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The use of Non-Disclosure Agreements in Discrimination cases

Submission to the Women & Equalities Select Committee

Chartered Institute of Personnel and Development (CIPD)

December 2018

Background

The CIPD is the professional body for HR and people development. The not-for-profit organisation champions better work and working lives and has been setting the benchmark for excellence in people and organisation development for more than 100 years. It has 150,000 members across the world, provides thought leadership through independent research on the world of work, and offers professional training and accreditation for those working in HR and learning and development.

Our membership base is wide, with 60% of our members working in private sector services and manufacturing, 33% working in the public sector and 7% in the not-for-profit sector. In addition, 76% of the FTSE 100 companies have CIPD members at director level.

Public policy at the CIPD draws on our extensive research and thought leadership, practical advice and guidance, along with the experience and expertise of our diverse membership, to inform and shape debate, government policy and legislation for the benefit of employees and employers, to improve best practice in the workplace, to promote high standards of work and to represent the interests of our members at the highest level.

Introduction

In putting this response together we sought the views of a number of CIPD members with expertise and experience across a wide range of sectors, plus some with expertise in employment law. We have cited some of their remarks and points of view.

In some cases we have unpicked some of the grouped questions in order to give more specific answers. On other occasions we have kept them grouped and addressed the questions under subheadings.

Executive summary

We believe it would be premature to call for a ban on Non-Disclosure Agreements (NDAs), nor do we see how a restriction policy would be implemented in practice.

Our overall view based on our consultation with members is that that any move to ban or significantly restrict the use of NDAs in relation to issues such as harassment or discrimination would be premature because it could have an unintended negative impact on many victims of such behaviour.

However, there were a number of senior HR practitioners who informed our response, that take the opposite view and believe that banning the use of confidential settlement agreements in harassment or discrimination cases would be the right thing to do.

The range of views on this issue highlights what a complex area this is and points to the need for a more in-depth consultation to allow for more evidence to be gathered and the competing arguments to be tested and challenged.

In the meantime, the CIPD proposes a number of safeguards that should be put in place to strengthen guidance, improve legal advice and improving director accountability.

Legal advice

Legal advice should be high quality and independent to allow employees to make informed decisions and ensure they are fully aware of any implications. The CIPD therefore suggests that:

- The Acas code is revisited to consider whether changes should be made that require advice on settlement agreements to be both independent and legal (i.e. from a qualified lawyer);
- Employers should be required to pay an employee with whom they are signing a settlement agreement a minimum of £500 towards the cost of good quality, independent legal advice to ensure that all employees can afford to access the advice they need;
- There should also be a separate requirement on employers to pay an appropriate amount to an employee to enable them benefit from good quality independent legal advice on the terms of an NDA if one is used in a settlement agreement.

Internal Grievance Procedures

It is essential that employers follow the Acas code for internal grievance procedures, and HR has an important role to fully investigate every claim and ensure good practice. However according to CIPD research, most employers say that once an issue has entered the grievance procedure, the complaint often becomes drawn out and more difficult to resolve. We would therefore suggest that:

- There is a case for using more proactive reporting channels, some of which are highlighted by the EHRC such as anonymous and/or confidential methods to report harassment or discrimination
- The time limit for lodging a tribunal claim in cases of harassment should be extended to six months and the countdown until employers' internal complaint and grievance procedures are completed paused.

Guidance

There needs to be more robust guidance available to employers on the appropriate and ethical use of NDAs and settlement agreements, which for the latter could be included in the Acas guidance on settlement agreements.

Transparency and accountability

In principle, we support stronger governance and transparency, however in the case of settlement agreements we believe disclosure would not have the desired impact. Instead we would draw the committee's attention to the role of directors:

- Nominating a non-executive director with responsibility for monitoring the number and terms of all settlement agreements means they could keep tabs on what is happening in a business without the potential conflict of interest that an executive director may have.
- Alternatively, executive directors could be made more accountable for the appropriate use of NDAs and settlement agreements through a requirement that directors sign or approve any settlement agreement or are at least informed of the terms of any settlement agreement.
- A more radical option would be to consider if directors should face being disqualified from being a director if they are found to have sanctioned the use of a settlement agreement that disadvantaged a victim of harassment or discrimination.

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Our response

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

The CIPD does not have any evidence on this particular question.

Should the use of NDAs be banned or restricted in harassment and discrimination cases?

There is some confusion about the term 'non-disclosure agreement', with the term often used in a catch all way, but it's important to differentiate between the different types of agreement: [1] 'non-disclosure agreement' [NDA] or confidentiality agreement and [2] settlement agreement.

As this committee has noted, the former type of NDA or 'confidentiality agreement' can form a legitimate part of an employment contract if they are used in their intended way, i.e. to protect trade secrets etc. They should not be used in a wider capacity by employers to attempt to silence employees from reporting inappropriate behaviour such as harassment or discrimination. There are protections for employees who sign a settlement agreement as they must obtain independent advice. Our evidence in this submission refers only to the use of [2] i.e. NDAs [or rather the confidentiality terms] in settlement agreements; none of the senior HR practitioners and employment lawyers we interviewed had come across the use of the former type of NDA in an employment contract in relation to issues of harassment or discrimination.

CIPD recognises that the use of confidentiality terms in settlement agreements to potentially prevent victims of harassment from speaking out about their experience, while protecting the alleged perpetrator from being held to account for their actions, is a deeply unsatisfactory scenario.

Having sought insights from a range of senior HR practitioners and a number of CIPD members who are employment lawyers, our overall view is that that a move to ban or significantly restrict the use of NDAs in relation to issues such as harassment or discrimination would be premature because it could have an unintended negative impact on many victims of such behaviour.

However, there were a number of senior HR practitioners who take the opposite view and believe that banning the use of confidential settlement agreements in harassment or discrimination cases would be the right thing to do. The range of views on this issue highlight what a complex area this is and points to the need for a more in-depth consultation to allow for more evidence to be gathered and the competing arguments to be tested and challenged. We noted Prime Minister Theresa May's answer during Prime Minister's Questions on 24 October 2018 in which she stated that the Government would 'consult on measures to seek to improve the regulation around non-disclosure agreements' and we look forward to having the chance to input into this.

Those CIPD members who are against banning or restricting the use of NDAs in harassment and discrimination cases argue that because many of these incidents involve only the alleged victim and the alleged perpetrator it is one person's word against another, which means that going through a formal grievance procedure and investigation, as well as any subsequent court case is often regarded by victims as an extremely stressful process with an uncertain outcome.

> *"When used properly settlement agreements can play an important role for the employee and not only the employer, and enable the parties to maintain dignity. While confidentiality is not the primary purpose of a settlement agreement, it is having the ability to agree confidential terms that typically makes the agreement possible in many cases,"* ***CIPD member.***
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> *There is a real danger here of throwing the baby away with the bath water. Restricted? Maybe, but definitely not banned. They should be managed and made workable for those that require them. We shouldn't forget that NDAs can be important for employees just as they can be for employers. The use of NDAs for the right reasons can help give victims of harassment some redress and recognition of their treatment and way of leaving an organisation with some dignity,"* ***CIPD member, HR consultant and former HR director.***
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> "*We would feel strongly that a ban on NDAs used in the context of settlement agreements would not serve the interests of victims of harassment. Often these cases involve one person's word against another and the victim in many instances just wants to protect themselves and do not want to go through a court case*," ***CIPD member, employment lawyer.***
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> *"In many cases even where the victim trusts the employer to investigate the complaint fairly and in good faith, they will say 'I need to draw a line under this and*

get out from the situation' because they want to protect themselves from having to go through the process," ***CIPD member and employment lawyer.***

"Women who are victims of harassment often want the fact they have been subject to this treatment acknowledged and recognised through receiving a confidential payment as part of a settlement agreement but they don't want to go to court and have to stand and be cross-examined, have their honesty questioned and to re-live what they have been through." ***CIPD member, HR Director.***

However, there were a number of CIPD members who believe that the use of confidentiality terms in harassment cases are not necessary and cannot be justified. For example, one HR director commented:

"In nearly three decades of practice in large businesses, across multiple industries, I have not once used or encountered a situation where a settlement agreement was appropriate for someone raising an allegation of sexual or racial harassment, nor have I ever been approached by an employee requesting one… I cannot think of a single circumstance where the balance of favour in the use of an NDA would be weighted towards the employee raising the issue."

"If organisations are serious about tackling harassment they (NDAs) should be banned; this would send out a statement that harassment and bullying are not tolerated." ***CIPD member and HR Director***

What impact would this have on the way cases are handled?

There was a majority view among the experts interviewed to inform the CIPD response that banning the use of confidentiality terms in settlement agreements would mean more victims would suffer in silence or leave an organisation without any redress.

The facts of a tribunal claim are published after the judgment, and a complainant often does not want the circumstances of their case made public and so this could deter employees from making an employment tribunal claim where there has been alleged harassment. Banning the use of confidentiality clauses in settlement agreements could risk using regulation as a blunt tool that would not automatically foster more inclusive and harassment- and discrimination-free workplaces.

"If NDAs were banned, we would be likely to see fewer victims being prepared to raise issues of harassment in the workplace. It would also go against the grain of

public policy that seeks to reduce the amount of litigation and increase the amount of disputes that are settled." ***CIPD member and employment lawyer.***

"I think that it would have a negative impact for both sides insofar as they wouldn't be as frank or forthcoming and, consequently, discussions would be more likely to break down. One of the key reasons for such an agreement, and the HR profession have a key role in this, is that the matter is settled with dignity. A ban or restriction would threaten this, and I can foresee a risk that people won't come forward with any complaints about bullying or harassment if they don't think a positive outcome could be reached," ***HR consultant and former HR Director.***

Another issue raised by two employment lawyers interviewed was that the use of NDAs can also play a positive role in protecting alleged perpetrators who are the victims of false accusations.

However, there was a significant minority view among some HR practitioners interviewed that banning NDAs would put a greater onus on employers to improve how they manage people and address issues such as harassment and discrimination more proactively.

"My experience is overwhelmingly that, when properly supported by HR professionals and with a sound policies and procedures, employees have raised allegations of inappropriate behaviour to have them properly investigated. I cannot think of a single circumstance where the balance of favour in the use of an NDA would be weighted towards the employee raising the issue." ***CIPD member and HR Director.***

Another senior HR practitioner said that banning the use of NDAs in harassment and discrimination cases would support more open working cultures and encourage and enable more people to speak up on these issues:

"NDAs shouldn't be used [in these circumstances] because if you want to change the culture then you can't have a system that restricts people from speaking." And;

"A NDA does not advance equality because it hides information. It doesn't create an open culture, it hinders it," ***CIPD member, HR Director.***

As stated above the CIPD view is that a more in-depth consultation on the use of confidential settlement agreements in harassment and discrimination cases is required in light of the differing views on the topic to ensure that any action to reform their use is informed by a complete understanding of all the issues and the factors that determine the

different views on the subject. We will be conducting further research with our members on this.

What safeguards are needed to prevent misuse?

We broadly believe that, if adhered to fully, the safeguards on the use of confidentiality terms are satisfactory in regard to their use with settlement agreements for employees. However, stronger advice is needed on the appropriate and ethical use of confidentiality arrangements where there are alleged cases of harassment and discrimination, and all professional bodies and employment organisations have a responsibility to make sure this is effectively communicated and practiced by their members and employers. We support any measures that make clearer in statutory guidance and codes of practices the meaning, effect and limits of confidentiality clauses, including explanation of what disclosures are protected under whistleblowing laws etc.

Acas guidance on settlement agreements makes clear that in order for them to be legally binding, the following conditions must be met:

- The agreement must be in writing;
- The agreement must relate to a particular complaint or proceedings;
- The employee must have received advice from a relevant independent adviser, such as a lawyer or a certified and authorised member of a trade union;
- The independent adviser must have a current contract of insurance or professional indemnity covering the risk of a claim by the employee in respect of loss arising from the advice;
- The agreement must identify the adviser; and
- The agreement must state that the applicable statutory conditions regulating the settlement agreement have been met.

The Acas guidance also states there should also be a cooling off period of a minimum of ten calendar days unless both parties agree this is not necessary.

Together, these safeguards should mean there is adequate independent scrutiny of a settlement agreement with confidential terms. There is however a question over the quality of the advice employees currently receive from a ‘relevant independent adviser’.

Another issue that needs consideration is whether in practice employers give employees sufficient time to consider all the terms of a proposed settlement agreement. The Acas Code says this will depend on the circumstances of each case, but recommends that a

minimum of 10 calendar days be given for the employee to consider the proposal and seek legal advice.[1] A 2015 survey found that almost half (47%) of employers surveyed give the employee a minimum of 10 days or more to consider a settlement offer, but a majority of employers usually ask the employee to respond more quickly. The most common number of days cited was seven (29% of employers).[2]

We believe there is a need to require employers to pay an employee with whom they are signing a settlement agreement a minimum of £500 towards the cost of good quality, independent legal advice to ensure that all employees can afford to access the advice they need.

In addition to this, we believe there should also be a separate requirement on employers to pay an appropriate amount to an employee to enable them benefit from good quality independent legal advice on the terms of an NDA if one is used in a settlement agreement.

There was also a belief among our interviewees that too often employees don't know where to go to receive truly expert advice and need more support in identifying sources of good quality legal advice.

> "*Employees need help to ensure they are able to identify a good lawyer who is experienced in these issues, not just a high street solicitor who may only have deal with this type of case once every so often,"* ***CIPD member, HR Director.***

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

It is essential that employers have an internal grievance procedure in line with the Acas Code of Practice, setting out the basic requirements of fairness and consistency for dealing with employee complaints. HR has an important role here to ensure good practice. The procedure should be clearly communicated to all employees and managers educated and trained in its implementation. The process should be followed in a reliable way, without fail, both to give confidence to victims that their cases will be taken seriously and to ensure that anyone accused is treated fairly, according to due process. Every case should be investigated objectively and swiftly, and no concerns should be brushed under the

[1] Acas Code of Practice on settlement agreements. Available at: http://www.acas.org.uk/media/pdf/f/k/11287_CoP4_Settlement_Agreements_v1_0_Accessible.pdf [Accessed 5 December 2018].

[2] XpertHR survey: Settlement Agreements 2015, based on responses from 471 organisations with a combined workforce of 1,158,067 employees. Available at: https://www.xperthr.co.uk/hr-benchmarking/survey/693/.aspx [Accessed 5 December 2018].

carpet.

Employers should ensure that staff are aware of the formal route open to them through the grievance procedure, including:

- all stages of the Acas Code and any further elements of the organisation's own procedures;
- with whom to raise the complaint and appropriate sources of support;
- timescales within which the organisation will seek to deal with the complaint;
- the stages of the grievance procedure, for example how a complaint may be raised with the next level of management if a satisfactory resolution isn't reached.

"*An employer owes a duty of care to both parties so it is difficult to see the scope for changing grievance procedures for these sorts of issues. An employer will have to be objective in how they investigate a compliant. More rules or processes will not make people more likely to make a complaint. I think the Acas guidelines are OK as they are on this."* ***CIPD member and employment lawyer.***

Having a separate procedure for bullying and harassment

However, given their sensitive and potentially complex nature, the Acas Code suggests that organisations may wish to consider dealing with issues involving bullying, harassment or whistleblowing under a separate procedure, and we concur with this advice. There is an understandable lack of confidence on the part of many people experiencing or witnessing inappropriate behaviour such as harassment or discrimination to formally report it.

We therefore welcome and support the use of more proactive and innovative reporting channels in organisations, some of which are highlighted by the EHRC such as anonymous and/or confidential methods to report harassment (e.g. telephone lines run by third parties and online reporting tools).[3] One organisation had trained a network of dignity advisers to act as a 'confidential first port of call' for concerns.

> *"I think it can be helpful to have a specific policy on bullying harassment that sets out the behaviours expected of people and examples of behaviour that will not be tolerated. It is useful to have a third party person who is not a line manager that people can speak to away from the line management hierarchy. For example, the*

[3] Equality and Human Rights Commission [EHRC]. Turning the tables: Ending sexual harassment at work. Available at: https://www.equalityhumanrights.com/sites/default/files/ending-sexual-harassment-at-work.pdf [Accessed 5 December 2018].

> *Old Vic has introduced Guardians that are available for people to go to share concerns if they are facing an issue in relation to sexual harassment."* ***CIPD member and employment lawyer***

The limitations of a grievance procedure

The majority of employers take adequate steps to ensure that grievances are handled fairly and consistently. However, some of the senior HR and Employment Relations specialists we consulted to help inform this response said they would welcome an extra level of scrutiny to ensure employers are implementing a fair procedure. As one commented:

> "*There should be stronger obligations on employers; as it currently stands no one is checking on employers about how they are implementing policies. There needs to be something stronger than just guidance to make sure employers are taking issues seriously and following up correctly.*" ***CIPD member.***

Further, according to CIPD research most employers say that, once an issue has entered the grievance procedure, the complaint often becomes drawn out and more difficult to resolve.[4] Navigating a formal procedure can be emotionally wearing, particularly for the employee, and the nature of harassment and discrimination complaints can mean the individual faces a particularly stressful ordeal. HR has an important role to play in ensuring that employees are supported throughout the process and understand their rights but many employees do not have access to their own independent advice through the process. Having the support of a union representative can be very helpful for the employee, but the level of union recognition of the private sector is low.

Using informal resolution routes such as mediation

Once formal procedures are used, the typical outcome is an irreversible breakdown in the employment relationship. Our research shows that a significant number of employers and employees are keen to encourage earlier resolution of conflict at work, such as mediation facilitated by an independent third party.[5] The appropriateness of using mediation in cases of alleged harassment depends on the level of seriousness of the complaint, and parties

[4] CIPD. Conflict Management: a shift in direction? Available at: https://www.cipd.co.uk/knowledge/fundamentals/relations/disputes/conflict-management-report [Accessed 5 December 2018].
[5] See above.

should enter into mediation on an entirely voluntary basis. However, harassment can fall within a very wide spectrum of behaviour and at its lower end incidents can be unintentional and misunderstood on the part of the alleged perpetrator. While such cases should be treated with no less seriousness, there is the potential for the situation to be resolved informally and the behaviour addressed and improved.

Each complaint needs to be judged on a case-by-case basis, as serious cases of bullying and harassment, and clear cases of discrimination, may need to be dealt with by a formal procedure. If the individual bringing a discrimination or harassment case wants it investigated, it should be investigated.

Pausing the time limit for a tribunal claim

There is the related issue of an individual currently having to make an employment tribunal claim within three months of the alleged harassment – during which time the individual may be in the middle of an internal grievance procedure. We therefore agree with the Committee's earlier recommendation that the Government should extend the time limit for lodging a tribunal claim in cases of harassment to six months and pause the countdown until employers' internal complaint and grievance procedures are completed.

How easy is 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?

Stronger advice and guidance

There also needs to be more robust guidance on the appropriate and ethical use of NDAs and settlement agreements, which for the latter could be included in the Acas guidance on settlement agreements. We welcome the Warning Notice issued by the Solicitors Regulation Authority in March 2018.[6]

There also needs to be much wider understanding of the status of the confidentiality clauses of settlement agreements under the *Employment Rights Act 1996* among employers and employees, as well as better enforcement of their appropriate use amongst

[6] Solicitors Regulation Authority. Warning Notice: NDAs. Available at: https://www.sra.org.uk/solicitors/code-of-conduct/guidance/warning-notices/Use-of-non-disclosure-agreements-(NDAs)--Warning-notice.page [Accessed 5 December 2018].

employers. Stronger action is needed to ensure that any individual entering into a settlement agreement with a confidentiality clause is made fully aware of its legal status, and that they are not prevented from making a protected disclosure under whistleblowing legislation. They should also be made fully aware of the implications of signing such an agreement and their inability to bring a future claim of harassment and discrimination to an employment tribunal.

The status of relevant advisers

For a settlement agreement to be legally valid, certain criteria must be met including that the employee must have received advice from an independent 'relevant adviser' on the terms and effect of the proposed agreement and its effect on the employee's ability to pursue that complaint or proceedings before an employment tribunal.

However, a 'relevant adviser' need not necessarily be a qualified lawyer but can be 'a qualified lawyer; a certified and authorised official, employee or member of an independent trade union; or a certified and authorised advice centre worker'.[7] The availability and quality of the advice is crucial. Given the complexity of the implications for signing a settlement agreement regarding an employee's future rights in relation to harassment and discrimination and whistleblowing, consideration could be given to whether or not the Aacs Code should be changed to stipulate that independent **legal** advice should be obtained. This would not prevent an employee from also obtaining advice from a trade union representative or advice centre worker, and we are not suggesting that the quality of advice provided by such individuals is poor. However, members of the legal profession are regulated for their ethical behaviour and so the accuracy and quality of the advice they give will be subject to closer scrutiny including disciplinary action and the loss of their licence to practice if they are found to be in breach of the rules governing their professional conduct.

The cost of obtaining good quality and sufficient legal advice

We are not aware that there is a shortage of qualified lawyers who meet the statutory requirements to provide the necessary advice to employers and employees; for example, the Law Society can make referrals. However, it is the employee who is likely to face the more significant financial barrier to obtaining good quality and sufficient legal advice. As one HR Director pointed out:

[7] See Acas Code of Practice above.

> *"It depends, of course, on the size of the employer. A FTSE company will have access to its own lawyers; it is much more difficult for the employee who will be bound by the limit their employer may put on the amount they will pay for the employee to access legal advice. There is a real need to create a level playing field as the system currently contains more obstacles for the employee than for the employer."* ***CIPD member and HR Director.***

Currently the cost [typically met by the employer although this is not mandatory] of a solicitor signing off a settlement agreement may not be sufficient for detailed advice or negotiations, and so consideration should be given to increasing the level and quality of legal advice available to the employee. As another HR Director told us:

> *"The employer nearly always pays for the legal advice, but in reality it is often a token sum for the employee to verify on the legality of the agreement – it isn't about advising about the course of action. Usually it is a legal read-through and signing of a letter, and I would be surprised if the employee was given advice on exactly what was meant and what they were signing."* ***CIPD member and HR Director.***

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?

It is likely that a minority of harassment cases involve repeat behaviour by a single harasser but it's not currently possible to gauge with any accuracy the incidence of these cases and whether or not appropriate action is being taken. Any information gleaned would be anecdotal and it's unlikely that many employers would wish to voluntarily disclose the details of such cases given their nature. Employers themselves may not hold consistent records.

What should the role of boards and directors be?

Boards have an important important role to play in monitoring the ethical use of NDAs. The leadership of any organisation has ultimate responsibility for fostering a culture in which discrimination and harassment are known to be unacceptable and where individuals are confident to bring complaints and where settlement agreements are used appropriately. The leadership team should be visible in talking about harassment and discrimination openly and promoting a zero-tolerance approach, so that everyone knows complaints will be taken seriously. Directors also have a responsibility to ensure that managers and

employees are educated about the ethical use of settlement agreements as well as the legality of an agreement.

The board should be aware of the number and scope of NDAs and have oversight of their proper and ethical use across the organisation. One suggestion is that organisations should be required to keep a record of all settlement agreements to this end, but such a proposal would need further consultation and careful consideration given issues such as data protection and who would have access to the information.

Another suggestion is that a nominated non-executive director, who may also have oversight of equalities-related issues, could have responsibility for monitoring the number and terms of all settlement agreements, as a non-executive director wouldn't have the potential conflict of interest that an executive director may have. They could keep tabs on the number of confidential settlement agreements happening in a business and have dispensation to be party to details of them.

Alternatively, executive directors could be made more accountable for the appropriate use of NDAs and settlement agreements through a requirement that directors sign or approve any settlement agreement or are at least informed of the terms of any settlement agreement.

A more radical option would be to consider if directors should face being disqualified from being a director if they are found to have sanctioned the use of a settlement agreement that disadvantaged a victim of harassment or discrimination.

And should employers be obliged to disclose numbers and types of NDAs?

Publication of numbers and types of NDAs

In principle, we support stronger governance and transparency to encourage better organisational practice. However, we are not sure that an obligation for employers to publicly disclose the number and types of NDAs used in settlement agreements would have the desired impact of shining a light on poor practice.

If organisations were required to publish the number and type of settlement agreements, this could lead to media attention and judgements made about the organisation without knowledge of the full facts or context. As outlined earlier, we believe there are a number of legitimate reasons for their use in some situations.

For example, if an organisation is making redundancies and agrees to enhance the terms of their workers' redundancy packages via settlement agreements, there could be potentially numerous settlement agreements signed for this purpose. If this information was made public, assumptions could be made about the use of confidential settlement agreements that were misplaced.

At the same time, there could be a situation where the regular and repeated use of settlement agreements with associated confidentiality clauses could indicate poor management and the camouflaging of inappropriate or discriminatory behaviour and publication of this information could lead to action being taken. There was no clear consensus view on this issue in the limited scope we had to consult our senior members on this issue.

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