**SUBMISSION TO THE WOMEN AND EQUALITIES COMMITTEE: THE USE OF NON-DISCLOSURE AGREEMENTS IN DISCRIMINATION CASES**

## INTRODUCTION

Centre for Women's Justice is a legal charity which aims to advance the human rights of women and girls in England and Wales by holding the state to account for failures in the prevention of violence against women and girls. It was founded in 2016 by Harriet Wistrich, a solicitor with more than twenty years' experience in private practice at civil liberties firm Birnberg Peirce.

Centre for Women's Justice does not have direct expertise in employment law (although we are building a panel of lawyers who do have such expertise in addition to other areas). Our experience around discrimination is focussed specifically on issues relating to state responses to violence against women. Our submissions are informed by our experience of:

- civil and criminal litigation on behalf of female victims of sexual violence and sexual harassment, in the workplace and elsewhere; and

- the particular difficulties in accessing justice for victims in these circumstances, as well as adequate protection from the justice system.

## EXECUTIVE SUMMARY

There is little doubt that settlement agreements such as those adopted by Harvey Weinstein have been drafted to include grossly unfair terms which have sought to coerce and intimidate victims and whistle-blowers into total silence, interfere with their rights, and evade attention from the law.

A legal settlement or agreement cannot lawfully prevent a complainant of criminal conduct from reporting her complaint to the police, co-operating fully with a police investigation, or indeed providing a full and accurate account in civil proceedings brought by any other party. It should also not prevent reporting to and/or cooperating with any regulatory investigation.

The Committee will be aware of recent guidance issued by a number of bodies with regulatory and advisory powers on the subject of NDAs.

See in particular the warning notice issued by the Solicitors Regulation Authority https://www.sra.org.uk/solicitors/code-of-conduct/guidance/warning-notices/Use-of-

non-disclosure-agreements-(NDAs)--Warning-notice.page. The Law Society has published practice guidance to accompany this warning: https://www.lawsociety.org.uk/support-services/advice/practice-notes/non-disclosure-agreements-and-confidentiality-clauses/. And it is understood the Bar Standards Board is to issue similar warnings. The EHRC has also provided helpful recommendations for the Government to tackle sexual harassment in the workplace: https://www.archonlaw.co.uk/2018/04/30/echr-report-turning-the-tables-ending-sexual-harassment-at-work/.

NDAs should never be used to silence victims or prevent the enforcement of criminal law or regulatory oversight. However, we are not convinced that a blanket ban on NDAs would deliver justice for victims of sexual harassment or effectively tackle workplace bullying and sexual harassment.

Unfortunately, we live in a culture of victim-blaming and of a pervasive rape mythology. As a consequence of this, many perpetrators can take advantage of vulnerable and easy targets and many who are victimised may be extremely reluctant to report. Meanwhile practitioners within the criminal justice system and the rest of society, unless experienced or trained to counter myths, will have attitudes which perpetuate victim blaming particularly by way of questioning the credibility of those who may complain. The consequence of this is that where complaints are made, the process of investigating, disciplining, litigating and prosecuting may remain imbued with myths that result in injustice for victims.

The consequence of this is that some victims of bullying and sexual harassment will be fearful of reporting not only to the police but to their employer and in those circumstances, consideration should be given to protections for complainants which may include certain non-disclosure provisions, including importantly the right to anonymity and other protections.

The onus on preventing a sexual harassment culture should not be on victims but on employers and regulators. The critical issue is that where settlements are reached that incorporate non-disclosure elements, it should be incumbent on employers to keep records of all such complaints and to take proactive disciplinary action where they become aware of two or more reports of similar misconduct by the same alleged perpetrator.

Companies and other organisations are now subject to extremely strict regulations in relation to their financial duties or data protection and they can be subject to very significant fines for breaches of such duties. Equivalent sanctions should apply to organisations that fail to tackle sexual harassment and discrimination.

**SUBMISSION**

## Clarity around the term 'NDA'

We have observed that since the scandal that erupted around Harvey Weinstein and the use of NDAs to 'gag' many of his victims, the term 'NDA' is now used almost exclusively to refer to agreements used by powerful people who have been guilty of serious (usually sexual) misconduct, and/or their employers, to keep secret conduct that they know is unlawful, or even criminal. Such agreements have been criticised as contrary to the private interests of the claimants who feel pressured into signing them but also to the public interest and the rule of law, in that they prevent powerful individuals from any accountability and allow them to maintain their positions and re-offend, undeterred.

In practice however, 'non-disclosure' of agreement terms is a common prerequisite in a range of commercial and legal settings. It may be in the interest of both parties, for similar or differing reasons. It is not always imposed upon one party under duress. This should be borne in mind when considering the other uses that they serve. As civil litigation practitioners, for example, we may agree settlements with a confidential '*Tomlin*' order. Terms such as the amount of compensation to be paid, may be kept secret (sometimes for good reason), but the allegations of the claim, set out in pleadings, and the fact of settlement will be open to publication. We do not believe that such non-disclosure clauses to an agreement need be barred to achieve the wider end envisaged by the Committee.

## Incentives to settle

When any dispute arises with an employer, whether in circumstances of sex discrimination/sexual misconduct or otherwise, it will often be the employee's wish to leave the company, take up another job, and move on with their lives. There is often, in other words, a desire for privacy and quick resolution, even where – perhaps even especially where – an employee has been a victim of unlawful conduct on the part of a bullying, sexually inappropriate colleague. Since she may not even have another job to go to in the short term, her first priority may well be a financial settlement and the desire to ensure that future employers and other third parties do not identify her as a 'troublesome' employee. She may well also wish for some acknowledgment of the wrongdoing, and accountability for the responsible parties, but only if it will not jeopardise her financially, stigmatise her or cause her a significant amount of stress over and above the stress that she has already endured in her workplace.

These are entirely reasonable wishes; it is not for every victim of a serious and distressing sexual incident to engage with a criminal or regulatory investigation, or instigate legal proceedings, to make an example of her abuser because it is in the public interest to do so, if she does not believe that it is in her own interests.

For many employees moreover there will be further deterrents, or downright barriers, to pursuing regulatory, civil, criminal, or employment proceedings:

Time limits

- Anyone seeking to bring a claim in the employment tribunal, which is likely be the most obvious legal remedy in these circumstances, must issue a claim within a limitation period of just 3 months.

- This is a prohibitively short period. It excludes victims who have delayed in filing a grievance or deliberated in bringing a claim, which will represent a significant proportion of individuals in these circumstances who may be very distressed by what has happened, afraid of speaking out/jeopardising their career, or only been emboldened to come forward with a claim when other victims do. It can exclude individuals who have become involved in protracted settlement negotiations without issuing a claim protectively, and/or who have not received immediate legal advice.

Likelihood of justice for the perpetrator

- A significant proportion of victims of this type of behaviour may not easily be able to 'prove' with corroborating evidence what has happened, and it is likely to be vehemently contested by the perpetrator. Many will conclude, particularly after advice from a legal representative, that while there is nothing to disprove their account they are unlikely to succeed with a claim in a court or tribunal, and that the police/CPS will decline to proceed with a criminal prosecution.

- As regards the probability of achieving justice within the criminal justice system, women who are victims of serious sexual assault or harassment in the workplace have very valid reasons for concern. The appalling statistics for reported rapes resulting in conviction which have stood for a number of years at around 6% seem to have got even worse recently. It was reported that only 2.4% of rapes reported in England and Wales result in a conviction[1]. There are clear indications from CPS' 'VAWG' offence data for rape-flagged

[1] https://www.independent.co.uk/news/uk/crime/crime-statistics-uk-justice-prosecution-rates-rape-victims-disclosure-police-funding-a8747191.html

cases up to March 2018 that there has in fact been a stark decline in charging since 2016 despite a rise in reporting[2]. There has also been an increase in rape cases being 'administratively finalised' without a charging decision even being made. This sends out a clear message to many victims that going to the police will not succeed.

- At the other end of the spectrum meanwhile, where a woman alleges that she was verbally bullied or touched inappropriately in the workplace but cannot establish that clearly that there was a pattern of criminal behaviour she is likely to struggle in persuading the police to take it forward. Our criminal justice system as it stands, while it is one course open to women who want to ensure accountability for sexual misconduct, is far from a reliable remedy – and for many women the process of pursuing a criminal complaint to prosecution and/or trial can be inconvenient, stressful, and re-traumatising.

Invasion of privacy and detriment to career prospects

- There are many good reasons why a victim or whistle-blower would not want to be associated with a protracted complaint/claim of sexual misconduct. These are by definition cases which involve extremely personal, and painful, details which many victims will not want made public. If the person they have accused has a high profile, they may be subjected to intensive media scrutiny, which for most individuals in these circumstances will be unwanted. They may not wish acquaintances to know. Moreover, many will fear, unfortunately, that their career prospects – especially if searching for roles within the same sector – will be hampered if it becomes known that have been embroiled in a protracted dispute with a previous employer.

- This is a particularly significant concern for anyone considering employment tribunal proceedings, as all employment tribunal proceedings are now published online. Any employment tribunal claimant with an unusual claim may find that a publication of the judgment of her employment claim is one of the first results for anyone (for example a prospective employer) entering her name into a search engine.

- In principle, victims of most sexual offences have a right to lifelong anonymity under the Sexual Offences (Amendment) Act 1992, which makes it a criminal offence for anyone to report someone's identity after they have made an allegation of an offence under the Act. Thus, allegations of rape and sexual assault will have the benefit of anonymity. However, sexual

[2] https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2018.pdf

harassment that falls short of unwanted sexual touching (for example, making lewd comments, putting pressure on a woman for a date, too much physical closeness falling short of sexual touching etc) does not entitle a victim to anonymity under the Act. While victims of these kinds of actions might succeed in an application to the court for anonymity or reporting restrictions in civil proceedings, they would be unlikely to be granted anonymity in criminal proceedings, or in employment proceedings.

Concerns around exposure – and the impact that his may have on their future career – are therefore a very significant obstacle, we believe, for victims of sexual misconduct in the workplace wanting to hold their abuser to account.

Experience of proceedings

- For a woman who has been victimised by a colleague, and may have had unpleasant dealings with her employer after filing a grievance, the prospect of protracted litigation may be extremely unappealing. Indeed, we know that many women find the process of pursuing a grievance, claim or criminal proceedings in these circumstances absolutely overwhelming and potentially re-traumatising. The idea of facing down a bully who has robustly contested the proceedings, in front of a court or tribunal, is one reason for this.

- For any individuals who wish to remain in the same place of employment, meanwhile, there is little incentive to go on record with a complaint to a regulator or other authority given that they are not adequately protected under whistle-blowing provisions from unfair treatment or dismissal if they enter into a dispute with their employer. We are concerned that whistle-blowers are only guaranteed protection in circumstances where the conduct about which they are blowing the whistle is in the public interest. We consider that it should always be deemed in the public interest if there is a culture of sexually inappropriate conduct in the workplace and that this should be made clear in legislation.

## When is an NDA not in the interests of women?

Given all of the above, a financial settlement agreement that includes a non-disclosure clause will clearly be a preferable – if not the only – viable remedy to women in a number of circumstances.

It is submitted that financial settlements that include non-disclosure clauses in the context of sexual misconduct cases do have a place, and can in principle serve the interests of both parties, subject to three caveats:

1. **A 'non-disclosure' clause in any financial settlement agreement should only prevent disclosure of certain details pertaining to the terms of the settlement.**

   A non-disclosure clause should never purport to guarantee that the facts of the allegation cannot be disclosed. The Committee ought to clarify that employers cannot prevent employees who are victims of criminal offences from reporting that to the police or to a regulator, even if civil/employment proceedings are settled.

   Legislation around unfair contract terms could also be extended to confirm that 'blanket' non-disclosure clauses which unreasonably prevent an individual from discussing allegations with third parties (like medical practitioners, her family, or fellow victims) are unfair contract terms and should be treated as unenforceable. In defence of practitioners who have represented claimants and defendants in these circumstances, it seems to us that there has hitherto been something of a 'grey area' as to which clauses are permissible if agreed between the parties and which ought to be considered unenforceable.

   Finally, the Committee could recommend sanctions for legal professionals, whether acting for claimants or defendants, who do not advise their clients that such clauses are unenforceable and ensure that they do not (even if instructed) include them.

2. **A settlement arising out of a misconduct allegation against an employee – whether it includes a non-disclosure clause or otherwise – should not preclude the fact of an allegation from being recorded.**

   Again, we are concerned that this is another lacuna in the law, or employment practice, which ought to be addressed. It is submitted that employers ought proactively to record any information that has come to light in the course of a grievance/mediation/litigation process, regardless of whether a claim has been settled. The fact that a case has been settled with a victim does not mean that an employer is relieved of its duties to protect future female employees from an ongoing risk that a colleague may pose in the workplace. If employers record allegations and act on the information they have appropriately, then there is no reason not to allow the victim who has come forward to settle on a confidential basis.

   Specifically, we call for better and more comprehensive regulation across the employment sphere. We are aware that in the legal and financial sectors,

regulatory bodies like the Solicitors' Regulation Authority, the Bar Standards Board, and the Financial Conduct Authority have more recently accepted complaints of sexual misconduct in regulated workplaces. We believe that there ought to be mechanisms in all sectors of employment for regulators to consider complaints of sexual misconduct – again, regardless of whether civil and employment proceedings have been settled between the employer and employee. We further believe that there ought to be clear regulatory obligations on the part of employers when they become aware of an allegation of sexual misconduct to include:

- **keeping records** of any allegations of sexual misconduct or harassment made against its employees and the outcomes of those allegations;
- **obligations to disclose** these records to regulators and to other third parties in certain circumstances;
- **requirement to engage in mediation** with a complainant of sexual misconduct before entering into any settlement agreement negotiations; and
- **demonstrating that they have investigated and disciplined** offenders as appropriate based on the intelligence that they have received.

3. **A programme of changes needs to be implemented within the justice system to strengthen the rights of women who are considering pursuing a complaint or claim against a perpetrator/his employer.**

This is essential. There is no doubt NDAs are open to abuse, but this is largely because victims of sexual misconduct in the workplace are in a vulnerable position and insufficiently protected by the law – such that many of them may sign NDAs effectively under duress, or wishing that they could have felt able to hold the perpetrators to account. We believe in this sense that coercive NDA terms are a symptom rather than a cause.

As well as a more robust approach from prosecuting authorities, a programme of changes should include, as far as law and procedure are concerned:

- Specific protections, under whistle-blower regulations, for any individual who wishes to whistle-blow to or about their employer regarding sex discrimination, sexual misconduct, or harassment (whether manifestly sexual harassment or otherwise) in the workplace, so that potential complainants, claimants and

witnesses can proceed without fear of losing their employment if they wish to remain in work;

- More flexible limitation periods in employment tribunal proceedings, to improve access to justice for claimants who may for a number of reasons – including possibly protracted settlement negotiations – wish to pursue legal proceedings out of time; and

- Guaranteed lifelong anonymity for individuals who go on record with any type of sexually motivated misconduct and inappropriate behaviour in the workplace.

**CONCLUSION**

We are not convinced that a blanket ban on NDAs will provide the best protection for potential victims of sexual harassment nor offer the best way of delivering justice for those already victimised.

The Committee would do better to recommend:

- Formal regulation in all sectors of employment – not just the financial and legal sector – imposing regulatory duties on all employers in circumstances where they are made aware of an allegation of sexual misconduct or harassment against its employees;

- Such regulation might include a requirement of employers to take action to investigate any individual where they become aware of two or more allegations of a similar type made against the same individual, regardless of whether the victim wishes to be involved;

- A more robust approach from the police and Crown Prosecution Service to investigating and charging in cases where allegations are made of harassment or sexual assault, so that there is more of an incentive for women to pursue complaints to the police;

- The right to anonymity for victims who do wish to report the misconduct and/or pursue legal proceedings, and better opportunities for victims wishing to bring employment tribunal proceedings out of time;

- Better whistle-blower protections for individuals who report concerns in the workplace relating to sexual misconduct and harassment of any kind;

- Clearer regulations as to clauses which are unlawful in the context of settling (pre-litigation or otherwise) civil or employment proceedings; and

- Better public-facing guidance for members of the public who wish to know what their rights are if they have been victims of harassment or sexual misconduct/violence at work.

**AFTERWORD**

Finally whilst these submissions are focussed on sexual harassment in the workplace, there are other forms of relationship where better regulation in relation to sexual harassment prevention and remedy in a range of other contexts should be considered. For example, between service-providers and service-users, between MPs and constituents, between directors and auditioning actors, and so on.