



Women and Equalities Committee Inquiry into the use of Non-Disclosure Agreements in discrimination cases

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This response to the Women and Equalities Committee inquiry into the use of Non-Disclosure Agreements in discrimination cases is submitted on behalf of:

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

- As became apparent in the evidence submitted the Committee on sexual harassment in the workplace, the extent to which NDAs are used is not known. This is obviously due to their nature and purpose in keeping confidentiality.
- However, this is concerning given that it is coming to light that many are being used unethically and to silence victims of discrimination and other offences.
- Research into the extent of their use is necessary.
- Given what we know already, it is likely that such research will reveal that NDAs are deployed more against employees who are in some way vulnerable and hold less power than their employer – women intimidated by male bosses, low-waged employees who cannot afford legal advice or challenge, uneducated employees who are easily influenced and threatened by the threat of legal action (even if unfounded), migrant workers who do not know their rights or where to seek assistance, employees in a niche, small or tightly connected sector who will find it difficult to get work should they go against the power structures.
- In the prominent case of Zelda Perkins, several of these factors were intersecting, leading to her keeping silent in fear of being further abused or harassed, unable to work in the entertainment sector due to Weinstein's influence over others, face imprisonment or high costs which she couldn't afford.
- In this way NDAs serve to further silence and subordinate those members of our society who are at most risk of discrimination and harassment. Every person should have the same rights to seek advice, support and justice for a wrongdoing if they choose to and as a PCC I work with my force to ensure victims of any offence feel able to report. Anything that stops this needs addressing urgently.

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?



- There are obviously some situations where NDAs are necessary – for example to protect trade or business secrets.
- However it needs to be made plainly clear to all, backed up with a real threat of punishment, that any matter which is criminal or unfair, cannot be protected by any legal agreement or preclude a person seeking help – formally from the police or informally from supportive friends - or whistleblowing to protect others/the public interest. The Courts will not uphold such an agreement and all employees need to be aware of this to prevent scaremongering.
- Therefore there cannot be a ban on such agreements, however their purpose and use needs to be tightly regulated and any NDAs used in matters of discrimination or similar matters be made known to regulators to ensure accountability and end impunity of perpetrators.

3. What safeguards are needed to prevent misuse?

- Information should be given to employees as a matter of standard practice. This could perhaps be in the form of a leaflet or pack given to all employees, setting out clearly what NDAs are, what they can and can't be used for and what to do if there are doubts as to authenticity or legality – akin to the 'How to rent guide' which the government now requires landlords to give to all tenants as standard when starting a new assured/short assured tenancy (<https://www.gov.uk/government/publications/how-to-rent>).
- ACAS has drafted suggested wording for any agreements, to make clear that employees are not barred from protected disclosures (about malpractice, breaches of the law, miscarriages of justice, dangers to health, safety and the environment, or the cover-up of any such behaviour), however to the lay person who has feels threatened or intimidated and unable to seek assistance, this clause is meaningless. [*“For the avoidance of doubt, this confidentiality clause does not affect or otherwise prevent the claimant from making a public interest disclosure under the Public Interest Disclosure Act 1998(PIDA).”*]
- The use of NDAs in general should be monitored by an appropriate body and inquiries into overuse/purpose can be investigated where necessary, to ensure the culture of silence is broken.
- Professional or legal penalisation for misuse.

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

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?

- I am unable to comment on the availability and access to good legal advice on the specific topic of NDAs. However, given the current state of the legal system, and indeed many sectors, as a



result of austerity, access to justice has been reduced for most. Particularly those with no recourse to public funds or low-waged employees.

- In addition, if NDAs are being used to silence the most vulnerable and intimidated employees, it is likely that they will fear seeking legal advice, as was stated in Zelda Perkins' evidence, as well as that of Andrew Taggart, Partner for Employment, Pensions and Incentives, Herbert Smith Freehills LLP. Andrew poignantly stated in his previous oral evidence to the Committee on sexual harassment that:

“There is a lack of understanding on the part of the individual as to what the real effect of the non-disclosure or confidentiality provision is...most of them have never heard of the legislation. It is not spelled out sufficiently clearly in the documentation, so that they would know that it does not prevent them from going to a regulatory authority or indeed taking legal advice, as many of them may think. I have had experience on phone lines acting for charities where the individual says, “I don’t know if I can even speak to you about this matter. I have signed up to a confidentiality agreement.”

- There may be a role for voluntary or government funded organisations to offer independent advice on NDAs and for employers to signpost employees to this advice and support. This redresses any power balance where employers are both negotiating agreements and paying for any legal advice to the employee.

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?

- There is nothing to stop firms from forcing NDAs on a series of victims of a serial harasser, if they put his contribution to the business above the well-being of their employees.

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

- As set out above, there may be a role for boards of directors, or alternatively external regulators or other bodies in monitoring employers' use of NDAs. Inquiries can then be made into overuse/purpose where necessary and sanctions brought.
- By exposing the use of NDAs the culture of silence and secrecy around them is broken and practice is more likely to be above board, if there is a chance the employer can be investigated.