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

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

Introduction

1. Protect (formerly Public Concern at Work) is the UK's leading authority on whistleblowing. Set up 25 years ago, at the heart of the charity's work is the free, confidential Advice Line, which helps over 2,500 individuals each year. The advice line helps workers who have witnessed wrongdoing, risk or malpractice in the workplace but are unsure whether or how to raise their concern. Protect has advised over 40,000 individuals to date, and this in turn informs its approach to policy and campaigns for legal reform.
2. All of the charity's work is aimed at protecting the public interest by encouraging workplace whistleblowing. Over and above the work with individuals on the advice-line, the charity helps organisations to create a safe environment in which staff can raise concerns at the earliest opportunity. The charity supports hundreds of organisations to help ensure their whistleblowing arrangements are trusted and effective. We currently work with many regulators, professional bodies, commercial, public sector and voluntary organisations including: CIPD, AAT, General Medical Council (GMC), The Law Society, John Lewis Partnership, Barclays, the Bank of England, ITV and the British Red Cross.
3. These two complementary streams of work give us a unique perspective on whistleblowing, including the challenges faced by individuals in speaking up, and those experienced by organisations in listening to and addressing concerns. Protect has employed this experience in a wide array of policy work which has shaped the frameworks in which individuals raise concerns, and how organisations handle them. This includes: helping to draft the primary piece of legal protection for whistleblowers, the Public Interest Disclosure Act (PIDA); drafting the British Standard Institution's Guidance on Whistleblowing Arrangements; establishing the Whistleblowing Commission which developed a Code of Practice for whistleblowing arrangements, a guide used by many organisations in creating their

whistleblowing processes; ongoing involvement in sectoral developments within the NHS and Financial Services; and long-standing collaboration with government on numerous initiatives which have touched on the wider world of whistleblowing.

The different regimes for whistleblowing and discrimination

4. Many of the issues raised by the committee and witnesses in the inquiry into sexual harassment have themes that are common to those experienced by whistleblowers seeking help on the advice line. A key distinguishing factor is that the whistleblower is a witness to the wrongdoing and the victim of sexual harassment or abuse in the workplace is self-evidently a victim. There are different routes for redress available to those facing discrimination or harassment as a victim and to those who *witness* inappropriate conduct, or other wrongdoing in the workplace. There is obviously also the potential for both statutory regimes to come into play when an individual wishes to pursue a complaint about sexual harassment or abuse.
5. The legislative regimes protecting whistleblowers (mainly found in PIDA) and those preventing discrimination (mainly to be found in the Equality Act) operate quite differently and we are concerned that without thorough review, there will be unintended consequences of piecemeal reform. While we welcome the various reforms suggested by the committee and by the government as a result of the sexual harassment inquiry, we worry that with the current approach the two regimes in discrimination and whistleblowing protection are being interwoven without any further review of how the law works in practice. We expand upon and provide our reasons for this below.
6. It is worth stating that while NDAs are often used legitimately, the committee's previous inquiry into sexual harassment has shown that they are open to abuse by unscrupulous employers and their lawyers. What's more we believe there is a problem of perception among the general public.
7. As an NGO that has worked on whistleblowing law and protection for over 25 years, we can provide a view on how the anti-gagging provisions in the whistleblowing legislation¹ are little known and little understood and how this affects the likelihood of an individual feeling gagged and effectively being silenced. This is the case even though they might have a remedy if pursued by a former employer for breach of a settlement agreement or other confidentiality provisions in contract. Notwithstanding that the anti-gagging provision in whistleblowing law has been on the UK statute book for over 20 years, due to low awareness of their rights under PIDA and the struggle to find legal advice, many individuals who are subjected to an NDA often feel prevented from further raising their concerns.²
8. Fear often drives the individual's approach in this area and while NDAs can be helpful for an individual in moving forward and prevent the need for a long and protracted dispute there is very often an inequality of arms. This makes the individual's position still more vulnerable.

¹ To be found in s43J PIDA – full text to be set out later in this response at para 9

² Survey results from 2018 show 63% of UK workers were either unaware or incorrectly believed there was no protection for whistleblowers, Protect and YouGov survey results 2011-2018, <https://www.protect-advice.org.uk/attitudes-to-whistleblowing/>

The anti-gagging provision in PIDA

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

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

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

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

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

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

13. In our view there are several reasons for this. By their nature whistleblowing cases involve sensitive issues for all involved. From the individual’s perspective, by the time they are considering signing a settlement agreement, they may well have been through an incredibly stressful situation, potentially involving the end of their employment and are looking at the

end of an (often lengthy) dispute. They are likely to have been offered a sum of money in settlement. Having negotiated the settlement of the dispute, it is understandable that an individual may think twice about taking any risk that might open up further legal entanglement or the risk that their hard-won damages may be at risk. The fact that there is no legal precedent of the provision makes it all the more uncertain and less likely that the individual will decide to take the risk of breaching an agreement with draconian confidentiality provisions in NDAs. We suspect exactly the same issues arise when an individual is dealing with the settlement of a sexual discrimination or harassment claim. Without a clear understanding of the wider context of their employment situation – for example evidence of a workplace culture which tolerated sexual harassment – the individual disclosing their own case also risks a challenge from the employer that the disclosure was not in the public interest.

14. For the organisation the issues involved may well impact upon their reputation. If they have settled the dispute confidentially with an individual, it is not an attractive option for this to be revisited in an action in breach of confidence. While this sort of action is often threatened, in 20 years of litigated cases testing the principles in PIDA, we have not seen any litigated cases where 43J has been fully considered by the courts. Perhaps this is because to follow through on a threatened action in breach of a confidentiality clause this would further damage the organisation's reputation (to sue a whistleblower for breaching a legal provision that attempted to silence them), as well as the allegation that the organisation may have been trying to cover up the wrongdoing, makes the likelihood of an action against the whistleblower very unlikely in practice. A sensible organisation (or their advisers) will also see that pursuing the whistleblower is much more damaging than dealing with the public interest issue - perhaps apologising for the wrong doing and avoiding further publicity.
15. Add to this the fact that it takes a very brave individual to take such a risk in the first place and it is not, perhaps, so surprising that the issue has not been litigated by an organisation testing the boundaries of s43J in the same way that the media have pushed the boundaries of the law of confidence, the Human Rights Act and the principles of freedom of speech and the press.
16. This lack of legal precedent creates an unacceptable level of uncertainty among whistleblowers and their lawyers and feeds into the sense that to disclose the wrongdoing any further by the whistleblower is a risk that is not worth taking.
17. The lack of regulatory oversight in this area and the often overly legalistic approach to the wording in settlement agreements make this all the more difficult for the individual. It is easy to see why in many whistleblowing cases the public interest issue becomes buried in the settlement agreement and the matter goes no further than the end of the employment dispute. We have long argued that this creates a very real risk that settlement agreements have enabled the cover up of wrongdoing – see our attempts to make the operation of PIDA

claims more open to public scrutiny here: [Briefing note on the Department of Business Innovation and Skills consultation: Employment tribunal claims and the Public Interest Disclosure Act \(PIDA\)](#), and here: [Parliamentary Briefing on amendments to the Employment Bill \(HL\) 2008 Extended briefing for MPs](#)

18. We would argue that the same principles apply to the cover up of sexual harassment and abuse. Effective mechanisms are needed to prevent these matters being shrouded in secrecy and to ensure that open justice principles apply across all employment protection legislation.
19. We would agree with comments made by witnesses to the inquiry that the way in which the law develops in this area too often relies on the individual taking forward an individual employment right and that to effect change there needs to be good system related responses as well as strong employment related rights.
20. There is a paradox at work here – how can society prevent the creeping culture of secrecy if these agreements are so effectively cloaked in secrecy. This is the reason s43J was included in the whistleblowing legislation in the first place. It is clear from the #metoo movement that the issue has not had enough attention and that a creeping culture of secrecy has been allowed to develop. We hope that the attention that the committee has brought to the issue will, in and of itself, result in lawyers, unions and the professions becoming more aware of the dangers of unscrupulous practice. The ongoing work in this area and can also help keep the issue alive and moving forward.

Proof of Abuse and NAO research

21. It is incredibly difficult to assess how widespread the misuse of NDAs is, given the confidential nature of such agreements. A problem we have seen on the Advice Line is that often workers feel they cannot either make a disclosure or even take legal advice about the effect of an agreement due to the legalistic or opaque wording of the confidentiality clause. This is further complicated by non- disparagement clauses and restrictions on allowing an individual to refer to the fact that such an agreement even exists. We know this is a problem from countless cases on our advice line.
22. In many such cases, we will ask to see a copy of the agreement (given that we operate under legal professional privilege), and often the agreement will on the face of it comply with or refer to s43J PIDA or to Part IVA ERA – the relevant section of the Employment Rights Act containing s43J. But the effect of all of the provisions in these agreements, taken together, are such that most people, unversed in the technicalities of employment protection legislation, would not understand the effect of S43J, or that it exists at all.
23. In 2013 [NAO research](#) looked at 50 settlement agreements from the public sector, and 49 were found to include a confidentiality clause which stopped the person discussing the

terms of the agreement. The NAO judged none to be in breach of s43J PIDA, in other words none of the agreements stopped a whistleblower raising their concern further.

24. The research provided a number of examples of the type of opaque wording used by employers in NDA agreements and identified a number of issues as contributing to the belief that they could not make further disclosures: 1) the events leading up to the signing of the agreement, including the culture of the workplace and the attitude towards whistleblowing 2) the wording of the agreement itself 3) despite getting legal advice (a prerequisite of accepting an agreement) it was generally not made clear to individuals that the confidentiality clauses would not prevent them blowing the whistle on a public interest concern.³
25. The NAO found in two agreements clauses that prevented the employee from further raising concerns with external bodies such as the Care Quality Commission. In one case a whistleblower had already raised their concern which was being investigated internally, and in another the NAO judged that the situation to not be a whistleblowing one.⁴
26. In the case where the concerns were being investigated internally the following clause prevented the whistleblower escalating their concern:

‘ [the Employee] will not bring or pursue any further internal complaint or grievance with the Employer in connection with any aspect of the Employer’s business which the Employee is aware of as at the date of this agreement, whether in accordance with the Employer’s grievance procedure or otherwise, or bring or pursue any further complaint or grievance against the following organisations in connection with any aspect of the Employer’s business which the Employee is aware of as at the date of the agreement: The Information Commissioner; The Care Quality Commission; The Audit Commission; NHS London and/or; The Department of Health.’⁵

27. The NAO judged that this clause did not breach s.c.43J. With respect, we disagree with this analysis as it makes no distinction between a private grievance issue or a public interest concern with the wording *‘any aspect of the Employer’s business which the Employee is aware of as at the date of the agreement’*.
28. The research established what we have long held to be true – namely that NDAs too often represent a barrier to a whistleblower who tries to raise their concern with an external regulatory body or with the police. This would be equally true for an individual reporting matters involving sexual harassment. The reasons for this are as follows:

³ Confidentiality clauses and special severance payments – follow up, NAO report, October 2013.

⁴ Ibid p.g. 10

⁵ Ibid

- **Low awareness among workers of their rights:** in survey research from 2015 67% of respondents (in this case UK workers) were either unaware or believed there was no legal protection for whistleblowing.⁶
- **The lack of clarity around the exact form of defence provided by PIDA:** the lack of guidance or case law creates a real lack of clarity as to whether or not the anti-gagging provisions can be relied upon under PIDA. This situation has not been helped by the unclear wording of 43J itself.
- **The opaque wording of many agreements:** many NDAs involving whistleblowers have unclear or opaque wording. The Financial Conduct Authority and the Prudential Regulatory Authority have taken action on this by requiring financial service firms to use specific wording in settlement agreements making it clear that a worker can approach them with concerns normally protected by PIDA.⁷ The following wording has been used by the FCA: *“for the avoidance of doubt, nothing shall preclude [the employee’s name] from making a “protected disclosure” within the meaning of Part 4A (Protected Disclosures) of the Employment Rights Act 1996. This includes protected disclosures about topics previously disclosed to another recipient.”*
- **Lack of legal advice:** as has been highlighted in previous evidence sessions with the committee there is often a disparity of arms between an employer and worker. Independent advice on the effect of the anti-gagging provisions in PIDA (or elsewhere) would remove some of the uncertainty and reassure a whistleblower that a settlement agreement will not stop them from taking their concerns to a regulatory body or to the police or exposing the issue more widely. **We have suggested adding to the requirement in S203(3)(c) ERA that an individual receives independent advice not only on the terms and effect of the settlement agreement, but that anti-gagging provisions are specifically included in this advice.**⁸

Public interest test

29. We are pleased that the government’s response to the original inquiry by the committee includes provisions to strengthen the regulatory environment for those who wish to report sexual harassment, but we are concerned, as mentioned above, by the piecemeal approach of this amendment. While the government claims that “the employment protections for whistleblowers can already cover disclosures of workplace sexual harassment”, we need to be clear that this is not quite as simple as the government suggests.⁹ When an individual suffers sexual harassment in the workplace, their usual remedy is through the internal grievance process. To fall within the protection of the Public Interest Disclosure Act (PIDA), the individual raising a concern has to have a reasonable belief that the employer is breaching a legal obligation and that the disclosure is *in the public interest*. It may seem self-evident that telling an external organisation – such as the EHRC – that sexual harassment has occurred should be a protected act – but it isn’t.

⁶ Ibid.

⁷ <https://www.handbook.fca.org.uk/handbook/SYSC/18/5.html?date=2018-08-08>

⁸ See [Whistleblowing Commission report](#) p22-23

⁹ [Sexual harassment in the workplace: Government Response to the Committee’s Fifth Report of Session 2017–19](#)

30. The law was changed to include the public interest test to stop individuals using PIDA to raise concerns about their own employment rights. Testing whether or not an individual is covered by PIDA in sexual harassment or discrimination claims may not always be straightforward and will rest on the number of people affected, the seriousness of the harassment, who the harasser is and how seriously the individual is affected.¹⁰ While it is likely the test will have a broad application it is an additional hurdle for victims that does not exist in the Equality Act. If the test is not met, a private grievance followed by an individual claim to the tribunal is still their only employment remedy.
31. This illustrates why the government's 'copy and paste' approach to this issue could have unintended consequences – assuming that someone reporting sexual harassment issues to the EHRC will have the same protection as, for example, an individual reporting financial misconduct to the FCA, without properly reviewing how the Equality Act and PIDA operate and making sure they operate effectively may mean that workers are under the impression that they are protected, when they are not.

Code of practice

32. Again, we welcome the proposal to introduce a statutory code in sexual harassment cases, to give a strong steer to employers about what they should be doing to prevent sexual harassment in the workplace. However, this should adequately consider how to support and encourage whistleblowers who speak up on behalf of victims. We have drafted an appropriate code of practice in whistleblowing arrangements which could be added to the code proposed (see [Whistleblowing Commission Code of Practice](#)).
33. We would add that without an enforcement mechanism, it remains with the individual to complain if the Code is not being followed. The government have proposed a wait-and-see approach to how tribunals respond to the Code – which is unlikely to make bad employers tremble. Even the threat of an uplift in a tribunal award for failure to prevent sexual harassment pales into insignificance when contrasted with the fines employers might face for breaching, say, GDPR requirements.
34. We agree with the committee that the government's failure to include a mandatory duty on employers to prevent harassment – a breach of which could lead to enforcement action by EHRC - is disappointing. It is also therefore disappointing that the good practice in some sectors in making whistleblowing arrangements mandatory – such as in Financial Services – have not been followed here.

Awareness campaign

35. We look forward to the proposals that will emerge surrounding the need for a wider public information campaign about legal rights in the employment sphere. We hope that the

¹⁰ See the leading case for more details *Chesterton Global Ltd & Anor v Nurmohamed* [2017] EWCA Civ 314

government and policy makers will include awareness around whistleblower rights – not just in the sphere of sexual harassment but the in the public interest more widely.

36. There have been sensible calls from others to the committee for guidance to be produced for lawyers, employers and workers around the use of NDAs and defences or exceptions that exist around their use. We agree. We also welcome the Solicitor’s Regulation Authority’s warning notice on NDA’s and confidentiality clauses and the Law Society’s recent practice note.¹¹ It is vital that there is better public awareness around employment protection legislation generally.

37. As can be seen from our experience in the whistleblowing sphere, even where there is a sensible anti-gagging provision included in statutory protection, individuals do not feel protected by it, and it is on their shoulders to test the boundaries of the legislation. This is simply not good enough and the measures suggested by the committee as well as a requirement that individuals are provided with independent advice on the effect of proposed anti gagging provisions should proceed as soon as possible.¹²

Costs and threats

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

Conclusions and Recommendations

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

- While we do not support the outright ban of NDAs, we do not think it would ever be appropriate to use an NDA to prevent the disclosure of an unlawful act that has not yet taken place.
- We would like to ensure that other clauses in settlement agreements (such as warranties or non-disparagement clauses) are not used to circumvent the anti-gagging provisions in PIDA (or other soon to be proposed anti gagging provisions).
- An employee who is the subject of a NDA should always be permitted to keep a copy of the NDA.

¹¹ [SRA warning notice](#) and [law society practice note](#)

¹² S203(3)(c) ERA should be amended so that an individual receives independent advice not only on the terms and effect of the settlement agreement, but that anti-gagging provisions are specifically included in this advice.

- More could be done to provide guidance for lawyers, employers and workers on the exemptions that exist in relation to NDAs and we welcome ACAS's intention to publish guidance.
- We welcome the recent publication of a practice note by the Law Society reminding lawyers that the public interest in the proper administration of justice takes precedence over the duty of acting in the client's best interests and to consider the SRA's warning notice on the use of NDAs. However, the guidance also recognises that whistleblowing in the public interest is a complex matter and that it is often legally uncertain whether a person can talk about how they have been treated because they made the disclosure (and refers to Protect for those needing support).
- To publicise and underpin fresh guidance there should be a public awareness campaign around workers' rights under PIDA as well as anti-discrimination law in the Equality Act.
- Section 43J should be amended with more robust language, **we suggest the following wording: "no agreement made before, during or after employment, between a worker and an employer may preclude a worker from making a protected disclosure."**
- There should be a requirement on lawyers when advising on settlement agreements (see S203(3) ERA) to explain the meaning and effect of 43J PIDA (and any additional anti-gagging provisions brought forward by the government).
- Any development of NDAs should carefully consider the balance between existing whistleblowing law and the desire to see stronger protections for those who have been the victim of sexual harassment at work. A stronger role for the EHRC to investigate concerns, rather than amendments to post-employment protections, may be a better way to change workplace cultures.

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