



Written submission to the bill committee of the Employment Rights Bill by Can't Buy My Silence (CBMS) December 2024.

Can't Buy My Silence is a global not-for-profit campaign co-founded by Zelda Perkins, who broke her NDA with Harvey Weinstein in 2017 and Dr. Julie Macfarlane, Distinguished Professor Emerita of Law and Member of the Order of Canada. It is dedicated to addressing the misuse of Non-Disclosure Agreements (NDAs) which have become the default solution for organisations, corporations, individuals, and public bodies to settle cases of misconduct, discrimination, harassment. They believe legislative and regulatory reform that will ensure NDAs cannot be used to hide harassment, discrimination, malpractice or other harmful or abusive behaviour is key to building better and more profitable workplaces as well as protecting and upholding workers rights and the integrity of law.

THE EMPLOYMENT RIGHTS BILL

The Employment Rights Bill broadly addresses protections for workers but does not specifically regulate the misuse of NDAs. The Bill clarifies that sexual harassment complaints could now qualify as protected whistleblowing, but only if disclosed to the relevant person and it is considered a matter of public interest. NDAs are considered void to the extent they attempt to prevent a worker from whistleblowing but the public interest qualification is an additional hurdle to surmount in addition to many other existing disincentives to report harassment (possible retaliation, use of NDA (see above), personal trauma) in cases of harassment.

However, the pervasive use of non-disclosure and non-disparagement clauses in settlements, pre dispute employment contracts and letters of severance requires broader provisions to deal with abusive behaviours, and not limited to sexual harassment. Adding clear provisions related to NDAs that would ensure transparency and justice in cases of harassment, sexual misconduct, discrimination and abuse of statutory compensation rights would enhance protections for all workers in a much needed and groundbreaking way. We believe it is vital that the Labour Government takes note of the enormous amount of work conducted with public money over the last five years and the recommendations and promises that have yet to be fulfilled. Alongside this the advice of the law sector which is clearly urging for greater legislative reforms makes this an obvious opportunity to improve the human rights of employees and the integrity of law.

CONSIDERATIONS AT COMMITTEE STAGE

We are calling on the government to bring forward legislation via the Employment Rights Bill prohibiting employers from entering into NDAs with employees in relation to complaints of sexual misconduct, abuse, harassment or discrimination unless conditions to protect and ensure informed consent are met.

The below are examples of active clauses in legislation restricting the use of NDAs in other jurisdictions including Ireland, Canada and the US that have come into force in the last three years. These classes do not stop the use of NDAs for their original, legitimate purpose of protecting trade secrets and proprietary information or the use of confidentiality at the victims request but add protection to employee rights and balance the inequality of bargaining during settlement negotiations.

- An NDA cannot prohibit disclosure of sexual harassment, discrimination, bullying, wage or compensation violations
- Any NDA for sexual misconduct, harassment or discrimination should only be entered into at the expressed wish of the employee (an “exempted NDA”)
- The employee has the right to refuse an NDA without retaliation
- An exempted NDA must be of a set limited duration
- Any exempted agreement must not adversely affect the future health or safety of a third party, or the public interest through its confidentiality provisions
- The employee can decide to waive their own confidentiality in the future (in effect a permanent or semi-permanent “cooling off period”).
- Any non-disclosure agreement has exceptions for individuals to whom an employee may always speak including: a lawyer, physician, psychologist or psychological associate; a registered nurse or nurse practitioner, or registered social worker; a community elder, spiritual counsellor or counsellor who is providing culturally specific services to the complainant; an Ombudsman; a friend, a family member or personal supporter. This should be for sexual harassment, misconduct and discrimination as well as criminal acts.
- Before requesting and signing an NDA, (above), victims/employees must receive independent legal advice including an explanation of alternative ways to protect their confidentiality and ensuring informed consent to all NDA consequences for both parties
- Every NDA must include a statement that the agreement does not affect their whistleblowing rights

NC4

We’re asking Bill committee members to stress the importance of NC4 in their discussions and to seek commitments on the record from the Minister that provisions on NDAs will be forthcoming in Government amendments in the later stages of the Bill.

While we would not want members to push this amendment to a division at this stage, it’s clear there is significant and growing cross-party support and a real need for the legislation to reflect the points raised in this briefing note.

"NC4.

To move the following Clause— “Non-disclosure agreements: harassment

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

(2) This section applies to any agreement between a worker and the worker's employer (whether a worker's contractor not), including any proceedings for breach of contract.

(3) In this section, a "relevant disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, shows that harassment has been committed, is being committed or is likely to be committed, by a fellow worker or a client of the employer.

(4) In this section, "harassment" means any act of harassment as defined by section 26 of the Equality Act 2010."

Member's explanatory statement:

This new clause would render void any non-disclosure agreement insofar as it prevents the worker from making a disclosure about harassment (including sexual harassment)."

Can't Buy My Silence is pleased that the amendment NC4 contains provisions to restrict the use of non-disclosure agreements. However, the provisions do not go far enough to eliminate the widespread and damaging use of non-disclosure agreements, as evidenced by broader restrictions that maintain victim agency enacted or pending in other jurisdictions (eg US, Ireland, Canada and Australia)

To move the following Clause— "Non-disclosure agreements: [harassment, sexual misconduct, retaliation and discrimination](#)

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

(2) This section applies to any agreement between a worker and the worker's employer (whether a worker's contract or not), including any proceedings for breach of contract.

(3) In this section, a "relevant disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, shows that harassment ([including sexual harassment and misconduct](#)) [retaliation or discrimination](#) has been committed, is being committed or is likely to be committed, by a fellow worker or a client of the employer.

(4) In this section, "harassment" means any act of harassment as defined by section 26 of the Equality Act 2010; "discrimination" means any act of discrimination (both direct and indirect) as defined by section 26 of the Equality Act 2010; "retaliation" means any act of victimisation as defined by section 27 of the Equality Act"

(5) An exempted non-disclosure agreement is permitted at the specific request of the worker, with their fully informed consent having been provided with independent legal action that explains alternative approaches to protect worker confidentiality. An exempted non-disclosure agreement must also

(i) not harm any third party in the future or the public interest;

(ii) include a waiver that enables the worker to withdraw from the non-disclosure agreement at any time;

(iii) be of a time duration not exceeding three years;

(iv) be written in plain English.

(6) Any exempted non-disclosure agreement must always allow the worker to speak with: a lawyer, physician, psychologist or psychological associate; a registered nurse or nurse practitioner, or registered social worker; a community elder, spiritual counsellor or counsellor who is providing culturally specific services to the complainant; an Ombudsman; a friend, a family member or personal supporter.

BACKGROUND

Over the last 3 years CBMS have created alliances with many international organisations and heard from thousands of individuals affected by NDAs. The experience, data collection and extensive knowledge have made CBMS regular experts who consult with legislators, educators and organisations around the world and have been key in successfully aiding with legislative advances in the UK, Ireland and Canada.

This submission highlights concerns and recommendations from three separate Women and Equalities Select Committee inquiries (2018, 2019, 2023) a Treasury Select Committee inquiry (2024), and the 2019 BEIS consultation into the misuse of NDAs, as well as reports and concerns that have been raised by legal regulators. Also given are examples and recommendations of current legislation that has passed internationally and is setting positive precedent that the U.K. could follow.

In 2023 CBMS partnered with the Department for Education and managed to translate their voluntary [pledge](#) (over 73% of higher education organisations pledged not to use NDAs in cases of harassment, discrimination and bullying between staff, students or visiting speakers) into legislation, with an amendment in the Higher Education Freedom of Speech Bill. This Act was put on hold by Labour the day before it came into force in August 2024 however we were informed directly, that the Government would seek to bring this change into legalisation via another route.

BRIEF DATA OVERVIEW

NDAs have a legitimate and important place in business to protect trade secrets and commercially sensitive information. However, NDAs are regularly misused to conceal complaints of misconduct within otherwise valid settlement agreements forcing cases of sexual harassment, discrimination and abuse underground and fostering an environment of secrecy and abuse. NDAs that are misused in this way to silence victims and protect sexual predators, bullies, racists and abusers, enabling the behaviour to continue and toxic, misogynistic work environments to flourish.

Data that CBMS has collected with its partner Speak out Revolution over the last 3 years shows us that:

- Amongst the over 1300 respondents to a survey of individuals harassed and discriminated against in workplaces across the UK, 25% said they had been made to sign an NDA with a further 11% “cannot say legal reasons – ’meaning they have signed an NDA, thus making the total 36%.

- NDAs chill the climate for those thinking of reporting abuse. 33% of people considering raising a complaint don't proceed as they fear they will be forced to sign an NDA.
- Four times as many women as men sign NDAs and NDAs are used disproportionately against women of colour - 55% of Black women report signing an NDA or “can't say for legal reasons” compared with 40% of white women.
- NDAs are not only related to sexual harassment or assault, they are commonly used to cover up maternity discrimination. A survey by Pregnant Then Screwed in 2022 of 696 women who signed an NDA has shown that 90% of women who signed an NDA after encountering maternity discrimination said signing was their only option, 72% said signing had a negative impact on their mental health, 78.5% believe their employer had used NDAs to hide wrongdoing multiple times and 90% of those who signed said they would have been happy for people to know what had happened to them at that organisation.
- NDAs come with serious mental health impacts. They typically block victims from speaking to family, friends, colleagues, future employers and even therapists about what happened. They add to and perpetuate the layers of trauma the person has suffered with 95% of respondents signing NDAs reporting negative mental health consequences.

One of the advantages of having comprehensive international legislation that has been in place for the last three years means we have been able to gather data on the effects of the new legislation. One of the most raised concerns has been that by removing NDAs, settlement rates would be chilled which would be bad for victims.

However in recent analysis (Macfarlane, 2023) of data from the US Employment Equality Opportunity Commission (EEOC, a federal body) compared the settlement rate for sexual harassment claims brought to the EEOC in 2017 - when there was no NDA legislation anywhere in the US - with 2022 - by which time legislation in 9 states banned NDAs for sexual harassment¹.

These states are California, Vermont, New Mexico, Arizona, Hawaii, New Jersey, New York, Washington State, and Maine. (more have followed in 2022-2023, but the last year for EEOC data is 2022 and a year is needed for the effect of the legislation to be reflected in the data). These 9 states constitute approx. 27% of the total US population.

Comparing 2017 to 2022: In 2017 there were a total of 6,996 sexual harassment claims to EEOC. These numbers began to rise significantly from 2018 on, probably the result of the MeToo movement. By 2022 they were back to 6,201. In 2017, before there was NDA legislation, the settlement (“merit resolutions” including successful settlement, withdrawal with benefits and successful conciliation) rate at the EEOC was **81%**.

After these 9 states had passed legislation forbidding NDAs for sexual harassment disputes in 2022, **there was a settlement rate of 92.1%**

GOVERNMENT ACTIONS

- **July 2018** the Women and Equalities Select Committee published its [report](#) Sexual Harassment in the Workplace, in which it examined the role NDAs play in sexism in the workplace and as a result called for an *end to “unethical” use of NDAs to silence victims of sexual abuse and harassment.*
- **June 2019** WESC published a further [report](#) from its inquiry into The Use of Non-Disclosure Agreements in Discrimination Cases, in which the Government agreed that the use of NDAs to cover up unlawful discrimination and harassment complaints was unacceptable and *committed to introducing reforms that would prevent employers from mis-using NDAs.*
- **July 2019** the then Department of Business Energy and Industrial Strategy, conducted a public consultation on ‘Confidentiality clauses, also known as NDAs’. This [report](#) concluded amongst other things, that legislation to *ensure signatories could not be prevented from making disclosures to the police, regulated health care or legal professionals and that new guidance for legal professionals should be produced.*
- **February 2023** an amendment to the [Higher Education \(Freedom of Speech\) Bill](#), which required Universities and their constituent colleges to stop using non-disclosure agreements to cover up sexual misconduct, harassment and bullying between students, staff or visiting speakers was passed, receiving Royal assent in May. However the Labour Government has put the Bill on hold, thus this action is now only being upheld by the CBMS voluntary pledge of the same requirements. (From September 1st 2024 The Office for Students has banned the use of NDAs by providers in cases of harassment or sexual misconduct)
- **September 2023** a Westminster Hall [Debate](#) was led by Dame Maria Miller on the misuse of non disclosure agreements in the workplace. This was well attended by cross party members with representation from many including committee member Minister Justin Madders who roundly called the Government for *action in legislating against NDA’s saying “I feel that this area has fallen victim to the Government’s inertia on employment rights”*
- **February 2024** the Women and Equalities Select Committee's Misogyny in Music [report](#) exposed systemic issues in the music industry, including the misuse of NDAs to silence victims of harassment, discrimination, and abuse. It recommended *prohibiting NDAs in cases of sexual misconduct and bullying, advocating for a retrospective moratorium on previously signed NDAs to allow victims to speak out.* The findings emphasised the need for legal and cultural change to ensure transparency, accountability, and protection for victims.
- **March 2024** the Treasury Select Committee’s [report](#) on Sexism in the City, also highlighted the serious misuse of NDAs to silence victims of misconduct while allowing perpetrators to continue their careers. The Committee called for robust measures to protect whistleblowers, urging that regulators, including the Financial Conduct Authority, strengthen their frameworks to address non-financial misconduct like harassment effectively. The Committee strongly recommended *legislative action to ban the use of*

NDA's in cases of sexual harassment, emphasising that these agreements undermine accountability and perpetuate harmful workplace cultures.

- **May 2024** an amendment to [The Victims and Prisoners Bill 2024](#) received Royal Assent and became an Act of Parliament clarifying that no confidentiality agreement can prevent a victim of crime from speaking to law enforcement; legal, regulatory or therapeutic advice services or a family member. This is a clarification rather than a change as it echoes legal regulation which has been in place for decades but has not stopped NDAs being used inappropriately. (e.g. Weinstein, CBI, Odey, Post Office, Fayed etc)

REPUBLIC OF IRELAND

- **October 2024** the Republic Of Ireland passed an amendment to the [Employment Equality](#) (Non-Disclosure Agreement) Bill 2021, that will ban the use of NDAs that prevent victims of abuse, harassment and discrimination in the workplace from speaking out about their experiences. Under the Bill, victims will still be able to enter into an NDA, so long as the agreement is made at their express request and meets a series of other conditions to safeguard informed consent..

LEGAL REGULATORY ACTIONS

The use of NDAs as a standard part of a settlement has become widespread, with many solicitors using template clauses that include them as a default. The proliferation in the inappropriate use of NDAs and the work of CBMS and the Government has resulted in action from legal bodies over the last 5 years yet reliance on legislative reform is holding back meaningful regulatory change.

- **The Solicitors Regulation Authority (SRA)** have issued three warning notices, in 2018, 2020 and 2024 regarding NDA misuse.
- **The Law Society** issued a revised practice note in 2019 on NDA misuse and in 2023 published a press release calling for the legal framework around NDAs to be improved. The then president of the Law Society, Lubna Shuja said “We urge the government to commit to making it harder for NDAs to be misused when they involve settling issues around workplace harassment or discrimination,”
- **The Legal Services Board (LSB)** who oversee all legal regulators and services in England and Wales, launched a consultation in 2023 which concluded there was “high cause for concern” in the way they were being used and is currently analysing how to reform practice through statutory policy.
- **The Bar Council** in 2024 made a public statement acknowledging that “NDA's are ripe for legislative change” and that they “welcome the Government’s intention to implement legislative reform”.
- Internationally both the **American and Canadian Bar** have voted to oppose the misuse of NDAs and urge governments to enact laws prohibiting NDAs in cases of harassment, discrimination or statutory rights violations.

CBMS are happy to provide a more detailed breakdown of the legislation from different jurisdictions above.

REFERENCES

- All statistics contained within this briefing note were compiled by Can't Buy My Silence and their data partner Speak Out Revolution. Speak Out Revolution is a not-for-profit founded in 2020 with the most comprehensive worldwide survey collecting data and testimony from around the world on bullying and harassment in the workplace: <https://www.speakoutrevolution.co.uk/dashboard>
- Additional statistics were from the campaign group Pregnant then Screwed survey.

FOR MORE INFORMATION

CBMS would welcome the opportunity to appear before the Committee to address these issues in more detail.

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