other than his employer, or to any other matter for which a person other than his employer has legal responsibility, to that other person (s. 43C);
c. to a legal adviser for the purposes of obtaining legal advice (s. 43D);
d. where a worker’s employer is appointed under any enactment, or is a body any of whose members are so appointed, to a Minister of the Crown or a member of the Scottish Executive (s. 43E);
e. to a person prescribed by an order made by the Secretary of State, where the person making the disclosure reasonably believes that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and that the information disclosed, and any allegation contained in it, are substantially true (s.43 F).
32. Section 43G treats a qualifying disclosure as a ‘protected disclosure, where the disclosure is made to any person to whom a worker may reasonably believe that disclosure is appropriate, provided that:

   a. the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true

   b. the disclosure is not made for the purposes of personal gain, and;

   c. the worker reasonably believes that:

      i. she will be subjected to a detriment by her employer if she makes a disclosure to her employer or to a person prescribed by the Secretary of State, or

      ii. (in a case in which there is no prescribed person in relation to the relevant failure) that it is likely that evidence relating to the relevant failure will be concealed or destroyed if she makes a disclosure to her employer,

   d. in all the circumstances of the case, it is reasonable for the worker to make the disclosure.

33. The reasonableness of the worker’s belief will be assessed taking into account, in particular: (i) the identity of the person to whom the disclosure is made; (ii) the seriousness of the relevant failure; (iii) whether the relevant failure is continuing or is likely to occur in the future, (iv) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person; (v) (where the worker has already made a disclosure to the employer or a prescribed person) any action which has taken or might reasonably be expected to have taken as a result of the previous disclosure, and (vi) (where the worker has already made a disclosure to the employer) whether, in making the disclosure to the employer, the worker complied with any procedure whose use by him or her was authorised by the employer (s. 43G).

34. Section 43H concerns disclosures relating to failures of an exceptionally serious nature. It provides that a protected disclosure will be made where a qualified disclosure is made to anyone to whom the worker might reasonably make the disclosure in all the circumstances of the case, provided that: (a) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true and (b) he or she does not make the disclosure for purposes of personal gain. The identity of the person to whom the disclosure is made will be taken into account in particular in determining whether it is reasonable for the worker to make the disclosure.

35. Sections 43G and 43H offer important protection for the worker in that they serve to open up the pool of persons to whom disclosures can be made (on a protected basis), particularly in cases where disclosure to the employer is not effective or itself poses undue risks for the worker or where the wrongful conduct is exceptionally serious. Depending on the facts of the case, these provisions could potentially be relied upon to effect a disclosure to the media, though this is likely to be regarded as reasonably necessary only as a last resort.
Nature of the protections

36. There are a number of protections which the legislation affords in connection with the making of protected disclosures.

37. Critically for the purposes of this discussion, s. 43J(1) of the 1996 Act stipulates that “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”. A relevant agreements is, by virtue of s. 43J(2) “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.”. The effect of these provisions is that NDAs which seek to restrain protected disclosures are not worth the paper they are written on: they are void and cannot be enforced against the worker. They effectively act as an iron-clad ‘shield’ against breach of contract claims brought by the employer for breach of the NDA. Notably, s. 43J of the 1996 Act appears to apply to gagging clauses regardless of when they were agreed, with the result that an NDA which was agreed prior to the introduction of PIDA would be treated as void under that section if the employer sought to enforce it after PIDA came into force.

38. The 1996 Act provides, in addition, that:

   a. “A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure” (s. 47B);

   b. “an employee who is dismissed that be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure” (s. 103A).

39. These latter provisions provide workers and employees with a ‘sword’ in the sense that they afford them a right to bring a claim in respect of any detrimental treatment suffered at the hands of their employer as a result of making a protected disclosure.

40. It should be noted that an employee who succeeds in establishing that their dismissal was automatically unfair under s. 103A will also be able to claim unlimited compensation in respect of losses flowing from their dismissal. This is because the usual statutory cap which applies to unfair dismissal claim is lifted in cases of whistleblowing dismissals (see further ss. 103A and 124 of the 1996 Act).

41. In summary, the legislation affords the following protections to workers/employees:

   a. first, any NDA would be void under section 43J of the 1996 Act insofar as it purported to preclude a disclosure being made about criminal acts;

   b. second, a worker would have the right to claim in respect of any detriment suffered at the hands of an employer because of any protected disclosure which they had made (this right must generally be exercised within the period of 3 months from the date of the relevant detriment); and
c. third, an employee who was dismissed (whether directly or constructively) as a result of making a protected disclosure would be able to claim that their dismissal was automatically unfair under s. 103A of the 1996 Act.\(^7\) Again, this claim would generally have to be brought within 3 months of the dismissal. The employee who succeeds in establishing that their (direct or constructive) dismissal was automatically unfair under s. 103A can claim compensation free from the statutory cap which would otherwise apply.

**Limits of the Regime**

42. In terms of the limits of the whistleblowing regime, there are three which are particularly worthy of note:

a. First, the legislation does not operate so as to penalise an employer who seeks to impose an excessive NDA on a worker. In effect, the employer can seek to bind the worker to the relevant NDA with complete impunity: they may not ultimately be able to sue on the agreement and they will be liable if they seek to punish or dismiss the worker for having made a protected disclosure but they suffer no adverse consequences merely as a result of getting the worker to sign the agreement itself. As may be appreciated, the act of getting the agreement signed, even if it is void in law, can itself achieve the practical effect of silencing the worker. Certainly, this will potentially be the case where the worker is not advised as to the void nature of the agreement or where the worker is otherwise so vulnerable that they are reluctant to take the risk of being sued for breach of contract. It is worth noting here that the provisions concerning protected disclosures embodied in the 1996 Act are themselves highly complex, as indeed is revealed by the analysis of those provisions set out above. Even if a worker is aware of the relevant provisions, they may well struggle to understand the extent to which they enjoy protection as a result of those provisions.

b. Second, the regime only affords protections to workers. Individuals who may be the victim of or who witness unlawful/criminal conduct but who do not occupy the position of a “worker” will not enjoy any statutory protection in respect of the NDAs they sign.

c. Third, the regime plainly does not give workers a completely free hand when it comes to selecting the recipients of their disclosures. Certainly, a worker who wishes to speak openly to the media about a particular wrong falling within the scope of s. 43B will generally only enjoy the protection of the legislation where he or she can establish both that (a) the wrong was of an exceptionally serious nature and (b) it was otherwise reasonable to disclose the information to the media (i.e. as opposed to one of the persons identified in ss. 43C-F). Many workers who wish to bring public attention to the wrong-doing in question may balk at going to the media for fear that they will not be able to meet these stringent requirements. The resulting risk that free (public interest) speech will be inhibited is clear and obvious.

\(^7\) A worker would be receive equivalent provision from the “detriment” provisions
d. Fourth, there is in any event a question as to whether the pool of persons to whom disclosures can be made so as to engage the statutory protections is unduly restricted. There is an important question as to whether the pool should be extended to include, for example, other law enforcement bodies, such as the police; professional regulatory bodies; bodies specifically charged with protecting the rights of employees, including for example the Equality and Human Rights Commission and ACAS.

Common law protections

43. The common law also provides some potentially relevant ‘shields’ to those forced to sign NDAs.

44. First, the doctrine of undue influence operates so as to render a contract voidable where it has been entered into as a result of pressure on one party which falls short of duress, but which equity regards as being unconscionable and therefore unlawful.

45. There are two species of undue influence, as defined by Lord Nicholls of Birkenhead in the seminal case of Royal Bank of Scotland Plc v Etridge No. 2 [2002] 2 A.C. 773:

a. The first comprises overt acts of improper pressure or coercion.

b. The second arises out of a relationship between two persons where one has acquired over the other a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage. This does not merely encompass cases where there is a “relationship” between the two parties (e.g. of trust of confidence), but can also include cases where a vulnerable person has simply been exploited, in the absence of any such underlying relationship.

46. This has particular resonance in circumstances where the NDA has come about effectively through an abuse of power.

47. In addition, the defence of illegality (or ex turpi causa non oritur actio) prevents a contract from being enforced by one party against the other where the relevant obligation(s) would be illegal. There is also the general principle that equity will not uphold confidences grounded in iniquity. Beyond iniquity, there is a question as to whether NDAs covering sexual harassment in the workplace might otherwise be treated as void or voidable on public policy grounds. It remains unclear the extent to which these principles could in practice be deployed to unravel NDAs. It may well be that an NDA which sought to frustrate criminal law enforcement processes would be void on grounds of illegality (perversion of the course of justice). However, a question remains as to how other types of restrictive provisions would fare under the common law.

The criminal legal landscape

48. As noted above, not all sexual harassment will amount to or include criminal wrongdoing. Where it does, various aspects of the criminal law may be engaged in respect of an NDA which seeks to prevent disclosures relating to the relevant harassment.
Criminal Law Act 1967

49. It is an offence under section 4(1) of the Criminal Law Act 1967 for a person, knowing or believing another to be guilty of a “relevant” (arrestable) offence, to act with intent to do any act with intend to impede his apprehension or prosecution without lawful authority or reasonable excuse.

50. A person guilty of an offence under section 4(1) may be liable on conviction to imprisonment for up to ten years according to the gravity of the other person’s offence (section 4(3)).

51. It is a further, separate offence under section 5(1) of the Criminal Law Act 1967 for a person to agree to conceal a “relevant offence” committed by another in exchange for any consideration other than the making good of, or the making of reasonable compensation for, any loss or injury caused by the offence.

52. A person guilty of an offence under section 5(1) may be liable on conviction to imprisonment for up to two years (section 5(2)).

53. Importantly these provisions appear to criminalise those individuals who sign NDA agreements designed to conceal a criminal (arrestable) offence. They may also criminalise those individuals who facilitate the creation of the relevant NDA. However, where the criminal is the employer, they do not obviously criminalise the employer’s actions in respect of the NDA. Query whether the employer could be held criminally liable on the application of the criminal law on aiding and abetting.

54. It is unclear the extent to which these offences, which are very old, have fallen into desuetude.

Hindering or frustrating the administration of justice

55. There is a further range of common law offences which cover conduct which hinders or frustrates the administration of justice, including the work of the police, prosecutors and the courts. These may overlap with the offences under the Criminal Law Act 1967 set out above.

56. The most relevant of these is the offence of perverting (including attempting to pervert) the course of justice, which is triable on indictment and carries a maximum penalty of life imprisonment. The offence requires the “course of justice” to be in existence at the time the relevant act(s) of perversion are committed. However, the course of justice can start as early as the occurrence of an event from which it can reasonably be expected that an investigation will follow.

57. Lawyers may also be liable for these offences insofar as they could be said to have aided, abetted, counselled or procured their commission.

The regulatory landscape

58. In an employment context, there are statutory requirements which must be satisfied before a settlement agreement can be treated as effectively compromising statutory employment protection claims, including claims brought under the 2010 Act. So far as relevant here, such agreements must be in writing and the worker must have had
access to “advice from a relevant independent adviser” (qualified lawyer; officer, official, employee or member of an independent trade union; some persons working at advice centres; Fellows of the Institute of Legal Executives). This provides some measure of protection to workers who might feel under pressure to sign settlement agreement containing an NDA or other confidentiality clause. However, in circumstances in which no settlement agreement will be countenanced by the employer without such a clause, workers may feel that they have little real option but to sign if they want to avoid litigation. No such restrictions apply to NDAs signed outside the context of litigation concerning the application of employment protection legislation.

59. More generally, important regulatory controls apply to those lawyers who assist parties in drafting and negotiating NDAs. The nature of these controls as they apply to solicitors has very recently been highlighted by the Solicitors Regulation Authority (“SRA”), which issued a ‘warning notice’ on the issue of how the solicitors conduct rules apply in the context of drafting and negotiating NDAs on 12 March 2018 (“the Notice”). This followed a raft of reports about the use of NDAs in sexual assault and harassment within the legal profession.

60. The Notice recognises that NDAs can legitimately be used to protect commercial interests and confidentiality, and in some circumstances, to protect reputation. It further recognises that such agreements can operate to the mutual benefit of both parties and specifically notes that the Notice should not be taken to prohibit the use of NDAs. However, it also highlights several risk areas for lawyers involved in the drafting or facilitating of NDAs. The Notice also specifies that the SRA considers it to be improper 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.

- use an NDA to influence the substance of such a report, disclosure or co-operation

- use an NDA as a means of improperly threatening litigation against, or otherwise seeking improperly to influence, an individual in order to prevent or deter or influence a proper disclosure

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prevent someone who has entered into an NDA from keeping or receiving a copy.

61. The Notice warns that the “[i]nappropriate use of NDAs, failure to report actual or suspected misconduct, or other wrongdoing or criminal conduct, by you or, when acting on behalf of a client, improperly proposing, or exerting inappropriate influence on a third party to enter into an NDA either in an inappropriate manner or with inappropriate content; or failure to report wrongdoing that is subject to an NDA” may put solicitors or the firm (where the same actions are undertaken by managers, employees or those responsible for managing human resources) in breach of one or more of the SRA Principles 2011. These principles include obligations to uphold the rule of law and the proper administration of justice (Principle 1), to act with integrity (Principle 2), to act independently (Principle 3), to behave in a way that maintains the trust the public places in solicitors and in the provision of legal services (Principle 6), to comply with solicitors’ legal and regulatory obligations and deal with their regulators and ombudsmen in an open, timely and co-operative manner (Principle 7), to run their businesses or carry out their role in the business effectively and in accordance with proper governance and sound financial and risk management principles (Principle 8).

62. The SRA also reiterates that the SRA Code of Conduct 2011 requires solicitors to report to the SRA where they know or have reason to believe they or any member of their firm has breached the Notice whether by inappropriately using NDAs or by trying to prevent a person within their firm from reporting it (see Outcomes (10.3), (10.4) and (10.7). The Notice also highlights Outcome (11.1), which requires solicitors “do not take unfair advantage of third parties in either [their] professional or personal capacity”, in regards to the use of improper threats or influence towards a person being asked to sign an NDA, such as threatening litigation or the adverse consequences of making a disclosure in the context of the negotiation to sign the NDA.

63. Currently, there has been no equivalent guidance issued by the Bar Standards Board, the regulator of barristers in England and Wales. It should be noted here that barristers may not be perceived as being on the front-line in relation to the preparation of NDAs. However, in reality, they do often advise on settlement agreements and Tomlin Orders in which non-disclosure or confidentiality provisions are commonplace. It follows that guidance from the Bar Council on this issue would be welcome. Under their Code of Conduct, barristers are subject to Core Duties which are similar in nature to the SRA Principles. They include: the duty to observe the duty to the court in the administration of justice (CD1); the duty to act with honesty and integrity (CD3); the duty to maintain independence (CD4); the duty to maintain public trust and confidence in the profession (CD5); the duty not to discriminate unlawfully against a person (CD8) and the duty to take reasonable steps to competently manage practice and achieve compliance with legal and regulatory obligations (CD10). Barristers must ensure that the proper administration of justice is served (oC10) and that the public has confidence in the administration of justice and those who serve it (oC5) and they can only protect the best interests of clients to the extent compatible with this principle and the Core Duties. This latter duty overrides inconsistent duties and applies irrespective of whether the barrister is acting as an advocate before the Court or is conducting litigation in any role (rC3).
Barristers will themselves have engaged in serious misconduct if they have engaged in assault or harassment (breaching CS3, CD5 and/or CD8) (gC96) and they have a duty to self-report to the Bar Standards Board where they engage in misconduct themselves (rC65). They also have a duty to report the serious misconduct of other barristers (rC66) where there are reasonable grounds to believe there has been such misconduct (gC98). This would specifically preclude the use of NDAs by barristers or their chambers to prevent the reporting of such conduct by barristers to the Bar Standards Board.

Given that lawyers will very often (although not always) be involved in the drafting and negotiation of NDAs, achieving effective regulatory control of their actions is inevitably acutely important in terms of limiting the potential for NDAs to be misused. Three important questions which fall for consideration by the Committee are:

a. whether the existing regulatory rules go far enough in terms of clearly prohibiting conduct which might contribute to the misuse of NDAs;

b. whether the rules are broadly fit for purpose but have not, until recently, been given sufficient prominence by the regulatory bodies; and

c. whether the legal industry, including its regulatory bodies, could in any event do more to inhibit the misuse of NDAs by clients, for example by providing more detailed guidance and training to lawyers on what is and is not permissible and otherwise by ensuring that robust regulatory action is taken in cases where lawyers misconduct themselves in respect of NDAs.

The writers of these submissions take the view that the conduct rules which regulate the legal profession probably are sufficiently flexible that they can operate to capture conduct which contributes to the misuse of NDAs. The real issue as we see it are whether the lawyers who are bound by those rules properly grasp how precisely the rules constrain their conduct in respect of NDAs in individual cases. It seems to us that more work needs to be done to create clarity and understanding within the legal profession as to where the line is drawn in terms of permissible and impermissible conduct. In this context, it is suggested that regulatory bodies should give careful thought to approving legally compliant pro forma confidentiality clauses.

D. THE (IN)EFFECTICACY OF THE CURRENT LEGAL FRAMEWORK

Enforceability of NDAs

We have already highlighted above that the provisions of the whistleblowing legislation only extend to workers. This has the result that they do not apply to agreements entered into by individuals who do not fall within the definition of a “worker”. It may be that in certain cases the common law would plug the gap left by the legislation. However, there is a question as to whether, to create legal certainty, the PIDA legislation should be amended so as to treat any NDA which seeks to restrain public interest disclosures of the kind contemplated by s. 43B as void,
irrespective of: (a) the status of the individual effecting the disclosure and (b) the nature and identity recipient of the disclosure.

68. Beyond this there is the important point that, in practice, individuals will often not know that they enjoy protections under the law in respect of the NDAs they have signed. For example, they may not know that the NDA is void and unenforceable. They may spend years believing that, if they speak out, they will be sued by the relevant counter-party. In effect, the agreement, despite being void, will have achieved its objective of gagging the individual.

69. This suggests, first, that every effort needs to be made to put in place sufficient deterrents to ensure that these agreements do not come into existence in the first place; and second, that potential victims need to be more effectively educated about their rights.

Deterrence

70. In terms of current deterrents, it would seem that employers/wrongdoers are not subject to any meaningful deterrent when it comes to the misuse of NDAs. Their actions are not obviously criminalised or otherwise challengeable under the civil law, save potentially where the NDA goes so far as to require perversion of the course of justice. In truth, as matters currently stand, employers/wrongdoers have little to lose and potentially much to gain by pressing for excessive NDAs. This appears to be a serious lacuna in the law: it is after all an odd state of affairs where an employer/wrongdoer can with relative impunity effectively abuse their dominant position so as to induce an individual (who may be a victim of criminality) to enter into an oppressive and excessive NDA which prevents serious or criminal wrongdoing from coming to light.

71. As to how the employer/wrongdoer could be penalised for seeking to restrain the individual from making public interest disclosures, this could take the form of a civil penalty regime (although that would raise the question of who would enforce the regime). It could in the alternative take the form of a statutory offence.

72. Insofar as the conduct was criminalised, that could in turn create a situation in which any lawyer who sought to aid and abet the criminal conduct by the employer/wrongdoer could also be held criminally liable. It may well be useful for such offences to be codified in legislation.

73. Other forms of deterrence which also merit consideration include statutory provisions which make clear that monies paid to an individual pursuant to a void NDA will be irrecoverable in any event. This is an important point to consider because individuals will often be fearful of being sued for return of monies paid under an NDA where they subsequently discover that they are not bound by the terms of the agreement. This fear can potentially be effectively removed if legislation makes clear that the counter-party has no right of redress (in terms of recovery of monies paid under a void agreement) against the individual.

Education / Awareness
74. A large part of the power imbalance at the heart of these issues derives from the ignorance of victims. They often will not know that their rights to speak out are protected, notwithstanding the NDA. This will be a particular problem where, as will often be the case, the individual is not legally represented.

75. Against this background, consideration should be given to:

   a. whether new statutory rules should be introduced so as to require signatories to be referred to the Government website on whistleblowing (https://www.gov.uk/whistleblowing), failing which the NDA will be void or unenforceable;

   b. enacting legislation which provides that NDAs/confidentiality provisions will be void unless the individual has received legal advice on the agreement/provision from an independent legal adviser;

   c. amending of the 1996 Act so as to require employers expressly refer to the rights of whistleblowers under PIDA in all contracts of employment and all worker contracts.

76. Bodies which potentially oversee settlement processes, for example ACAS, should in any event ensure that staff are well versed in the legal issues surrounding NDAs, and are trained to advise litigants on the implications of signing such agreements. Organisations which routinely advise individuals who sign NDAs, including Unions and law centres, should also ensure that their staff members are properly trained on issues relating to NDAs.

Other Measures

77. As discussed above, individuals who may already feel very vulnerable can often find themselves under enormous pressure to sign NDAs. They may do so in the heat of the moment only to bitterly regret their actions once the heat has abated. Against this background, the Committee should also consider whether individuals should be afforded a “cooling down” period, say a period of one week, during which they can effectively resile from the agreement. The downside of such an arrangement is that agreements which are agreed at the door of the court may be unravelled, effectively resulting in the litigation process being revived, at greater cost for both parties. The advantages include that vulnerable individuals who may not be able to withstand the pressure of the negotiations are able to enjoy more of a level playing field when it comes to the NDA process.

78. There is otherwise a strong justification for the Director of Public Prosecutions issuing guidance indicating that she will take robust action to enforce the criminal law where offences have been committed in respect of particular NDA processes.

79. In case it assists the Committee, Annex B to these submissions contains a brief overview of how other jurisdictions, and particularly the United States, has responded to the recent debates on the misuse of NDAs.

E. SUMMARY RECOMMENDATIONS
80. Below we set out in summary form the legislative reforms and other measures which we consider ought to be recommended to the Committee.

Legislative Reform

81. We consider that steps should now be taken to reform the legislation governing protected disclosures, particularly so as to improve protection for those who are subject to excessive NDAs and otherwise so as to deter employers and others from seeking to misuse NDAs. In particular, we invite the Committee to consider amending the 1996 Act as follows:

a. All contractual provisions which seek to restrain qualifying disclosures falling within the scope of s. 43B should be treated as void, irrespective of whether or not the individual who is bound by the agreement can be treated as a “worker”. The simple point here is that it is in the public interest that there should be no contractual restraint preventing or inhibiting the making of public interest disclosures falling within the scope of s. 43B. Such an amendment would otherwise operate so as to ensure that there was no undue restraint on fundamental right of free speech. The exercise of that right is obviously of acute societal importance in the context of speech which is undertaken in the public interest. In the alternative, on a narrower approach, consideration should be given to removing the requirement in the legislation for the individual making the disclosure to be a ‘worker’ and otherwise expanding the pool of persons to whom disclosures can be made on a protected basis.

b. Section 43H of the Act should otherwise be amended so as to make it clearer that individuals who speak publicly about particularly serious wrongdoing will enjoy protected status, provided that the disclosure is not made for personal gain and the individual reasonably believes that making the disclosure about the wrongdoing public is itself in the public interest. The point here being that there is often a strong public interest imperative in individuals speaking publicly about such matters, not least because it enhances public awareness, fosters informed public debate and otherwise militates against a socially damaging culture of silence. At present there is a concern that s. 43H unduly inhibits public interest disclosures being made to the public at large.

c. The Act should provide that it is an offence for any party to contractual negotiations to propose a contractual provision which is designed or intended to inhibit or prevent the making of a disclosure falling within the scope of s. 43B. In the alternative, on a narrower approach, the Act should be amended to make clear that it is an offence to propose an NDA which is designed or intended so as to restrain the disclosure of information which reveals: (a) that a criminal offence has been committed or is likely to have been committed or (b) that a breach of a regulatory requirement provided for by legislation has been or is likely to have been committed or (c) that attempts have been made to deliberately conceal such matters.

d. The Act should otherwise contain a provision which makes clear that any individual subject to an NDA must be provided with a copy of the same. Such a provision should not operate so as to prevent the individual recipient being made subject to confidentiality obligations in respect of the copy which they
hold, provided that the duty of confidentiality can itself be overridden in the public interest.

e. The Act should be amended so as to include a requirement that individuals be given independent legal advice where they are invited to agree to confidentiality provisions which have been proposed by an employer or principal, failing which the agreement will be deemed void.

Non-Statutory Measures

82. In terms of other non-statutory measures which would be likely to limit the risk of misuse of NDAs, we would suggest the following:

a. **Regulatory measures within the legal profession:**
   i. the Bar Council should promptly issue its own guidance on the use and misuse of NDAs;
   
   ii. the Bar Council and the SRA should offer dedicated training to legal professionals on the use and misuse of NDAs;
   
   iii. the SRA should consider whether it would be prudent to issue legally compliant pro forma confidentiality provisions which can be adopted by solicitors;

b. **Public education and training of other professionals**
   
   i. More should be done by the Government to highlight the rights of individuals who sign NDAs – e.g. through publication of dedicated leaflets to be made available at law centres.
   
   ii. Any organisation responsible for advising individuals on NDAs, particularly Unions, law centres and ACAS should be encouraged to provide dedicated training to staff on issues pertaining to NDAs and otherwise to have dedicated policies on such issues in place.

F. CONCLUSIONS

83. There is no doubt but that the misuse of NDAs is a serious social evil, and one that requires a robust legal response. It is hoped that these submissions will go some way towards assisting the Committee in determining the proper shape of that response

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ANNEX A

1. The use of confidentiality clauses in settlement agreements has given rise to controversy in a number of different areas. The aim of this annex is to provide the Committee with an overview of some of those controversies.

Public health and administration

2. In 2013, there was significant public debate and controversy when it emerged that the National Health Service (NHS) had spent millions of pounds in severance payments made pursuant to compromise agreements with staff which also prevented disclosures of information concerning mismanagement, patient safety and care.\(^\text{10}\) One high profile case was Gary Walker, the former chief executive of the United Lincolnshire Hospitals Trust (ULHT), a hospital that was under investigation for a high rate of deaths, who said he had been prevented by the NHS from speaking out about his dismissal in 2010 and his concerns about patient safety because of the terms of the settlement agreement which ended his employment.\(^\text{11}\) Mr Walker breached the confidentiality agreement in a settlement by speaking to the press about patient safety issues he had previously blown the whistle on. ULHT threatened to sue him in order to recover the reported £500,000 it paid him when settling the claim.\(^\text{12}\) Concern was raised at the time by the National Audit Office (NAO) that NHS staff and civil servants who refused to sign compromise agreements (described in the press as “gagging orders”) were putting their careers at risk because they would not be able to get an agreed reference for their future employment.\(^\text{13}\) In response to the controversy, then Health Secretary Jeremy Hunt announced that the practice would end with immediate effect to help create a culture of "openness and transparency" across the NHS.\(^\text{14}\)

3. This opened up a broader review of the NHS and the civil service. The 2013 National Audit Office investigation report that followed, “Confidentiality clauses and special severance payments”, concluded that there was nothing in the settlement agreements reviewed that would prevent NHS officers or civil servants from making protected disclosures under PIDA. However, similar to the issues raised in the context of recent sexual harassment cases, concern was raised that, notwithstanding the legal position, those who had signed did feel they were effectively gagged. Concern was also raised with the lack of transparency and accountability in the use of compromise agreements in the public sector, as well as the failure to have in place any central oversight of the way in which compromise agreements were being used:

There is a lack of transparency, consistency and accountability in how the public sector uses compromise agreements, and little is being done to change this situation. This is unacceptable for three reasons: the imbalance of power

\(^{10}\) See https://www.independent.co.uk/life-style/health-and-families/health-news/nhs-hospitals-spend-2m-on-gagging-orders-preventing-staff-speaking-out-8654716.html
\(^{11}\) See http://www.bbc.co.uk/news/uk-politics-22868913
\(^{14}\) https://www.theguardian.com/society/2013/mar/14/ban-on-nhs-gagging-orders
between the employer and employee leaves the system open to abuse; poor performance or working practices can be hidden from view, meaning lessons are not learned; and significant sums of public money are at stake. The responsibility to address these issues is shared, and the following recommendations are designed to bring better governance to this serious issue.\(^\text{15}\)

4. This was followed by an inquiry by the Public Accounts Committee, which reported in 2014, and largely mirrored the concerns and recommendations raised by the NAO. The Public Accounts Committee concluded:

\[\text{We are deeply concerned about the use of compromise agreements and special severance payments to terminate employment contracts in the public sector. The lack of transparency, oversight and proper accountability over their use has allowed taxpayers’ money to be used to reward failure and to avoid management action, disciplinary processes, unwelcome publicity and reputational damage. Confidentiality clauses within these compromise agreements may be appropriate in some circumstances, but they have been used inappropriately to deter former employees from speaking out about serious and systematic failures within the public sector, for example, in patient care or child safety.}\(^\text{16}\)

5. Even in the public sector, it was apparent that the confidential nature of the agreements impeded the ability to understand the extent of the problem. At that time, the Treasury did not have any central oversight of the use of compromise agreements, which was a matter of concern to the Public Accounts Committee and resulted in an improved system of central oversight:

\[\text{Despite being responsible for approving special severance payments, the Treasury does not know how many payments have been made across the public sector. It does not review the compromise agreements associated with the payments and could therefore not tell us how many agreements have been signed by public sector bodies and contractors to government, or whether these agreements have been used to ‘gag’ employees. The lack of oversight by central government has led to inconsistencies in the use of compromise agreements, with no one looking for trends that might provide early warnings of service failures.}\(^\text{17}\)

6. The Public Account Committee’s findings were focused upon the public sector and only touched upon the private sector where entitles were contracted to deliver public services, recommending:


\(^{17}\) Ibid.
The Treasury should make clear what it expects from private sector employers when they enter into contracts to deliver publically funded services. This should include the expectation that staff working for private sector contractors are encouraged to raise matters of public interest, ensuring whistleblowing policies include the option to raise issues directly with government, and public reporting requirements such as the requirement to disclose special severance payments related to public services.18

7. The Cabinet Office has since issued guidance on the use of settlement agreements.19 The guidance makes clear that settlement agreements should not be used in the following circumstances:

- to avoid taking appropriate performance/attendance management or disciplinary action. Separate policies and procedures exist to address poor performance or attendance;
- to cover up individual or organisational failure;
- to prevent an employee from speaking out - for example, to mask malpractice;
- to terminate a person’s employment because they have made a protected disclosure under the Employment Rights Act 1996 (i.e. whistle blowing).

8. There is also now a requirement on all Departments to seek prior approval of their Minister and then of the Minister for the Cabinet Office for the use of confidentiality clauses in settlement agreements. The Cabinet Office also publishes annually civil service-wide data on special severance payments.

9. The NHS also published revised guidance in December 2013 after the controversy.20

Local government administration

10. In 2016, there was further controversy about the use of compromise agreements – this time in local government administration. A BBC Radio 5 investigation found that UK councils has spent more than £200m on settlements with staff, most of which include gagging orders. Between 2010 to 2015, 17,571 “compromise agreements” or settlements were signed by council workers and most included a clause preventing public criticism of their boss.21

11. Concern about the lack of transparency and potential concerns for public administration and corruption was raised by Transparency International, which stated:

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21 https://www.theguardian.com/uk-news/2016/apr/03/councils-gagging-orders-most-staff-settlements-bbc-radio-5-live-investigates
“Our research shows that the anti-corruption controls in local government have been steadily eroded, and the ability of staff to speak out about suspicions or malpractice is now one of the crucial remaining defences against corruption…If staff are silenced by gagging orders, it increases the risk that we will wake up in five or ten years to find that corruption has taken root in local government, and at that point it will be much harder to eradicate.”

Universities

12. In 2017, controversy arose in respect of universities’ use of confidentiality clauses in settlement agreements after it emerged that the use of compromise agreements in the higher education sector appears to be much higher than in the NHS. Freedom of information requests gathered by the Liberal Democrats showed more than 3,500 former staff had signed settlement agreements with confidentiality clauses. Then leader of the Liberal Democrats, Tim Farron said ‘[u]niversities are supposed to be bastions of free speech and forthright opinions, yet our research has shown that confidentiality clauses may have been used not only to avoid dirty laundry being aired in public but now are just common practice in higher education’. The Department of Education was reported to have said it was a matter for the employment practices of universities as businesses.22

The BBC

13. It appears that a number of high profile journalists refused to sign confidentiality agreements in relation to the termination of their employment at the BBC in order to allow them to speak publicly about the experience of older women in journalism and potential age discrimination.23

14. The examples outlined above demonstrate the prevalence of the use of settlement agreements with confidentiality clauses across a range of sectors and highlights the difficulty of obtaining information about the extent of their use, particularly in relation to the employment practices of the private sector, and more specifically their use in cases involvement sexual harassment.

22 https://www.theguardian.com/education/2016/dec/30/universities-gagging-former-employees-lib-dems-compromise-agreements

23 See, for example, https://www.theguardian.com/media/2014/nov/07/bbc-journalist-olenka-frenkiel-reject-gagging-clause
ANNEX B

1. The use of confidentiality clauses in settlement contracts has come under public scrutiny in the US and around the world following the Weinstein revelations. Similar confidentiality agreements have been used in a raft of high profile sexual harassment claims, including by Fox News in relation to the allegations against Roger Ailes. It also sparked discussions about how to reform the law on the use of NDAs in relation to the sexual harassment claims of Congress employees. This has led to various calls for law reform prohibiting the use of NDAs in relation to sexual assault and harassment cases.

2. In the US, enforceability of confidentiality clauses (and the enforcement of contracts) is a matter of state law. Broad confidentiality clauses in employment contracts which prevent employees from making critical comments that could harm the company’s “business reputation” or “any employee’s personal reputation” could prevent an employee or former employee from speaking about sexual harassment and other workplace misconduct. The National Labor Relations Board has ruled that confidentiality clauses of this kind preventing an employee or ex-employee from speaking about sexual harassment and other workplace misconduct “among themselves”, constitutes an “unfair labor practice” under the National Labor Relations Act of 1935 (“the Wagner Act”). This federal statute does not apply to domestic workers, independent contractors, or individuals employed as supervisors.

3. As with the UK, in the US there are several important legal exceptions to the enforceability of NDAs. First, an NDA can never prevent an employee from assisting in official agency investigations. Further, NDAs cannot lawfully prohibit employees from officially reporting illegal conduct. Title VII of the Civil Rights Act invalidates agreements that prohibit employees from filing charges with or assisting the Equal Employment Opportunity Commission in its investigation of any charges. The Defend Trade Secrets Act (DTSA) similarly preserves the rights of employees to blow the whistle even if that means revealing trade secrets or breaching an NDA.

4. In the US, as with in the UK, confidentiality clauses as part of a settlement agreement with an employee in which legal claims are waived are regularly used and there has been concern raised that these have been used in cases involving sexual assault and harassment in the workplace. Some have argued that “sunshine-in-litigation” state laws, which bar the enforcement of confidentiality clauses in settlements if they conceal information related to “public hazards”, should apply to cases of workplace-based sexual harassment, particularly where there is a pattern of abuse.

5. US lawmakers have already turned their attention to the issue of felony sexual offences. In 2016 California passed a law which prohibited the use of confidentiality clauses in settlement contracts involving sexual assault and harassment. The law also applied to non-agency employees and independent contractors. Other states are considering similar legislation. Despite this, many companies continue to use NDAs in settlement agreements.

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28 See, for example, https://www.law360.com/employment/articles/863553/the-issue-with-confidential-sexual-harassment-settlements
clauses in civil settlements if the “factual foundation” for the allegations involve acts that could be prosecuted as felony sexual offenses. The law also specifies that lawyers who negotiate settlement agreements which prevents the disclosure of factual information related to sexual assault, as a condition of settlement or advising a client to sign an agreement that includes such a provision, may be grounds for professional discipline, requiring the state to investigate.

6. However, in the wake of the Weinstein scandal, many have argued the law needs to go beyond banning confidential agreements in relation felony sexual offences. California Sen. Connie Leyva has proposed legislation, Senate Bill 820, which will provide that those accused of sexual assault, harassment or discrimination in the workplace would be prohibited from using a confidentiality provision as part of a settlement agreement. The proposed Stand Together Against Non-Disclosures (STAND) Act would cover both private and public employers, applying to agreements entered into on or after 1 January 2019, making them void as a matter of law and against public policy. In announcing the Bill, which is currently under consideration by the Senate Judicial Committee, Sen Levya said:

“SB 820 will not prevent people from mutually agreeing to settle, but it will simply prevent the perpetrator from requiring the victim to remain silent about the harassment as a condition of settlement. Everyone deserves to live and work free from sexual harassment, assault and discrimination. The STAND Act helps end the curtain of secrecy that has existed for far too long.”

7. Similar laws are being considered in New York, New Jersey and in Pennsylvania. Congress has introduced a bipartisan bill, named the ME TOO Congress Act that would similarly limit NDAs in harassment settlements.

March 2018

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29 https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB1682
30 See full text here http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB820
33 https://www.congress.gov/bill/115th-congress/house-bill/4396/text?q=%7B%22search%22%3A%22%5B%22congressId%3A115%26%26billStatus%3A%5C%22Introduced%5C%22%22%22%5D%5D%22%22%22%22%22%22&ref=99