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EMPLOYMENT LAWYERS ASSOCIATION ('ELA')
RESPONSE TO THE WOMEN AND EQUALITIES SELECT COMMITTEE INQUIRY INTO USE OF NON-DISCLOSURE AGREEMENTS IN DISCRIMINATION CASES ('Inquiry')
28 NOVEMBER 2018

ELA welcomes the extension of the Inquiry to cases where any form of harassment or other discrimination is alleged, as this allows for focus on confidentiality restrictions in a broader context.

This paper is set out as follows:

A ABOUT ELA

The Employment Lawyers Association ('ELA') is an a-political group of approximately 6,000 UK employment law specialists. Members include in house, trade union and private practice employment lawyers, who advise employers and employees, and represent clients in Courts and Employment Tribunals. ELA does not lobby on behalf of third parties or comment on the political merits of proposed legislation. However, ELA is happy to share legal and practical insight gained from our experience as employment lawyers.

Legislation requires that employees receive advice from qualified people before they sign settlement agreements (see C). Confidential negotiation between employment lawyers prior to conclusion of settlement agreements means that, in practice, employment lawyers are uniquely placed to comment accurately on current practices and potential changes to the law. (It should, however, be noted that those who negotiate settlement agreements are not always ELA members or lawyers, see further below.)

The timeframe allowed for this submission has been very short and, accordingly, an abbreviated process has been adopted to inform ELA's response. In particular, this paper has been subject to less consultation and scrutiny from our wider membership than would normally be the case, in order to ensure that the paper reflects the full range of ELA members' perspectives.

B EXECUTIVE SUMMARY

1. **ELA's earlier paper** 'Sexual Harassment & Employment Law' of 25 July 2018 is available here https://www.elaweb.org.uk/resources/surveys/ela-sexual-harassment-employment-law. A copy is attached as Appendix 2 to this Response. The paper draws on survey data gathered from ELA members relating to sexual harassment and includes information and explanation relating to the subject matter of this Inquiry.

2. **Statutory settlement agreements**: This Response focuses on UK statutory 'settlement agreements' (see C, D & F), but also considers confidentiality terms that may be applied in other situations relevant to the scope of the Inquiry, for example confidentiality terms included in employment contracts and 'standalone' confidentiality agreements (see E & F). The term 'NDA', which until very recently was more commonly used in the US and in the context of commercial deals, can be misleading when applied to restrictions set out in UK settlement agreements (see C).

3. **Why employers and employees seek confidentiality:** Confidentiality and related terms in settlement agreements can be helpful to both employers and employees who wish to settle claims. For example, employees are frequently concerned about securing a new job and may seek agreement on the terms of references for prospective employers. Employers will often ask employees to reaffirm their commitment to keeping business-related information confidential. Both may be concerned about what is said to third parties about the dispute and settlement terms. There are advantages and disadvantages to including, and/or restricting, confidentiality-related terms in settlement agreements (see C). There are also a number of different types of confidentiality restriction that may be used in settlement, and other types, of agreement, to which different considerations will apply.

4. **Consistency between types of claim:** From a practical perspective, it is helpful if laws relating to settlement agreements apply consistently to different types of claim. Employees who experience harassment or discrimination typically make other types of claim and these are normally settled using one settlement agreement. For these, and other, reasons it is also important to ensure that the impact of any change to

settlement agreement laws on other types of claim is considered, for example complaints of unfair dismissal or for unpaid wages.

5. **Moving on:** ELA is particularly concerned about the potential impact of changes to the law that may affect employees' ability to secure new employment, see C below. It is important to recognise that the broader public interest in disclosure may not align with the interests of individual victims, employers, alleged perpetrators, and families. Some improvements to the law could be made without disadvantaging individuals, see F, but in other cases choices would need to be made. Where choices are to be made, it would be sensible to consider whether any change is a 'proportionate means of achieving a legitimate aim', specifically whether there are other ways of achieving the same benefits with less adverse impact on individuals.

6. **Removal of all confidentiality restrictions:** If confidentiality terms were not permitted at all in settlement agreements, settlement is likely to be regarded as an admission of liability by third parties. Employers and employees may be concerned about reputational damage and impact to business and careers. These are serious concerns. ***It is likely that far fewer claims would settle before litigation if confidentiality were not permitted.*** Settlement is normally preferred by employees and employers to expensive, public, slow, uncertain and often damaging litigation. (Except in quite narrow circumstances, Tribunal judgements, including facts found by the Tribunal, are currently published online.) Employees with valid claims may be discouraged from seeking redress at all if litigation were the only practical option. Even if significant numbers were discouraged from seeking redress, reduced willingness to settle would probably lead to an increase to the number of cases reaching the already overstretched UK Employment Tribunal system. Instead of seeking settlement at an early stage, employers might simply wait to address claims that are actually made to Tribunal or until they are convinced that they will lose at Tribunal.

7. **Exceptions to confidentiality restrictions:** There is concern that employees do not always feel able to report wrongdoing or seek appropriate advice due to the application (or apparent application) of confidentiality restrictions. ELA suggests some ways that this might be addressed, see F.

8. **Potential change to legislation:** Employment lawyers' views as to the best options will not be entirely consistent. Nonetheless, ELA has sought to comment on likely advantages and disadvantages of potential changes to legislation to assist Parliament in making informed decisions on preferred policy, see F. For example, Parliament may wish to consider introducing record keeping requirements and amendments to statutory protections included in legislation providing for settlement agreements. Careful thought should be given to any proposals as the form of any arrangements, and protections included, could have significant impact on both individuals and employers.

C CONTEXT AND SETTLEMENT AGREEMENTS

1. It is helpful to understand the context in which settlement agreements are used and how these 'work' in practice. In particular, some understanding of the advice employees and employees are likely to receive from their lawyers would probably assist. ELA members would be happy to 'role play' or talk through typical situations if that would be helpful for the Committee or to help try to find a way for those who have been involved in relevant situations to provide feedback confidentially and without fear of public 'outing'. The following explanation may assist by way of basic background.

Settlement agreements and confidentiality

2. Confidentiality agreements are not usually made as 'standalone' documents. Standalone confidentiality agreements are sometimes made, e.g., in the context of a commercial transaction (see E below on other contexts). However, the sort of terms that have raised public concern in recent months are typically set out in a statutory settlement agreement. Settlement agreements are not normally signed with the primary purpose of securing confidentiality. They are normally primarily intended to settle existing statutory employment claims.

Settlement agreements

3. A 'settlement agreement' is a statutory form of agreement used for settling statutory employment claims. Typically, the agreement also includes terms intended to settle other types of claim, e.g., potential contractual claims over unpaid remuneration, and other terms, for example dealing with practical matters such as untaken holiday, expense reimbursement, tax or return of property. Please refer to the extracts from the Equalities Act 2010 at Appendix 1. There are other pieces of legislation including similar provisions, for example s203 of the Employment Rights Act 1996. (It would be helpful if the wording of any amendments to legislation were consistent across the various pieces of legislation, see F.)

History and role of ACAS

4. For some years statutory employment claims could only be settled via the Advisory, Conciliation and Arbitration Service (a publicly funded body focused on helping resolve employment disputes and known as 'ACAS', see http://www.acas.org.uk). At that time solicitors were also involved in negotiating employment settlements, but agreements needed to be concluded via an ACAS 'COT3' agreement if they were to be effective. It became difficult for ACAS to deal with the volume of disputes to be resolved and flexibility and speed required. There was also concern over a developing practice of ACAS being expected to 'rubber stamp' agreements negotiated by lawyers. So, laws were passed over 25 years ago allowing for conclusion of 'settlement agreements' without ACAS involvement. The legislation provided some protections for employees, see Appendix 1, e.g., the requirement that the employee must receive independent advice, as to the terms and effects of the agreement. Potential amendments to these statutory protections are discussed further below, see F.

5. ACAS continues to help claimants reach settlements through its (useful) conciliation service. However, it is clear that a return to compulsory ACAS conciliation is not practical, for a number of reasons. These include the volume of claims that now arise:

ACAS could not possibly cope with the volume without substantial increases in funding and staffing. ELA is not advocating a return to compulsory ACAS involvement as a condition of effective settlement and considers that would be detrimental to all parties, including those who currently benefit from ACAS services.

6. ACAS conciliators are experienced conciliators, not lawyers. Whilst conciliation offers an invaluable service for many, a decision not to engage a lawyer can put claimants at a significant disadvantage, and can have an impact on outcome for both claimants and their employers. ACAS conciliators are unlikely, for example, to be able to negotiate complex legal terms or advise on complex documentation such as share plans. Typically, more senior employees and those with complex claims benefit from advice from specialist lawyers, if they can afford it. Also, it is worth bearing in mind that regulation of the conduct of lawyers would not be sufficient to directly regulate the conduct of ACAS conciliators, or other non-lawyer advisers. Amendment of employment legislation impacting all relevant advisers may be more effective to achieve some objectives, see further below.

Typical form of settlement agreement

7. To facilitate discussion, and understanding of the comments made below, it would be helpful to refer to a sample settlement agreement. (Please let ELA know if the Committee has any difficulty accessing such an agreement and ELA would be happy to assist. We would need to deal with intellectual property ownership etc to include such an agreement here, and that is not practical in the time allowed.). A settlement agreement will normally include confidentiality provisions. There are no 'pro forma' requirements regarding confidentiality terms, though they tend to follow consistent patterns. In practice, many settlement agreements are based on templates provided by lawyers or other third party providers, such as 'PLC' or 'LexisNexis'.

8. There is a practical difficulty with securing balanced confidentiality provisions. An employee may agree to confidentiality whereas an employer may not, as a practical matter, be able to ensure that all its employees maintain confidentiality without explaining why this is important etc. In practice, in the context of discrimination and sexual harassment claims, key employer representatives may agree to confidentiality restrictions. Those named may include, e.g., HR Managers or others who have had sight of relevant documents but who are not guilty of any wrongdoing.

'NDAs'

9. Certain types of legal claim can only be settled in ways prescribed by legislation. These restrictions apply to settlement of discrimination and other statutory claims. An ordinary standalone contractual document or 'NDA' (non-disclosure agreement) in the traditional sense normally understood by lawyers *cannot* effectively prevent an employee from making a future discrimination or harassment claim.

10. The fact that an 'NDA' cannot, legally, *prevent* an employee from making a future discrimination or harassment claim does not mean that such an agreement could not *discourage* an individual from doing so, see E below. Many of the concerns that arose from the Inquiry related not so much to the form of current legislation but to employees' knowledge of how that legislation works. See F below on potential amendments to statutory protection that could address this concern.

11. Indiscriminate use of the US term 'NDA' can be quite confusing (even for lawyers) because the reader does not always fully understand what is being discussed. The central purpose of an 'NDA', or 'non-disclosure agreement', is to contractually prevent disclosure of confidential information. The central purpose of settlement agreements is to settle potential statutory and other employment claims without litigation, not to prevent disclosure of confidential information. In addressing concerns about confidentiality terms in settlement agreements ELA considers that it is critical that the objective of settlement is taken into consideration. Different concerns apply to standalone 'NDA's', see E.

Public data regarding use of settlement agreements

12. There is currently no public repository or easily accessible data relating to concluded settlements. Most settlement agreements include confidentiality clauses so employees are rarely free to discuss the matters settled. Advisers are subject to duties of confidentiality to their clients. See D and F below regarding options for collecting and retaining data going forward.

D RESPONSES TO SPECIFIC INQUIRY QUESTIONS

1. Are there particular types of harassment or discrimination for which NDAs are more likely to be used?

1.1 It is worth highlighting upfront that the term 'harassment' has a specific meaning in an employment context, and goes far beyond public understanding of 'harassment' as being behaviour such as unwanted touching, stalking, sexual threats or rape. ELA does not recommend any change to this employment law definition for the reasons given in section C2 of ELA's 25th July paper, see Appendix 2.

1.2 Most settlement agreements relating to harassment or discrimination include terms relating to confidentiality. In fact, most settlement agreements dealing with employment claims of any type contain terms relating to confidentiality. This includes those dealing with straightforward redundancy.

1.3 Understanding of the context and concerns that the parties are trying to address when drafting confidentiality terms is important. The focus of confidentiality terms in settlement agreements is often not so much to silence the employee as to reach agreement on what can, truthfully, be said to allow both parties to move on. Usually all parties are concerned about confidentiality and reputation.

1.4 For example, an employee will typically be concerned about getting another job. The terms of a settlement agreement will often provide that a very simple reference be given and that oral enquiries will be dealt with consistently with the reference and/or reason for termination set out elsewhere in the agreement.

1.5 Reasons for termination of employment or the circumstances of termination are often, but not always, confirmed in the settlement agreement. In addition to concerns about

references and future employment, reasons for termination may, for example, be relevant to entitlement to statutory redundancy pay; eligibility for insurance, share awards, bonus or other benefits; or tax treatment of payments due. Moreover, some context must be confirmed to enable effective settlement of claims. Currently, legislation requires that the settlement agreement must relate to the particular complaints.

1.6 In practice, it is quite difficult to separate the need to document the context of the dispute from confidentiality restrictions: they are often two sides of the same coin.

1.7 Facts related to harassment and discrimination claims are often heavily disputed and more sensitive for both employer and employee. Accordingly, facts tend to be documented more carefully and terms providing for 'no derogatory statements' etc are more likely to be agreed when harassment and discrimination claims are settled.

1.8 So, it is not so much that particular types of harassment or discrimination are more likely to be subject to confidentiality restrictions but that more care tends to be taken when the context is more sensitive.

2. Should the use of NDAs be banned or restricted in harassment and discrimination cases? What impact would this have on the way cases are handled?

2.1 We refer to ELA's 25th July Paper:

> '3.2 The overwhelming majority of respondents to ELA's survey confirmed that they thought freedom for the parties to agree terms related to confidentiality, references, reasons for termination etc in settlement agreements was helpful for employers (92%) and employees (82%), whilst a much lower proportion of respondents (40%) confirmed that they thought this freedom was helpful from a public policy perspective, disregarding the interests of those directly involved.
>
> 3.3 Only 5% of respondents to ELA's survey said that they would support a total ban on confidentiality restrictions in settlement agreements. An overwhelming majority of respondents to ELA's survey (95%) did not.'

2.2 A key concern expressed about confidentiality restrictions contained in settlement agreements is that, if a claim can be settled privately, there is likely to be far less pressure to focus on preventing future claims. (67% of respondents to ELA's survey indicated that where they advised employees or employers on sexual harassment the complaints typically related to a more senior or powerful individual, whilst only 3% indicated that this was not usually or never the case.) There is naturally public concern about 'serial predators' and that those that are 'guilty' may abuse their power to avoid responsibility for harassment and discrimination. See further below.

Admission of liability

2.3 ***The reality is that if confidentiality terms were not permitted in settlement agreements, it is unlikely that agreement would be reached easily in the vast majority of harassment and discrimination cases*.** This is because if the settlement agreement were to be an 'open' document, the simple fact that the agreement has been signed and money has been paid is likely to lead others to conclude that something has happened, particularly those who are not familiar with the way settlement agreements work in practice.

2.4 Facts are often heavily disputed where sexual harassment and discrimination are alleged, and decisions may depend on quite subjective assessments of the credibility individuals offering accounts of what has happened.

2.5 Also, more than one party is typically involved in this type of dispute and their views on resolution are not always aligned. For example, senior managers may take a pragmatic view and be willing to reach a compromise with the individual, whilst the alleged perpetrator may be adamant that they are 'not guilty' and will not sign any document that gives the impression that they are.

Damage to reputation

2.6 There is currently no effective way for ordinary people with limited means to challenge defamation or repair damage to reputation. The effect of damage to reputation can be devasting in an employment context. For example, both complainant and perpetrator may experience difficulty in securing future employment. Families, businesses and colleagues may also be affected.

2.7 One of the advantages of the settlement process is that resolution can be reached without the need for either party to admit liability, that they have done anything wrong, or to issue denials or demand statements withdrawing accusations. Settlement agreements essentially offer a dispute resolution process aimed at avoiding litigation.

2.8 Freedom to reach agreement without 'bottoming out' liability also considerably reduces costs associated with negotiation for all parties. This may be particularly important for complainants with limited means who are often willing to accept an agreement that satisfies a limited range of objectives, e.g. clarity regarding remuneration due, financial compensation and comfort on what will be said to a prospective employer.

2.9 It is common for complainants to express a strong desire for a quick 'clean break'. The process of negotiating settlements can be very stressful, particularly where there are allegations of sexual misconduct, harassment, discrimination or whistleblowing. The tone of correspondence and criticism of individuals can be very wearing. Complainants frequently say that they want an end to it and typically report that they feel much better once a settlement agreement is concluded.

2.10 It is important to bear in mind that many employees are often simply seeking to be 'put right', for example compensation for lost earnings. Employees who do not seek a remedy, for example for lost employment, can be seriously financially disadvantaged.

Tribunals

2.11 In many cases employees who receive payments under the terms of a settlement agreement in respect of allegations of harassment or discrimination would not be successful if they were to pursue litigation. Many with strong cases would choose not to pursue their case to a Tribunal because of the cost, potential risk to reputation and future job prospects, and because the outcome of litigation is not always predictable.

2.12 Tribunal litigation is expensive and very time consuming for participants and lawyers and, accordingly, pursuing litigation to the Tribunal is not undertaken lightly by those who are advised properly. For example, irrecoverable legal costs associated with a properly run discrimination / harassment claim that is taken through Tribunal without settlement are unlikely to be less than £10,000. The average Tribunal award for sex discrimination, according to Tribunal figures is £19,152[1]. Even following the abolition of Tribunal fees employees are normally at a huge disadvantage, because of their typically more limited financial resources. Employees do not, technically, need to instruct lawyers to go to Tribunal but they are likely to be at a disadvantage if they do not and their employer and/or the perpetrator does.

2.13 The potential cost of litigation, and reality that it is often difficult to reintegrate employees who have made claims into the workforce, will often lead employers to offer settlement terms, even where they do not believe that the employee's claim has merit, or would 'win' at Tribunal. (This should be taken into consideration if it is decided that settlement agreement statistics should be collated and/or disclosed, see F below.)

2.14 Alternative cost-saving options for employees whose personal resources are limited are rarely satisfactory for those seeking to settle or litigate sensitive harassment or discrimination claims. These include:

a) insurance cover, e.g. through household insurance (though in practice this rarely delivers the anticipated level of support);
b) lawyers offering limited support on a pro-bono basis, via schemes such as those offered via the Bar Pro Bono Unit, Free Representation Unit and ELIPS;
c) legal advice centres;
d) lawyers offering support on a 'contingency fee' basis;
e) trade unions.

Despite the importance of these issues to individuals personally, e.g., potential damage to earnings, health and reputation, Legal Aid is not normally available to employees, even those with very low earnings.

[1] ET and EAT Tables 2016/2017 - GOV.UK

3 What safeguards are needed to prevent misuse?

3.1 Current safeguards include the following:

a) Legislation prevents 'contracting out' of statutory employment rights, e.g. under discrimination legislation, except 'after the event' and in prescribed ways, e.g. by use of a settlement agreement (see extract from Equality Act at Appendix 1).

b) Settlement agreement legislation requires that settlements must be in writing; that employees be advised by a qualified person (for example an independent solicitor, barrister or certified trade union or advice centre representative); that the adviser be clearly identified in the settlement agreement; and that the adviser carries insurance or other professional indemnity cover. See Appendix 1. (Employees are not, of course, obliged to follow the advice given.)

c) In practice, employees are almost invariably required under the terms of the settlement agreement to provide a 'certificate' from the adviser confirming that the advice required to satisfy the legislation has been given. Provision of the certificate will normally be a condition of payment, but is not required by legislation.

d) Solicitors and barristers are regulated by their professional bodies (Solicitors Regulation Authority, 'SRA' and Bar Standards Board, 'BSB'). The SRA has issued a warning notice to solicitors regarding the use of confidentiality agreements[2]. (See also C5.4 below on regulation.) Other advisers such as qualified union or advice centre representatives or ACAS conciliators are not regulated.

ELA considers that the above safeguards are helpful. Parliament could consider introducing a Code of Practice for unregulated advisers but those contributing to this response are not aware of any specific concerns in that regard.

3.2 Less than 1% of respondents to ELA's survey confirmed that they had ever advised (either an employer or employee) on a settlement agreement which included a requirement that the employee could not keep a copy of the agreement (See Appendix 2, F2c)). However, if settlement agreement legislation is to be amended it would be relatively easy to include an express requirement that individuals who waive rights via the settlement agreement should be permitted to keep a copy.

4 What is the role of internal grievance procedures. What obligations are there on employers to ensure these are fair and thorough?

4.1 In practice, a formal grievance under an employer procedure or an informal complaint will normally be made before a claim is made. Many employers go to great lengths to

[2] SRA Warning Notice regarding the use of NDAs, see https://www.sra.org.uk/solicitors/code-of-conduct/guidance/warning-notices/Use-of-non-disclosure-agreements-(NDAs)--Warning-notice.page

try to resolve grievances fairly and will wish to follow good practices. They may also, pragmatically, adopt processes with the aim of managing the risk of claims.

4.2 Employees with genuine discrimination and harassment complaints, particularly serious claims, typically find employer-led processes stressful and difficult to navigate. It is common for employees (and alleged perpetrators) to feel disappointed, dissatisfied and angry both about process and outcomes. Often these internal processes fall far short of objective standards of fairness. Where the process is fair, those affected may not like allegations made or outcome, and the experience is still likely to be difficult. Participants, particularly victims, can, and frequently do, become ill during the process. This can also lengthen the time that it takes for an employer to try to complete the process.

4.3 Typically, employees are also at a huge disadvantage in terms of their expertise and access to legal advice on dealing with grievance processes, primarily due to expense. Neither public funding nor legal expenses insurance cover is likely to cover the sort of professional legal advice that the employer will have access to. Unions are typically stretched and offer qualified legal support only to a minority of cases. Most experienced union representatives will be unable to give privileged legal advice. Nevertheless, union support, and a union's knowledge of the employer and its practices, can be invaluable for employees. Employees may also seek occasional guidance from free advice centres of one sort or another, e.g., Citizens Advice Bureau, Legal Advice Centres etc. What these advice centres are able to offer is, again, limited. Supporting an employee through a grievance process can be complex legally, subtle and fast moving. It is very difficult to give good advice quickly in a context where knowledge of people, history etc is unknown. Some employees will, of course, seek specialist legal advice at their own expense but this is not a practical option for the majority of complainants. It should be noted, of course, that legal advice is not always sought by employers in respect of discrimination complaints, for example internal guidance will often be sought from HR Managers in the first instance.

4.4 An internal grievance process will naturally be fairly 'rough and ready' notwithstanding clear ACAS guidance, as the integrity and efficiency of the process is dependent on the complainant, people who investigate, make decisions etc and time will be limited. A workplace grievance process is not an objective Tribunal or Court, and it is unrealistic to expect it to be. Higher standards may be required where professionals, such as doctors, are involved, where, e.g., sanctions may lead to loss of career.

Mediation

4.5 Given some of the shortcomings of grievance processes highlighted above, some employers, in both the public and private sectors, use mediation as an alternative means of resolving workplace disputes. Mediation is intended to be a non-adversarial way of resolving difficult situations. One of the chief advantages of mediation, as pointed out by key stakeholders, including the Centre for Effective Dispute Resolution ('CEDR') is confidentiality.

4.6 The mediator is neutral and aims to help the parties have an open and honest discussion to identify a mutually acceptable outcome. It is said by some that mediation is about collaborating rather than blaming.

4.7 Employers use a mixture of internal and external mediators (with a tendency to use external mediators when dealing with more complex and/or sensitive disputes) and tend to bear related costs.

Third party investigations

4.8 Another option is for employers to engage third parties to conduct investigations. There is currently no legal requirement to do this but employers sometimes choose to do so. Investigators do not normally make formal decisions on the grievance but formally report on what has happened etc, i.e., they make findings of fact. This approach might, for example, currently be adopted by a larger employer looking to deal with a sensitive and complex investigation objectively or by a smaller employer without sufficient internal HR resource to carry out their own objective investigation. Naturally, there is a cost to adopting this approach as the third party would need to be paid. The value of the report is also dependent on the independence and professionalism of the investigator, who is typically selected by and paid by the employer.

4.9 It can be difficult for employers who have not been through this sort of process before to identify 'good' investigators. These might, for example, be independent barristers, solicitors or HR consultants. HR consultants are not formally regulated. They will, however, often have practical insight that is useful for investigation of grievances. An HR consultant is unlikely to be an appropriate choice for investigation of a potentially criminal allegation of serious sexual harassment.

4.10 One option might be to maintain a central 'register' of individuals who are qualified or self-certified as investigators. (See F.) A neutral way of ensuring that selection is not entirely in the hands of the employer may also be helpful. It might be that existing public agencies could assist by maintaining a register of some sort and/or helping with allocation of investigators to cases. Careful thought would need to be given to how this would work in practice, including costs. An objective contemporaneous investigation report from a neutral person, even if not perfect, is also likely to assist Tribunals in their findings of facts, if resolution is not reached.

4.11 Grievances can be difficult and time consuming to manage. They can be vexatious, repetitive and sometimes trivial. Any change to legal requirements should take account of the need to allow some flexibility for different types of complaint if employers are not to become 'bogged down' in process. Complaints are often best dealt with informally before problems escalate.

4.12 If changes are introduced to facilitate objective investigation, they could be introduced on a voluntary basis, at least initially, so that potential impact can be assessed. Recommendations could be made via ACAS codes of practice and/or guidelines. Currently ACAS guidance is helpful in setting out expectations for investigations,

decision making processes etc and compliance with recommended standards is taken into consideration by Employment Tribunals.

4.13 We refer to ELA's 25th July Paper in relation to those falsely accused:

> 'E3. **False and malicious claims and protection for alleged perpetrators**
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> 3.1 Responses to ELA's survey suggest that false and malicious claims are not common. 64% of respondents to ELA's survey advising employers, and 87% of those advising employees indicated that less than 5% of claims they advised on where a settlement agreement was concluded were false or malicious. However, even if the figures are not so high as for genuine complaints, the potential impact of claims on alleged perpetrators is substantial. Damage to an individual's reputation (and relationships) cannot be undone, and there is no effective legal remedy for false accusations. Justice requires that the concerns of this relatively small but deeply affected group of victims should be considered carefully. It is also worth bearing in mind that, in practice, it is often the case that both complainant and alleged perpetrator speak their own 'truth' but that the conclusions to be drawn from conflicting perspectives may, nevertheless, be unclear. Third parties may also find it hard to distinguish between an individual who has been found 'guilty' in an employment context given the issues with standards of proof, broad definition etc highlighted above and an individual guilty of criminal sexual assault.
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> 3.2 It should be reiterated that, in an employment context, allegations are not normally proven to a criminal standard. For example, in an employment context a manager conducting a grievance hearing may simply think one employee's oral evidence is more reliable than another's. This relatively low standard of proof should be taken into considering when debating the extent to which formally recording allegations and internal decisions is appropriate and should be made public.'

5 How easy is it for employees and employers to access good quality legal advice on NDAs? How can quality and independence of legal advice for employees negotiating severance agreements be assured when advice is paid for by the employer?

5.1 We refer to ELA's 25th July paper:

> **10. Access to legal advice for claimants**
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> Access to legal advice at reasonable expense is a serious problem for claimants, and this is something that requires ongoing consideration along with other access to justice issues. Employers can also find legal costs difficult to bear but typically have greater resources. In practice, the parties do not typically have equal access to advice. Alternative ways of funding support for claimants include pro bono support (eg as currently offered in a limited way by ELIPs or FRU), contingency fees, legal aid, EHRC, insurance etc, none of which currently provides sufficient support for sexual

harassment-related employment claimants. Legal costs are generally irrecoverable in the Tribunal even if the claimant wins and, where a claimant is properly represented, may be disproportionate to sums awarded at Tribunal. Public policy considerations may warrant differential treatment for this type of claimant. For example, action by the EHRC[3] could have considerable dissuasive impact beyond the particular case supported.

Costs

5.2 As highlighted above, it can be difficult for individuals to access good quality advice in relation to a grievance process or other pre-termination internal investigations leading up to production of a settlement agreement. Generally, concerns are around cost constraints rather than the availability of advisers. Similar concerns arise for employees seeking advice on settlement agreements.

Pool of potential advisers

5.3 There is a very large pool of potential qualified advisers who meet the statutory requirements for advising on a settlement agreement. ELA has approximately 6,000 members, most of whose names and contact details are included on ELA's website, and most of whom will be able to do this type of work. Other lawyers who are not ELA members, for example lawyers in general practice, often also do settlement agreement work. The Law Society is able to refer individuals to lawyers. In practice, ELA is not aware of any practical difficulties with finding a lawyer and the experience is generally that lawyers who do this work are capable.

Independence

5.4 There is a statutory requirement that advisers should be independent and, as explained above, lawyers will normally certify in writing that they meet the statutory requirements.

5.5 Solicitors (and barristers) are regulated professionals. The regulator for solicitors is the Solicitors Regulatory Authority ('SRA'). The SRA has published mandatory 'Principles' that can be found in its handbook.[4] These include requirements that solicitors (you):

1. uphold the rule of law and the proper administration of justice;
2. act with integrity;
3. not allow your independence to be compromised;
4. act in the best interests of each client;

[3] Equalities and Human Rights Commission
[4] Version 20, published 1 October 2018 is available here: https://www.sra.org.uk/solicitors/handbook/handbookprinciples/part2/content.page

5. provide a proper standard of service to your clients;

6. behave in a way that maintains the trust the public places in you and in the provision of legal services;

7. comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner;

8. run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles;

9. run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity; and

10. protect client money and assets.

Principles 3 and 4 should be highlighted particularly in this context, including the additional explanation provided in the Handbook. Failure to comply with these Principles can result in disciplinary action being taken against a solicitor by the SRA, and the solicitor may potentially be struck off the roll of solicitors. Similar professional duties apply to barristers.

5.6 Qualified union representatives and others may also advise on settlement agreements, in place of lawyers. ELA is not aware of any suggestion or evidence that those representatives are not independent, or that their advice is of poor quality. ELA is concerned that a number of high profile and unusual cases may be prejudicing public perception of the way advice is normally given. Some additional commentary on current safeguards regarding lawyers' independence is set out below.

Identity of clients and conflict checks

5.7 A solicitor who is advising an employee on the terms of a settlement agreement will be engaged directly by the employee, not the employer, and this will clearly be confirmed in a written letter of engagement confirming charging arrangements, i.e., the engagement letter must confirm the identity of the client. Lawyers are required to carry out checks for conflicts of interest before taking on new clients and to take steps if a conflict of interest arises during the engagement. The wording of current settlement agreement legislation would not allow solicitors to act for both employer and employee. In that event they would not be independent and there would be a conflict of interest. In most cases the employee will be obliged under the terms of the relevant engagement letter to pay the solicitor regardless of outcome, and the invoice must be addressed to the client.

5.8 The law does allow for 'no win no fee', contingency or insurance-backed advice, and lawyers will typically discuss alternative funding options with clients. ELA would be happy to provide further information regarding these arrangements on request. We do not have statistics regarding the frequency with which these arrangements are adopted, but it is probably fair to say that these will not be attractive options for most clients who have been offered a settlement agreement.

Payment of employee's fees directly to lawyers

5.9 Tax relief on payment of lawyers' fees directly to the lawyer by the employer in the context of termination of employment is permitted[5]. Typically, the settlement agreement will provide for a minimal contribution of £500 plus VAT, sometimes less. Even where the case is straightforward, this is likely to be insufficient to cover time to deal with the regulatory requirements regarding file opening etc, review the papers, meet with the employee, give thorough advice and collect the fee from the employer. A £500 employer contribution will rarely be sufficient to cover the type of complex advice that is typically required where there has been sexual harassment or other types of discrimination. Typically, the employee pays the balance of the fee. Sometimes a bigger employer contribution is negotiated and confirmed in the settlement agreement, though this is not typical, and rarely offered at the outset of negotiation. The invoice would be addressed and delivered to the client but may be marked as 'payable by' the employer.

Independence and selection of lawyers

5.10 Sometimes employers will provide the contact details of lawyers to individuals. So, for example, a list of lawyers who might be willing to advise may be provided. Sometimes this can be helpful. For example, if a number of employees are made redundant, costs can be reduced substantially for individual employees if one lawyer advises a number of individuals together in relation to the same circumstances and agreement. The employee is, however, always free to make their own choice of lawyer and they frequently do so even where names are suggested. A requirement that an employee chooses an adviser from a list would not meet the requirements of current settlement agreement legislation and any lawyer advising would have a duty to make that clear to their client. It would be possible for legislation to be amended to prohibit employers from recommending advisers or providing advisers' contact details to employees. ELA has not had an opportunity to seek members' views on options for change to these practices, or the extent to which that might be helpful, but it seems likely that opinions would vary, and there may be unforeseen complications if changes were made to the law. For example, it is common for an employee to be referred to a 'good' lawyer by a friend at work or a kind member of the HR team. The 'employer' will naturally often not be aware of this. Also, it may be helpful to an employee to receive relevant union contact details. Generally, clients are more comfortable approaching advisers where there has been a personal recommendation.

5.11 The most significant barriers to securing good legal advice for employees are that they may not be aware of the benefits (or their legal rights generally) and that, even if they are aware, they cannot afford good advice.

5.12 Also, employees with limited resources, and who want to maximise outcomes, will need to prioritise their requests for amendment to settlement terms. Prudent preparation for any negotiation begins with consideration of priorities. Few employees prioritise amendments to technical terms. Most will focus on money, reputation etc

[5] Income Tax (Earnings and Pensions) Act 2003 (ITEPA)

and will wish to expend legal fees accordingly. (Mandatory pro forma wording could potentially help address this problem, see F.) Settlement agreement legislation currently requires advice on the 'terms and effects' of agreements but does not require that employees follow the advice give.

5.13 Additional considerations apply to confidentiality commitments that are not contained in settlement agreements as there is no legal requirement for the individual to be advised prior to conclusion. Even employees with sufficient financial means rarely seek advice unless there is some other work-related concern (e.g., a pending business sale).

6 Do some employers use NDAs repeatedly to deal with cases involving a single harasser? If so, is appropriate action being taken to deal with the behaviour?

6.1 It is clear that harassment is repeated by some perpetrators. However, it is very hard to assess the frequency with which this happens accurately without any accessible records. It is open to perpetrators to seek new employment; employers may use different advisers; and, similarly, those dealing with complaints within the employer's organisation may change over time. Those engaged in negotiating 'repeat' settlement agreements may not be aware of previous records of harassment.

6.2 It may be helpful to find some mechanism for tracking 'repeats' both internally within an employer, and in a form that can be accessed by appropriate third parties. For example, it would be possible to require by law that a named individual at an employer be given responsibility for keeping records. (See 7 below responding to the Inquiry's question regarding directors etc.)

6.3 A harasser may be disciplined by the employer, sanctioned by a regulatory body and/or lose their job. This clearly does happen to some actual and alleged perpetrators. Settlement agreements may be negotiated for those dismissed. Former employers who give false references may be liable to third parties. ELA does not have sufficient information to assess whether overall 'appropriate action is being taken to deal with the behaviour'. Given that sexual harassment in and outside work is clearly an ongoing problem, it would be sensible to try to take practical steps to eliminate it, regardless of whether employers currently follow best practice.

6.4 Employment lawyers will often remark that employers who have personal experience of dealing with claims are more willing to accept advice on tackling discrimination generally. This is not the case with all employers or all perpetrators.

6.5 As highlighted above, it is important to be clear that signing a settlement agreement does not equate to admitting 'guilt'. Settlement agreements are typically entered into on the basis that neither side admits liability. See C regarding potential benefits of this 'status quo' to those seeking to reach a negotiated settlement and the potential impact of damage to reputation on complainant, alleged perpetrator, and employer. Accordingly, ELA would recommend that any proposed record keeping process includes safeguards for those who may be adversely affected by disclosure.

7 What should the role of boards and directors be? And should employers be obliged to disclose numbers and types of NDAs?

7.1 Options discussed include:

a) requiring that directors sign or approve any settlement agreement;
b) requiring that directors are informed of the terms of any settlement agreement;
c) requiring that similar arrangements are made by other types of employer (not all employers are companies);
d) requiring that a person or committee be appointed for the above purpose (perhaps coupled with other harassment or equality-related responsibilities);
e) keeping a confidential register or other records of terms of agreements and/or parties and types of claim at the employer or centrally that can be accessed by appropriate people or at appropriate times;
f) requiring that a public register be maintained by the employer or a public body.

7.2 ELA considers that it would be impractical and unhelpful if directors and/or boards were required to sign settlement agreements or approve all settlement agreements *in advance* as that would make negotiation and settlement less flexible.

7.3 Timing can be important, for both parties, for settlement for lots of reasons. For example, there may be a need to move quickly because of a pending Tribunal deadline; tight time constraints for judicial mediation (e.g., one day); an external event (e.g., anticipated press report); regulatory requirement (e.g. to report price sensitive information within a specified time frame); because the board can only, practically, make decisions at certain times; because an announcement is to be made in conjunction with another event (e.g., business sale or reorganisation); or because the claimant has a job offer they wish to accept. Flexibility to conclude at an appropriate time for the parties without unnecessary extra procedure to work round is helpful. (Introduction of a 'cooling off period' as applied to some agreements in the US would create similar challenges.)

7.3 It would be sensible to review the practical impact of existing requirements of this type, e.g., in the public sector, before extending such requirements to others.

7.4 Where a director is the claimant and party to a settlement agreement, additional considerations currently apply. Terms should be approved by the Board, or the Board may formally delegate authority to sign a specified agreement, or an agreement subject to agreed parameters, prior to conclusion. If the employer is listed strict reporting requirements (including in relation to timing) are likely to apply.

7.5 In practice, in smaller organisations directors are often involved in approval of settlement agreements and/or instruction of lawyers. In larger organisations authority may be given to a senior employee. Often, the interface with employment lawyers acting for an individual is another lawyer taking instructions from an HR manage or director. However, HR teams rarely make decisions on settlement terms themselves. They will normally seek internal approval from managers or directors.

7.6 It may be helpful to introduce a legal requirement that all employers have a nominated director (or directors) who should receive copies of all settlement agreements within a fixed period following conclusion (e.g., 7 days following conclusion). Ensuring that more than one person is tasked with this may also help with continuity, e.g., in the event that a director leaves the business.

7.7 It may also be helpful to require employers to keep copies of settlement agreements, subject to appropriate steps to secure confidentiality, and access, for a period of time. ELA would suggest this should be for 6 years following conclusion.

7.8 ELA considers that the possibility of adopting a formal record keeping mechanism of some sort should be considered very carefully. Care would need to be taken to ensure that this does not prejudice individuals unnecessarily. ELA does not feel able to comment in detail on this in the time available for submission of this Response. For example, consideration should be given to:

a) who should access the data and why, e.g. EHRC for the purposes of inspection;
b) whether an online central filing requirement would assist with inspection or create additional risk of potential data leak;
c) whether records should be anonymised or given reference numbers;
d) the extent to which disclosure may be made to third parties, e.g. in the context of a commercial tender or subsequent litigation (express prohibition would probably be helpful);
e) compliance with data protection laws;
f) the extent to which statistics may reflect different practices, resources and regulation of different sectors.

7.9 One particular group of people deserves a special mention. It is common for HR teams, and those with similar roles, to be closely involved with grievance and disciplinary processes and dealing with allegations of harassment. As a consequence, it is not uncommon for those individuals to be personally named in Tribunal applications. They may be expressly 'released' if a settlement agreement is concluded. It is important that record-keeping arrangements do not inadvertently, unfairly imply 'guilt'.

E OTHER TYPES OF CONFIDENTIALITY OBLIGATION

1. The comments and suggestions above relate to settlement agreements. There are other contexts in which an employee may enter into agreements providing for confidentiality. There are also a variety of laws imposing duties of confidentiality that may impact on an employee. See further below.

Common law duties of confidentiality

2. Most employees are automatically subject to a duty of confidentiality under the common law in relation to their employment. This may cover, e.g., the employer's

trade secrets and highly confidential information. This common law duty has been in place for decades, is proportionate, flexible and works well in practice. 'Fiduciaries', e.g., company directors, partners and very senior employees, are also automatically subject to additional duties. Fiduciaries have duties of confidentiality, and will also have a duty to disclose certain matters. For example in so,me circumstances they must disclose their own wrongdoing. (The EU Trade Secrets Directive[6] should also be considered, but does not add much to debate on the best way forward in principle.)

Data protection (privacy) laws ('GDPR')

3. Employers are required to comply with data protection laws regarding employees, including, for example, sensitive personal data. Employees who deal with other people's data are also required to process it lawfully.

Public interest disclosures / whistleblowing

4. Clauses restricting an employee's rights to make 'public interest disclosures' will be void. However, employees may not always know this. In some contexts, highlighting public interest disclosure rights is mandatory, e.g., to comply with public sector or financial services requirements. It may be appropriate to require the inclusion of the same mandatory wording in all employment contracts.

Employment contract

5. Typically, a competently drafted employment contract will include fairly generic confidentiality clauses. These usually broadly reflect the common law position. However, most employers will seek to describe what the relevant confidential information is in the context of their business etc. Confidential information does not always 'belong' to the employer. Often the intention of confidentiality terms is to protect the confidentiality of others. For example, payroll, HR and compliance teams may hold sensitive personal data relating to other employees, or sales staff may hold confidential contact details for customers. Policies relating to confidentiality, e.g., data protection or whistleblowing policies often seek to remind employees of existing obligations as much as impose new requirements. The business itself may need to commit to confidentiality and/or to impose confidentiality terms on its staff in order to do certain kinds of work. For example, this may be required to comply with data protection laws. This kind of confidential information is not normally directly relevant to a sexual harassment or other discrimination claims.

6. Given the very large numbers of employment contracts that are signed and amended, and that pretty straightforward wording is used in most, it is probably not a good use of resource to require that protections similar to those provided for settlement agreements are applied to every employment contract. It would, however, be possible to require that a statement regarding confidentiality be included in every contract. This

[6] Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure

might be done, e.g., by amending the Employment Rights Act 1996 provisions relating to 'statutory particulars'. Additional public information regarding confidentiality expectations might be made more easily accessible online.

Special circumstances agreements

7. Sometimes employees are asked to sign agreements in respect of special events, e.g.
    - an employee might be asked to sign an additional confidentiality agreement, for the benefit of a client, before accessing the client's IT systems;
    - a senior manager or company director might sign a confidentiality agreement before being provided with information related to a potential business purchase;
    - an employee who is promoted might be asked to sign up to new terms.

    As with employment contracts it would be possible to require that specified wording be inserted.

Potential penalties

8. If statutory wording is to be required consideration should be given to potential penalties for failure to include such wording. One option might be to simply make the relevant confidentiality provision unenforceable if the statutory wording is not included. If that approach were adopted care should also be taken with drafting of legislation to ensure that this does not undermine common law rights or existing commitments.

9. **Reaffirmation of confidentiality terms**

Settlement agreements frequently provide for confirmation of confidentiality obligations that are already contained in the employment contract or other contractual documents or that would normally be imposed by the common law. The reason for this is that it is often alleged by employees in the context of a dispute that their employer has breached the employment contract. If the employer breaches the employment contract it may not subsequently be able to enforce terms of the employment contract. The settlement agreement may provide for reaffirmation of the earlier confidentiality obligations to reduce the risk of future dispute regarding enforceability.

F POTENTIAL CHANGES TO LEGISLATION AND OTHER SUGGESTIONS

The tight timeframe for delivering this response has restricted ELA's ability to consult with members regarding appropriate change. The options highlighted below are highlighted for the purposes of information and to facilitate discussion. They are not intended to be recommendations. ELA would be happy to offer more detailed comments in relation to any proposed legislation in the usual way.

1. Access to advice / redressing imbalance of resource

a) Regulation of employment-related insurance cover

Parliament could consider regulating the terms on which insurance is offered to individuals regarding employment claims. The terms imposed on cover typically provided with household insurance etc may, in practice, mean that employees do not enjoy the anticipated level of legal support. A set of standard terms which apply unless otherwise expressly agreed might be helpful. Even limited legislation requiring that hourly rates do not fall below Court rates might assist.

b) Confidentiality hotline / online information

It might be helpful to ensure that clear information regarding potential scope of confidentiality terms etc is available online and perhaps via a dedicated ACAS or other helpline.

c) Minimum contribution to legal fees

It would be possible to legislate for a mandatory minimum contribution to legal fees by the employer as a condition of settlement agreement conclusion. Currently employers typically voluntarily offer £500 plus VAT, though practices vary and many still offer £250 or £350 plus VAT. A minimum contribution of £750 plus VAT might make a huge difference to employees. Secondary legislation would be more appropriate for this purpose. It is likely that many employers would consider a requirement of this type to be unfair.

d) *Claw back clauses*

The practice of including claw back clauses providing for repayment of all compensation paid under the terms of a settlement agreement in the event of (potentially minor) breaches of settlement agreements could be expressly prohibited through employment legislation. We refer to the related comments made in ELA's 25th July Paper.

> 6. Claw back clauses
>
> 6.1 A significant proportion of settlement agreements include 'claw back' clauses requiring repayment of money delivered under the terms of a settlement agreement in the event that the employee breaches any term of the settlement agreement, or breaches specified terms.
>
> 6.2 It can be argued that such clauses are void on grounds of public policy, e.g. because specific terms amount to an unenforceable 'penalty clause'. Interestingly, 47% of respondents to ELA's survey confirmed that they thought these clauses were not normally enforceable whilst 19% thought these clauses were usually enforceable. Clearly there is some uncertainty as to the precise effect of these clauses, and of course context, scope and drafting will be different for different settlement agreements so a clear answer may be hard to give through a survey.

6.3 It may also be that such clauses are included to 'discourage' breach rather than with a genuine expectation that they would be enforced in the event of breach.

6.4 The 'threat' of claw back, when coupled with uncertainty around the scope of confidentiality (and other) clauses has been criticised by some.

It would be possible to restrict claw back of some types of payment (e.g., unpaid remuneration or statutory redundancy pay), whilst allowing claw back of other types of payment (e.g., payment over and above statutory entitlements). Many lawyers would consider the proper remedy for breach of a settlement agreement by the employee to be damages for actual losses and question whether any type of claw back clause allowing recovery in excess of loss is appropriate.

2. Restrictions on scope of confidentiality provisions

We refer to comments made in ELA's 25th July paper on potential restrictions:

5.2 These might include for example the right to:

- report a crime to, or cooperate with, the police;
- give evidence to, or comply with an order by, a Court or Tribunal;
- make a 'protected disclosure' (ie those covered by whistleblowing legislation, s43A of the Public Interest Disclosure Act);
- report to, or cooperate, with a regulatory body;
- seek medical, legal and tax advice etc.

There are already some existing (limited) requirements in this regard, e.g. in a financial services context / related to protected disclosures. As highlighted by others, a clear list of bodies to which disclosures can clearly be made under the Public Interest Disclosures Act would be helpful.

5.3 Other exceptions commonly referred to in settlement agreements include exceptions to allow discussion with a defined partner or close family (this is normally made subject to a corresponding commitment to confidentiality) and for information that is already in the public domain (other than through the individual's breach) or order of a Court or Tribunal.

5.4 A majority of respondents to ELA's survey supported amendment to legislation to require mandatory wording relating to confidentiality in settlement agreements as a condition of enforceability. 58% thought mandatory wording should be included and 42% thought it should not be.

5.5 Respondents were more narrowly divided on whether similar mandatory wording should be required in other confidentiality agreements with employees or workers. (An example might be written confidentiality clauses in an employment contract). 53% thought mandatory wording should be included 47% thought it should not be. It is worth noting that a (limited) duty of confidentiality is normally implied into every employee's contract of employment under the common law.

5.6 Some potential pros and cons of including mandatory settlement wording related to confidentiality as a condition of an effective settlement agreement (ie an agreement that would effectively prevent the individual from making specified statutory employment claims) include the following:

• mandatory wording would be static and could not be easily adapted to suit the parties' preferences or developing case law;

• lawyers could confidently advise on exemption wording, knowing they are recommending the 'right' wording;

• requirements could be imposed on unregulated individuals who may prepare settlement agreements for the employer (eg HR specialists) if the settlement agreement were not effective without it.

5.7 If any wording is to be imposed, consideration should be given to whether mandatory exceptions to confidentiality provisions (as above) should be imposed or whether mandatory confidentiality wording should be imposed. The latter would significantly reduce the flexibility of lawyers to help clients agree terms to fit the circumstances.'

a) The simplest way to restrict the scope of confidentiality provisions in settlement agreements would be to require that prescribed wording relating to statutory exceptions is included, and this would help keep costs down for most parties.

b) Mandatory wording could also be required for other types of agreement, e.g. confidentiality terms in contracts of employment. The enforcement mechanism would need to be different, e.g., via amendment to 'statutory particulars' legislation in the Employment Rights Act 1996.

c) If settlement agreement laws, such as those set out in Appendix 1 are to be amended it would be straightforward to require that those who waive statutory claims are able to keep a copy of the settlement agreement.

3. Assistance with appointment of independent investigators

It would be possible to set up a mechanism by which independent investigators could be registered and/or agreed via an independent body.

4. Statutory requirement to provide references

In the UK there is currently no obligation to provide a reference save in some particular regulated occupations. Recognising that normal practice is currently to provide simple references confirming start and end dates and job title, and in some instances final salary, it may be possible to establish a statutory mechanism for ensuring that this information is provided. This could reduce, though not eliminate, the incentive for employees to agree references with employers.

5. Appointment of nominated person / reporting to Board

Legislation could require appointment of a person or people to carry out specific statutory duties related to settlement agreements, e.g. to retain records. (We assume that the introduction of a mandatory duty to take steps to prevent discrimination and harassment as discussed elsewhere is beyond the expected scope of this Response.) Obligations could potentially extend to other confidentiality and data protection restrictions agreed with employees, e.g., any set out in employment contracts or standalone agreements.

6. Monitoring

a) Record keeping

It would be possible to set up a voluntary or compulsory online system by which advisers and/or employers must report certain key statistics regarding settlement agreements on an anonymous basis, for example date and types of claim settled. A reference number could be provided in respect of a report to be included on the face of the settlement agreement to facilitate tracking of compliance.

b) Claims to which a settlement agreement relates

Legislation could be amended to ensure that settlement agreements clearly list the specific claims to which an agreement relates. This would assist with production of statistics. Any requirement to specify the information to be reported should ideally be included in secondary legislation to facilitate change.

c) Inspection

A requirement to keep copies of settlement agreements concluded would allow for the possibility of inspection of records by public authorities, e.g. the Equality and Human Rights Commission. Careful consideration would need to be given to the purpose of such inspections, potential remedies, and protection of confidentiality for affected individuals.

7. Change to statutory definition of harassment

For the reasons given in ELA's 25th July Paper, attached, ELA does not recommend any change to the statutory definitions of harassment.

ELA would be happy to discuss and/or elaborate on any of the above options.

Employment Lawyers Association, 28 November 2018 (www.elaweb.org)

APPENDIX 1: EQUALITY ACT 2010

144 Contracting out

(1) A term of a contract is unenforceable by a person in whose favour it would operate in so far as it purports to exclude or limit a provision of or made under this Act.

(2) A relevant non-contractual term (as defined by section 142) is unenforceable by a person in whose favour it would operate in so far as it purports to exclude or limit a provision of or made under this Act, in so far as the provision relates to disability.

(3) This section does not apply to a contract which settles a claim within section 114.

(4) This section does not apply to a contract which settles a complaint within section 120 if the contract—

(a) is made with the assistance of a conciliation officer, or

(b) is a qualifying settlement agreement**.**

(5) A contract within subsection (4) includes a contract which settles a complaint relating to a breach of an equality clause or rule or of a non-discrimination rule.

(6) A contract within subsection (4) includes an agreement by the parties to a dispute to submit the dispute to arbitration if—

(a) the dispute is covered by a scheme having effect by virtue of an order under section 212A of the Trade Union and Labour Relations (Consolidation) Act 1992, and

(b) the agreement is to submit the dispute to arbitration in accordance with the scheme.

145 Void and unenforceable terms

(1) A term of a collective agreement is void in so far as it constitutes, promotes or provides for treatment of a description prohibited by this Act.

(2) A rule of an undertaking is unenforceable against a person in so far as it constitutes, promotes or provides for treatment of the person that is of a description prohibited by this Act.

147 Meaning of "qualifying settlement agreement"

(1) This section applies for the purposes of this Part.

(2) A qualifying settlement agreement is a contract in relation to which each of the conditions in subsection (3) is met.

(3) Those conditions are that—

(a) the contract is in writing,

(b) the contract relates to the particular complaint,

(c) the complainant has, before entering into the contract, received advice from an independent adviser about its terms and effect (including, in particular, its effect on the complainant's ability to pursue the complaint before an employment tribunal),

(d) on the date of the giving of the advice, there is in force a contract of insurance, or an indemnity provided for members of a profession or professional body, covering the risk of a claim by the complainant in respect of loss arising from the advice,

(e) the contract identifies the adviser, and

(f) the contract states that the conditions in paragraphs (c) and (d) are met.

(4) Each of the following is an independent adviser—

(a) a qualified lawyer;

(b) an officer, official, employee or member of an independent trade union certified in writing by the trade union as competent to give advice and as authorised to do so on its behalf;

(c) a worker at an advice centre (whether as an employee or a volunteer) certified in writing by the centre as competent to give advice and as authorised to do so on its behalf;

(d) a person of such description as may be specified by order.

(5) Despite subsection (4), none of the following is an independent adviser to the complainant in relation to a qualifying settlement agreement—

(a) a person (other than the complainant) who is a party to the contract or the complaint;

(b) a person who is connected to a person within paragraph (a);

(c) a person who is employed by a person within paragraph (a) or (b);

(d) a person who is acting for a person within paragraph (a) or (b) in relation to the contract or the complaint;

(e) a person within subsection (4)(b) or (c), if the trade union or advice centre is a person within paragraph (a) or (b);

(f) a person within subsection (4)(c) to whom the complainant makes a payment for the advice.

(6) A "qualified lawyer", for the purposes of subsection (4)(a), is—

(a) in relation to England and Wales, a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation;

(b) in relation to Scotland, an advocate (whether in practice as such or employed to give legal advice) or a solicitor who holds a practising certificate.

(7) "Independent trade union" has the meaning given in section 5 of the Trade Union and Labour Relations (Consolidation) Act 1992.

(8) Two persons are connected for the purposes of subsection (5) if—

(a) one is a company of which the other (directly or indirectly) has control, or

(b) both are companies of which a third person (directly or indirectly) has control.

(9) Two persons are also connected for the purposes of subsection (5) in so far as a connection between them gives rise to a conflict of interest in relation to the contract or the complaint.

APPENDIX 2:

EMPLOYMENT LAWYERS ASSOCIATION ('ELA')

SEXUAL HARASSMENT & EMPLOYMENT LAW

25 July 2018

This paper is set out as follows:

A ABOUT ELA

The Employment Lawyers Association ('ELA') is an a-political group of approximately 6,000 UK employment law specialists. Members include in house, trade union and private practice employment lawyers, who advise employers and employees, and represent clients in Courts and Employment Tribunals. ELA does not lobby on behalf of third parties or comment on the political merits of proposed legislation. However, ELA is happy to share legal and practical insight gained from our experience as employment lawyers.

B PURPOSE OF THIS PAPER

1. This paper is intended to provide information and insight to those considering potential change to employment laws and practices related to workplace sexual harassment. The paper offers some commentary on current laws and their impact, in practice, on victims, perpetrators and employers. It is further informed by a limited survey of our members completed on 20 July 2018, to which 464 ELA members responded (8% of those included in the survey). Please note that this paper is not intended to provide a comprehensive overview or review of sexual harassment law, but simply to contribute to current debate.

2. There are a number of reviews, initiatives and bodies currently focused on sexual harassment at work including, for example, the Parliamentary Women & Equalities

Committee inquiry into sexual harassment in the workplace, the Law Society, the Solicitors Regulatory Authority ('SRA'), the Equality and Human Rights Commission ('EHRC') and the Advisory Conciliation and Arbitration Service ('ACAS'). This paper is intended to complement and assist those bodies and reviews, and there is naturally some overlap between the content of various reports and contributions and this paper. In particular, the paper submitted by employment and partnership lawyers, CM Murray LLP, to the Women & Equalities Committee inquiry offers some helpful perspectives on employment law and sexual harassment. As discussion develops we anticipate that this ELA paper may need to be updated and/or replaced.

3. It should be noted that whilst ELA members have, in many respects, differing views, responses to ELA's Survey from claimant and respondent-focused lawyers were markedly consistent in many areas.

C CONTEXT

1. Responsibility for sexual harassment

Responsibility for sexual harassment in the workplace rests squarely with perpetrators. Attention given to the role of employers below reflects the significance of employers in preventing sexual harassment and in dealing with incidents and allegations as they arise. This focus should not give the impression that sexual harassment is typically perpetrated by, or actively supported by, employers. It is acknowledged that many employers work hard to eradicate harassment within their organisations. Similarly, lawyers advising employers typically work hard to encourage best practice.

2. Definition of sexual harassment at work

2.1 It is worth highlighting from the outset that 'harassment' has a different, broader, meaning in an employment law context to that understood by the general public.

2.2 The definition of harassment set out in s26 Equality Act 2010 is quite long and complex, and has been interpreted through case law. Essentially, the Equality Act confirms that a person harasses another person 'B' where they:

> *engage in 'unwanted conduct related to' sex or 'of a sexual nature' and 'the conduct has the purpose or effect of' 'violating B's dignity' or 'creating an intimidating, hostile, degrading, humiliating or offensive environment for B'. The definition also covers less favourable treatment for rejecting or submitting to unwanted conduct of this nature.*

2.3 This employment law definition goes far beyond public understanding of 'harassment' as being behaviour such as unwanted touching, stalking, sexual threats or rape. The employment law definition clearly covers matters which would not ordinarily amount to a

crime. For example, making offensive jokes may create a humiliating or offensive workplace environment for an employee sufficient to amount to harassment for the purposes of the Equality Act. This set of facts may not meet criminal law criteria required for successful prosecution.

2.4 The legal standard for 'proof' of allegations is very different in an employment context from a criminal context. Essentially, it is much easier to 'prove' harassment for the purposes of employment legislation. The consequences of allegations being proven are also very different.

2.5 In an employment context, subjective impact on the victim is important (amongst other things). So, for example, it is possible to 'harass' for employment law purposes without intending to do so.

2.6 Through a common definition, employment law recognises harassment connected to a range of 'protected characteristics' (including for example race, age, disability, religion and belief and sexual orientation) in a consistent way. Consistency makes advising employers and employees, predicting outcomes, fair decisions, and settling claims easier. Any attempt to change sexual harassment laws out of line with laws relating to harassment on grounds of other recognised 'protected characteristics' would be unhelpful from a legal perspective. ELA anticipates that any attempt to give sexual harassment preference over other forms of harassment (eg on grounds of disability or race) would be challenged vigorously by interested parties in the Courts.

2.7 This current employment law definition is also consistent European law and any departure from this approach is likely to be challenged (assuming European law continues to apply).

2.8 In practice, the current employment law definition works reasonably well and is the cornerstone of a great deal of helpful case law. From a practical perspective, an amendment to this definition may be an unhelpful distraction from focusing on prevention and would introduce a period of uncertainty. It is hard to identify changes to the Equality Act definition that would either reduce harassment directly or encourage employers and others to take steps to do so.

2.9 Even disregarding European law constraints, harmonisation of criminal and employment law criteria and rules would not be practical, appropriate or helpful for victims or alleged perpetrators, and would inevitably lead to 'less serious' harassment falling out of scope of employment legislation.

2.10 Essentially, ELA would not recommend any substantial change to the current legal definition of harassment related to sex for employment law purposes.

2.11 It is imperative that those discussing or proposing changes to laws relating to sexual harassment are clear about the type of sexual harassment they are referring to (ie whether they are referring to criminal or employment law definitions/standards). For the purposes of this paper, ELA is referring to harassment in the employment law sense, except where expressly confirmed otherwise.

3. Liability

Amongst others, individual employees, e.g. perpetrators, line managers, HR managers, and employers may be liable for sexual harassment under employment law. Employers may currently defend claims on the basis that they have taken 'reasonable steps' to prevent harassment, for example by offering training. Both potential liability and potential for defence are important in encouraging employers and senior managers to focus on prevention and attend to training. Essentially, this potential legal liability can help focus even unwilling employers on the need to combat sexual harassment. However, if the bar for avoiding responsibility is set too high there is a risk that employers and managers may be unnecessarily stigmatised. See further below in relation to a potential code of conduct for sexual harassment.

4. Role of employment lawyers

Employment lawyers typically engage with employers and employees over sexual harassment by:

- offering advice on compliance and prevention, e.g. by drafting equality policies, reviewing working practices and, providing training to HR practitioners, managers and employees;
- helping claimants, employers and respondents respond to specific allegations of harassment, e.g. advising on an investigation, grievance or disciplinary process;
- advising on settlement of claims (typically by means of a statutory settlement agreement); and/or
- assisting with litigation.

See further below.

D POLICIES AND TRAINING

1. Equality policies and training in practice

1.1 Employment lawyers have considerable experience of offering equality training to employers, both to human resource specialists and to staff directly. Similarly, equality policies will often be drafted by employment lawyers (or be based on documents that have been drafted by employment lawyers.) This work appears to have had some impact in helping to change workplace culture but the quality of the training itself is not the only factor. For example, securing appropriate internal 'business sponsors' can be important and the frequency of training, implementation of policies and relevance of policies to the particular workplace and group of employees can make a difference.

1.2 Rigorous academic research into the practical impact of various types of training and policy would be helpful to inform employer choices, and the advice of employment lawyers, although, in practice, this is difficult in the absence of accessible and reliable statistics relating to sexual harassment allegations, claims and outcomes.

1.3 In practice, employment lawyers often observe that employers are more open to suggestions after they have experienced the stress, wasted management time, expense etc of a claim.

1.4 Cultural change can take time and, to some extent, employers 'inherit' the attitudes of those they recruit. 283 respondents to ELA's survey confirmed that they would be willing to help if a group of employment lawyers were to offer training to school children on workplace rights and responsibilities, including sexual harassment.

1.5 There appear to be marked differences in attitudes between different sectors, job types, professions, sexes, age-groups etc. Employment lawyers will typically adapt equality training to audience. For example, training related to recruitment practices might not be appropriate for junior administrators, whereas training on raising concerns might be appropriate for a broad audience.

2. Potential introduction of mandatory harassment policies

Requiring the application of rigid, mandatory harassment policies for employers is unlikely to be helpful. For example, because that would side step the educational benefits for employers of working on policies, and the thought and commitment that is required to adapt policies to a particular workplace. A new code of practice is likely to be more helpful than rigid policies, see further below. The reality is that employees do not always read policies, and employment lawyers observe that it is not so much having documents but doing something with them that makes the difference.

3. Specific workplace sexual harassment training

3.1 It is notable that equality training and policies do not always focus explicitly, or in detail, on sexual harassment. This is unfortunate as it is apparent that perpetrators and victims often have different ideas about the sort of behaviour that amounts to harassment. This is something that employment lawyers and employers could work together to improve.

3.2 Limitations should also be acknowledged: many perpetrators harass individuals deliberately and are either fully aware of what they are doing, or recklessly disregard the impact on the victim. Training may not directly impact on perpetrators' behaviour but may still help empower colleagues, managers and victims to speak up and take action.

E RESPONSE TO INCIDENTS

1. Early reporting

Frequently concern is raised that reports of sexual harassment are not made (or dealt with) early or often enough, for example before harassment becomes more serious or whilst there is still an opportunity to deal with matters informally. By the time victims approach lawyers, it is often too late for them to 'save' their relationships and the attitudes of managers can become entrenched. Many victims end up leaving their employment. 46% of respondents

to ELA's survey indicated that where a formal grievance or complaint about sexual harassment was raised employees 'rarely' remained in their role, whilst a further 51% indicated that complainants 'sometimes' remained in their role. (This may not give a clear picture of how this works in practice given that the formal complaints reaching lawyers may not be representative of all workplace complaints, and it seems likely that those reaching lawyers are at the more serious end. Nevertheless, survey and anecdotal evidence from employment lawyers is depressing.)

2. **Retaliation**

2.1 Raising a formal grievance brings with it a risk of retaliation (victimisation), and if that happens the impact on the victim can be severe. This is something that employment lawyers will naturally warn both claimants and employers about when incidents arise. Nevertheless, reaction is a common human response to complaints, and even well-supported and diligent HR practitioners may not be able to prevent it.

2.2 67% of respondents to ELA's survey indicated that where they advised employees or employers on sexual harassment the complaints typically related to a more senior or powerful individual, whilst only 3% indicated that this was not usually or never the case. Employees who make complaints are vulnerable. This is something that is, to some extent, unavoidable, but which employers and lawyers could work to improve. Senior sponsorship of policies, reporting and claimants is likely to be important but this is not something that can easily be developed simply by changing the law. (See below on a potential code of practice.)

2.3 In many cases victims will choose to endure harassment or seek alternative employment, rather than make internal reports or raise claims. This will be the case for many who seek legal advice as well as those who choose not to do so. Statistics and surveys cannot identify the extent to which this occurs but employment lawyers, naturally, know that it does occur to some extent through their own work.

2.4 Bringing any kind of discrimination claim or grievance is typically stressful for the individual (much more so than those who have not been involved might imagine), and stress-related health issues are common. There appears to be a lack of awareness of the impact of conduct of employer investigations etc on individuals. It may be that practical improvements could be made, for example by referral of investigation to more neutral investigators, training on the health-related impact of stress, offering support lines etc. This context may also inform views on the importance of freedom to speak with friends, families and medical practitioners, see further below.

2.5 The role of colleagues in providing support and advocating change to workplace practices does not appear to have been sufficiently explored. 87% of respondents to ELA's survey who advised employees thought those they advised either 'occasionally' or 'never' felt they were supported by colleagues (including HR). Some of these things can be addressed by raising awareness, training etc but the cultural shift required to allow victims (and accused) to raise

concerns with colleagues (and colleagues to support them) safely is not something that law can deliver in isolation.

3. **False and malicious claims and protection for alleged perpetrators**

3.1 Responses to ELA's survey suggest that false and malicious claims are not common. 64% of respondents to ELA's survey advising employers, and 87% of those advising employees indicated that less than 5% of claims they advised on where a settlement agreement was concluded were false or malicious. However, even if the figures are not so high as for genuine complaints, the potential impact of claims on alleged perpetrators is substantial. Damage to an individual's reputation (and relationships) cannot be undone, and there is no effective legal remedy for false accusations. Justice requires that the concerns of this relatively small but deeply affected group of victims should be considered carefully. It is also worth bearing in mind that, in practice, it is often the case that both complainant and alleged perpetrator speak their own 'truth' but that the conclusions to be drawn from conflicting perspectives may, nevertheless, be unclear. Third parties may also find it hard to distinguish between an individual who has been found 'guilty' in an employment context given the issues with standards of proof, broad definition etc highlighted above and an individual guilty of criminal sexual assault.

3.2 It should be reiterated that, in an employment context, allegations are not normally proven to a criminal standard. For example, in an employment context a manager conducting a grievance hearing may simply think one employee's oral evidence is more reliable than another's. This relatively low standard of proof should be taken into considering when debating the extent to which formally recording allegations and internal decisions is appropriate and should be made public.

4. **Potential professional sanctions**

4.1 The above should also be born in mind if proposals are made to facilitate more severe professional sanctions for perpetrators and their employers.

4.2 There is often a practical need for quick 'rough justice' in the workplace, in preference to 'no justice' or 'slow justice'. Whilst raising the stakes would clearly encourage regulated employers to focus on addressing problems, this may also limit freedom to take practical steps to resolve things informally at an early stage.

4.3 The possibility of more severe potential professional sanctions for harassment that does not meet criminal standards could also have an impact on employees coming forward to raise relatively minor concerns. (Early raising of concerns is generally accepted to be helpful in allowing HR, managers and employees an opportunity to find informal resolutions before problems escalate.)

4.4 Processes for reporting and/or determining professional sanctions; standards of proof required for reporting and sanction; and opportunities for alleged perpetrators to participate, appeal etc will be important considerations. It is important to appreciate that

professional sanction can have a devastating and potentially permanent effect on an individual's career.

4.5 An additional consideration for the legal profession (by contrast, for example, with regulated financial services) is the need to give due consideration to the value of legal privilege to clients and the public. Imposition of reporting obligations on solicitors in relation to matters that concern clients' conduct should be considered carefully, particularly if other approaches are available. (Privilege is not, of course, a special consideration in relation to harassment taking place in law firms or chambers and should not apply to the text of a settlement agreement that has been concluded).

F SETTLEMENT AGREEMENTS AND CONFIDENTIALITY

1. Current role of settlement agreements

1.1 Before considering whether legislation relating to settlement agreements should be amended, it is important to understand the pivotal role settlement agreements currently take in the context of a variety dispute types. Changes to legislation and required practices could affect large numbers of victims, employees, employers, witnesses and perpetrators.

1.2 It should be recognised at the outset that any form of redress for sexual harassment is likely to be unsatisfactory, in that sexual harassment that has taken place cannot be undone. Also, that the impact on victims (and accused and employers) can vary considerably. Many victims suffer serious health problems and potential future employment and income disadvantages as consequences of harassment. The impact on those (rightly or wrongly) accused of harassment can also be severe. It is important that the interests of the 'wider public' take into account the interests of individuals directly affected by harassment and by allegations of harassment. Those interests are not always aligned to those of the wider public. (See below on responses to ELA's survey in respect of confidentiality particularly.)

1.3 In practice, victims of harassment may seek a range of outcomes including, for example, acknowledgement that the wrong has been done; an apology; to see significant change in workplace practices as a consequence of their complaint; for the perpetrator to be 'punished' in some way (eg to lose their job or supervisory role); for the harasser to stop doing what they are doing; or simply to move on with privacy or confidence that there will be no further negative action. These types of desired outcome cannot all be addressed by litigation or settlement agreements.

1.4 Most employment lawyers would agree that litigation is a last resort, rather than a desirable outcome, for victims. Victims find litigation stressful, and litigation can be disproportionately expensive. Litigation, even when successful, does not typically deliver the sense of resolution or 'justice' (or privacy) that litigants tend to look for at the outset. Settlement agreements help all parties to find an informal resolution without facing litigation. The primary remedy typically offered by a settlement agreement is money. Another key benefit for individuals is that the agreement can regulate the behaviour of the parties going forward. This does not typically fully meet the victim's needs, but currently it is

one of few options available to them to seek redress. At a practical level, victims who lose their jobs often find financial compensation helpful, if not sufficient to redress the wrong.

1.5 Examples of terms that might be agreed via a settlement agreement include:

- confidentiality, for example, that specified people will not talk about specified events, usually with caveats, e.g., to allow the employee to make a 'protected disclosure' or discuss the events with a partner or lawyers;
- the terms of a reference for the employee, again often subject to caveats, e.g. related to regulatory obligations.
- terms restricting either, or both, parties from making derogatory, untrue or misleading statements about the other.

Further commentary on confidentiality restrictions is offered below.

1.6 It is important to reiterate that settlement agreements are also used in a wide range of situations which do not involve sexual harassment at all, e.g. redundancy, unfair dismissal, claims related to unpaid wages and for other types of equality-related claim. Careful consideration should be given to the potential impact of any proposed change focused on addressing sexual harassment on these other areas.

2. Settlement agreement – statutory requirements

For a settlement agreement to effectively settle statutory employment claims the agreement must satisfy specific requirements confirmed in various pieces of legislation and in case law. For example:

- the individual must be independently advised by a qualified person (in addition to solicitors and barristers, qualified trade union representatives may advise);
- the agreement must generally relate to the complaints made;
- the agreement must confirm in writing that the relevant settlement agreement legislation is satisfied.

It is worth bearing in mind that disputes can also be resolved via ACAS conciliation and settlement through an ACAS 'COT 3' agreement, to which different rules apply.

3. Confidentiality

3.1 Less than 1% of respondents to ELA's survey confirmed that they had ever advised (either an employer or employee) on a settlement agreement which included a requirement that the employee could not keep a copy of the agreement.

3.2 The overwhelming majority of respondents to ELA's survey confirmed that they thought freedom for the parties to agree terms related to confidentiality, references, reasons for termination etc in settlement agreements was helpful for employers (92%) and employees (82%), whilst a much lower proportion of respondents (40%) confirmed that they thought this freedom was helpful from a public policy perspective, disregarding the interests of those directly involved.

3.3 Only 5% of respondents to ELA's survey said that they would support a total ban on confidentiality restrictions in settlement agreements. An overwhelming majority of respondents to ELA's survey (95%) did not.

3.4 It is worth bearing in mind that confidentiality provisions in settlement agreements allow the parties to settle claims without admission of liability. Typically, a claimant will be much better off financially (with less risk) following receipt of compensation under a settlement agreement, than if the claim were pursued to Tribunal, where an award of compensation might be lower, the claim might be lost, legal costs are not generally awarded even to successful claimants, and the outcome will generally be public. It is also important to note that Tribunal outcomes are not accurately predictable. If freedom to settle without admission of liability were removed there would be less incentive for respondents to settle and to settle early, before substantial expense is incurred.

4. Advice to clients on the meaning of settlement agreements

Solicitors (and other qualified people) advising on a settlement agreement are already required by the legislation provided for settlement agreements to advise on the 'terms and effects' of the agreement and that advice should of course include advice on any confidentiality agreement contained in the settlement agreement. See, for example, section 203 of the Employment Rights Act 1996. For commercial reasons, the solicitor advising the claimant is almost invariably required to provide written confirmation that the solicitor has actually given that advice. More recently the Solicitors Regulatory Authority has issued a 'warning notice' to solicitors regarding their obligations in relation to confidentiality agreements.

5. Mandatory wording relating to confidentiality in settlement agreements

5.1 As highlighted above, current legislation already requires that settlement agreements include some specific information in writing (see, e.g., s203 of the Employment Rights Act 1996). One option would be to amend settlement agreement legislation to require written confirmation of exemptions to any confidentiality obligation.

5.2 These might include for example the right to:

- report a crime to, or cooperate with, the police;
- give evidence to, or comply with an order by, a Court or Tribunal;
- make a 'protected disclosure' (ie those covered by whistleblowing legislation, s43A of the Public Interest Disclosure Act);
- report to, or cooperate, with a regulatory body;
- seek medical, legal and tax advice etc.

There are already some existing (limited) requirements in this regard, e.g. in a financial services context / related to protected disclosures. As highlighted by others, a clear list of bodies to which disclosures can clearly be made under the Public Interest Disclosures Act would be helpful.

5.3 Other exceptions commonly referred to in settlement agreements include exceptions to allow discussion with a defined partner or close family (this is normally made subject to a corresponding commitment to confidentiality) and for information that is already in the public domain (other than through the individual's breach) or order of a Court or Tribunal.

5.4 A majority of respondents to ELA's survey supported amendment to legislation to require mandatory wording relating to confidentiality in settlement agreements as a condition of enforceability. 58% thought mandatory wording should be included and 42% thought it should not be.

5.5 Respondents were more narrowly divided on whether similar mandatory wording should be required in other confidentiality agreements with employees or workers. (An example might be written confidentiality clauses in an employment contract). 53% thought mandatory wording should be included 47% thought it should not be. It is worth noting that a (limited) duty of confidentiality is normally implied into every employee's contract of employment under the common law.

5.6 Some potential pros and cons of including mandatory settlement wording related to confidentiality as a condition of an effective settlement agreement (ie an agreement that would effectively prevent the individual from making specified statutory employment claims) include the following:

- mandatory wording would be static and could not be easily adapted to suit the parties' preferences or developing case law;
- if specific wording were required less time (and expense) would be wasted on discussion between the parties (and their lawyers) over appropriate wording;
- lawyers could confidently advise on exemption wording, knowing they are recommending the 'right' wording;
- requirements could be imposed on unregulated individuals who may prepare settlement agreements for the employer (eg HR specialists) if the settlement agreement were not effective without it;

5.6 If any wording is to be imposed, consideration should be given to whether mandatory exceptions to confidentiality provisions (as above) should be imposed or whether mandatory confidentiality wording should be imposed. The latter would significantly reduce the flexibility of lawyers to help clients agree terms to fit the circumstances. For example, the parties to an employment dispute will often agree that responses to telephone enquiries to a former employer from a potential new employer must be consistent with an agreed written reference set out in the settlement agreement. This is often agreed at the request of the employee's lawyer to help the employee confidently seek new employment. For example, an employee dismissed for what the employer sees as 'poor performance', but the employee sees as 'character clash' or bullying, may seek some comfort that the employer will not destroy their chances of securing a new job by provide an unfairly critical reference.

6. Claw back clauses

6.1 A significant proportion of settlement agreements include 'claw back' clauses requiring repayment of money delivered under the terms of a settlement agreement in the event that the employee breaches any term of the settlement agreement, or breaches specified terms.

6.2 It can be argued that such clauses are void on grounds of public policy, e.g. because specific terms amount to an unenforceable 'penalty clause'. Interestingly, 47% of respondents to ELA's survey confirmed that they thought these clauses were not normally enforceable whilst 19% thought these clauses were usually enforceable. Clearly there is some uncertainty as to the precise effect of these clauses, and of course context, scope and drafting will be different for different settlement agreements so a clear answer may be hard to give through a survey.

6.3 It may also be that such clauses are included to 'discourage' breach rather than with a genuine expectation that they would be enforced in the event of breach.

6.4 The 'threat' of claw back, when coupled with uncertainty around the scope of confidentiality (and other) clauses has been criticised by some.

7. Other purposes of settlement agreements

When considering whether to amend or tighten settlement agreement legislation it is important to bear in mind that the majority of employment disputes do not involve sexual harassment or 'criminal' sexual harassment. 85% of respondents to ELA's survey confirmed that they had either never advised on incidents of sexual harassment that might potentially be criminal (27%) or that less than 5% of the settlement agreements they advised on related to sexual harassment (58%). This is important because if, as most employment lawyers would assume, even without our limited survey data, settlement agreements generally relate to other things it is important that the impact on those other situations is taken into consideration when new legislation aimed at tackling sexual harassment is proposed.

8. Restricting who can sign settlement agreements for the employer

8.1 It has been suggested that restricting who can sign settlement agreements for the employer (eg to a statutory company director) could potentially assist victims by ensuring knowledge at a senior level of the settlement terms, perhaps making it more likely that action would be taken to prevent recurrence.

8.2 One potentially negative consequence is that such a formal process may make conclusion of settlement agreements less likely, and potentially lead to more litigation to be resolved by Courts and Tribunals. It would be sensible to review the practical impact of existing requirements of this type, for example in the public sector, before extending such requirements to others.

8.3 Respondents to ELA's survey did not support this suggestion (68%). There was very little support either for differentiating between different types of claim in this regard (eg by reference to size of employer or type of claim).

G OTHER SUGGESTIONS

1. Formal responsibilities and guidance for employers

1.1 81% of respondents to ELA's survey supported introduction of a non-binding statutory code of practice to guide employers, perpetrators and victims in their response to this issue.

1.2 The same proportion or respondents (81%) supported imposition of specific statutory duties on employers to take steps to combat sexual harassment.

1.3 These two approaches could stand alone or both be adopted separately. We assume that, if adopted, the scope and content of the proposals, and consequences of non-compliance, would be considered very carefully. Timing for introduction would also be important to maximise impact.

2. Reintroduction of statutory equality questionnaire procedure

2.1 A majority (but not a huge majority) of respondents to ELA's survey (61%) supported reintroduction of a statutory questionnaire process, either in the form adopted previously (29%) or with some modifications (32%). The questionnaire would give victims an opportunity to ask questions and a Tribunal could draw inferences from responses.

In practice, under the previous legislation allowing for this, most sensible employers would choose to respond to a statutory questionnaire. This could help, for example, by giving the victim an opportunity to request information that might assist at an early stage. For example, the employee might ask about the employer's previous claims record.

2.2 This could help address difficulties that claimants sometimes face in obtaining evidence from employers. Employers who anticipate being served with a questionnaire may also take steps to ensure that they can respond positively to the questions likely to be asked, e.g. by ensuring that they offer appropriate training to staff.

2.3 In practice, completion of questionnaires under the previous legislation was quite onerous for employers.

2.4 If questionnaires were to be reintroduced, consideration should be given as to whether they should be available for a full range of claims available under equality legislation.

2.5 If questionnaires are reintroduced careful consideration should also be given to the advantages and disadvantages of 'pro forma' questions. Pro forma questions would make response by the employer easier but would be less useful to employees seeking particular information needed to make a claim, or to decide whether to make a claim. Timing may also be important.

3. Time limits

3.1 There has been some discussion over the short time limits for making claims for sexual harassment under employment legislation to an Employment Tribunal. This can be challenging for claimants, particularly those whose health and strength have been affected by their experience. However, a narrow majority of respondent's to ELA's survey thought that the time limit should remain at 3 months (52%).

3.2 Examples of arguments for and against extension include the following:

- claimants find making claims stressful and being pressed to take action quickly may have an adverse impact on health, outcome or ability to meet time limits;
- short time limits force the parties to address matters while recollections are relatively fresh and evidence is more easily available;
- short time limits may disrupt settlement negotiations, depending on context;
- short time limits may sometimes prompt quicker resolution.

3.3 The availability of a discretion to extend time limits does not give the same comfort to a claimant as a longer certain time limit. Prudent lawyers will usually err on the side of caution and deliver by a reliable deadline when they can, rather than rely on a possible exercise of discretion.

4. Record keeping

4.1 A majority of respondents to ELA's survey (54%) did not support introduction of a mandatory register of sexual harassment allegations.

4.2 If such a requirement were introduced there are a variety of approaches that might be adopted. Careful consideration should/could be given, e.g., to:

- the purpose(s) of such a register;
- who would be able to access such a register and how they would do so (Respondents to ELA's survey indicated that prescribed managers, Tribunals and possibly regulatory bodies could be given access, with differing degrees of support. There was no obvious support for differentiating between large and small employers. Very few (7%) supported public access to the information and it should be reiterated that the majority (54%) did not support introduction of such mandatory requirements at all);
- the interests of alleged perpetrators who may not have been found 'guilty' or been given an adequate opportunity to respond (see above), and of victims who may value their privacy;
- data protection laws;
- whether a mechanism for anonymous reporting of the subject matter of settlement agreements (eg by lawyers or employers, or both) might be appropriate;
- whether copies of settlement agreements concluded, rather than allegations, should be retained, and made available for inspection for specified purposes;
- whether data relating to Tribunal decisions on sexual harassment could be more effectively gathered.

4.3 This is a complex topic not well suited to analysis by survey and any proposals should be very carefully considered.

4.4 As indicated above, settlement agreement legislation typically requires that the agreement should relate to the particular complaints made. In practice, this is often done by including a long list of all the claims the employer can possibly think of, rather than by careful articulation of the claims that have actually been raised by the claimant. Requiring that

employers stick to the wording of current legislation when setting out claims would help with the collation of statistics. (This would probably require some change to legislation as there is existing case law in this area).

5. Volunteers

The majority (88%) of respondents to ELA's survey supported clear extension of employment sexual harassment legislation to volunteers (in addition, e.g., to paid employers, workers and those who provide personal services).

6. Professional conduct

Evidence given by Zelda Perkins to the Women & Equalities Select Committee has prompted some considerable re-focus on ethics, specifically the way that solicitors' conduct requirements interact with confidentiality provisions. At the time of writing, a 'warning notice' to solicitors has been issued by the SRA and guidance aimed at the public and lawyers is the subject of consideration by the Law Society, SRA, ELA and other interested parties.

Law firms, the SRA and the Law Society all help solicitors understand their ethical obligations. As a members' association, ELA is not required to provide ethics training to members but has voluntarily included or referred to ethics in its training programme, to some extent. 81% of ELA's survey respondents supported inclusion of ethics training focused specifically on employment lawyers in ELA's programme.

7. Personal injury

Further consideration might be given to the interaction of personal injury laws and employment laws where damage to health has been caused by sexual harassment (and in other circumstances), including the extent to which it is appropriate to settle personal injury claims via a settlement agreement.

8. Damages

It would be possible to provide for aggravated damages or other additional penalties in cases where there is evidence of previous complaints of sexual harassment made against the same individual and the employer has failed to take action.

9. Third party harassment

75% of respondents to ELA's survey supported reintroduction of specific statutory protection against harassment by third parties. (For example, sexual harassment of an employee by a customer.)

10. Access to legal advice for claimants

Access to legal advice at reasonable expense is a serious problem for claimants, and this is something that requires ongoing consideration along with other access to justice issues. Employers can also find legal costs difficult to bear but typically have greater resources. In practice, the parties do not typically have equal access to advice. Alternative ways of funding support for claimants include pro bono support (eg as currently offered in a limited

way by ELIPs or FRU), contingency fees, legal aid, EHRC, insurance etc, none of which currently provides sufficient support for sexual harassment-related employment claimants. Legal costs are generally irrecoverable in the Tribunal even if the claimant wins and, where a claimant is properly represented, may be disproportionate to sums awarded at Tribunal. Public policy considerations may warrant differential treatment for this type of claimant. For example, action by the EHRC could have considerable dissuasive impact beyond the particular case supported.

CONCLUSIONS

As highlighted at the outset, the purpose of this paper is to inform debate rather than to promote suggestions for legislative change, and particularly to highlight the way that employment laws relating to harassment currently operate in practice. ELA would like to highlight the following:

1. Whilst the law is important, the prevalence of sexual harassment to a large extent depends on workplace culture and the behaviour of individual perpetrators and employers. It can be tempting to assume that changing the law will 'make a difference'. Changing the law is often easier than addressing underlying problems – it is within legislator's control, whereas the behaviour of individuals is not. Whilst changing the law is not a 'quick fix' to this problem there are areas where improvement might be made. That is the area where ELA's members have particular expertise and this paper therefore naturally focuses on the narrower legal context.

2. Legislators may, e.g., consider introducing the following and, if they do so, further work should be done to ensure that the decisions made are appropriate:
    a. introducing mandatory wording for inclusion in settlement agreements (ie without which the agreement will not be enforceable) to make the restrictions on the scope of confidentiality agreements clearer, and possibly mandatory wording for inclusion in other types of confidentiality agreement intended to bind employees and workers;
    b. introducing mandatory duties to take steps to combat sexual harassment;
    c. introducing a code of conduct for employers regarding prevention and management of sexual harassment allegations;
    d. re-introducing a statutory questionnaire procedure.

3. Legislators should be cautious in proposing changes to legislation that may potentially have far-reaching and unexpected consequences for claimants, employers and those accused of harassment. e.g. the potential impact of new professional penalties or reporting requirements; and on the ability to individuals to secure new employment or reach a negotiated settlement without admission of liability or litigation should be considered carefully.

4. Settlement agreements and confidentiality agreements are used in a very wide range of situations, a small proportion of which relate to sexual harassment, and an even smaller proportion of which relate to matters that might be considered 'criminal'. It is important that changes focused on a small proportion of claims takes account of the wider impact on other types of employment dispute.

Employment Lawyers Association

25 July 2018