



## **Response to: Legal Services Board Call for Evidence: Misuse of Non-Disclosure Agreements (NDAs)**

### **About Rights of Women**

Rights of Women is a legal rights organisation which specialises in supporting women who are experiencing – or at risk of experiencing – all forms of Violence Against Women and Girls (VAWG), including domestic and sexual violence. In our approach, we recognise the additional barriers posed by the intersection of gender-based abuse, racism, structural inequality and other forms of discrimination and oppression that impact on women's vulnerability, exclusion and marginalisation.

By offering a range of services – including specialist telephone legal advice lines, legal information and training for professionals – we aim to increase women's understanding of their legal rights and improve their access to justice. We empower women to make informed choices where they come into contact with the criminal, family, employment or immigration and asylum legal systems so they can live free from violence.

Rights of Women is a registered charity 1147913 and Company Limited by Guarantee.

### **Rights of Women's consultation response**

Before answering the specific questions asked in the consultation we would point out that as a women's legal organisation we will confine our responses to law and legal policy issues within our skills and experience.

### **The use of NDAs**

- a) **Are there other legitimate purposes for using NDAs that we have not considered? If so, what is the rationale for the use of these NDAs?**
  - b) **Can you provide examples or case studies for entering into NDAs? If you can, please include the following in your response:**
    - **The context in which the NDA was signed**
    - **The factors that influenced the individuals' decision to sign an NDA**
    - **If signing an NDA had any impact on them (e.g., wellbeing, health, future opportunities)**
    - **Can you provide any quantitative evidence on the nature and extent of NDA misuse?**
1. Since 2019, Rights of Women have provided free legal advice to women in England and Wales who have experienced sexual harassment in the workplace. We are currently the only specialist service of this kind in England and Wales and over this

period we have advised on approximately over 1,000 calls from women in a wide range of industries, sectors, and professions.

2. Most of our advice relates not just to sexual harassment but also engages additional types of discrimination and harassment, most commonly sex, race, disability, and age. Our callers represent both women and marginalised or minority groups protected under the Equality Act 2010. The Women's Budget Group published data in July 2023 identifying the 'gender justice gap' for women, particularly those facing employment law issues such as pregnancy/maternity discrimination.<sup>1</sup>
3. There exists a persuasive culture within employment law matters towards settlement, as opposed to litigating, due to litigants not usually being able to recover legal fees in the Employment Tribunal. It is costly to pay privately for legal advice. Law firms can quote clients approximately up to £30,000 + VAT to prepare and represent complex cases in the Employment Tribunal. While it is possible to represent yourself, this is extremely daunting and stressful, and therefore it is not surprising nearly all cases settle.
4. Whilst legal aid is available for discrimination cases, we know this uptake is small. The Equality and Human Rights Commission (EHRC) published research in 2019<sup>2</sup> on the various barriers to uptake and concluded that victims of discrimination are not getting the help they need to enforce their rights. Nor does this funding usually extend to representation in the Employment Tribunal.
5. Due to the extraordinary backlog of cases in the Employment Tribunal system, which recent reports suggest is at over 50,000 cases<sup>3</sup>, cases can take nearly a year to be listed<sup>4</sup> and the wait for a judgment can be up to two years<sup>5</sup>. This is hugely off-putting to litigants, especially litigants in person, who wish to put the matter behind them. According to Open Democracy, only 56 cases of sexual harassment went to Employment Tribunal in 2021<sup>6</sup>.
6. Access to free and independent legal advice about discrimination or harassment in the workplace is scarce in England and Wales. Many of our callers are signposted to us through ACAS, where they can receive informal advice and information. However, this information can miss important advice only a lawyer can provide, for example, regarding time limits to bring claims to the Employment Tribunal. This will undoubtedly mean some victims will give up on their Employment Tribunal cases before they begin.
7. Most of the women we support enter into NDAs as part of a wider settlement agreement after reporting sexual harassment/violence (including sexual assault, stalking and rape) to their employers. NDAs are standard practice within settlement agreements; therefore, NDAs and settlements can be considered as synonymous for the purposes of harassment and discrimination cases. We also occasionally provide legal advice to women who have experienced sexual harassment/violence in higher education institutions where the usage of NDAs is also widespread<sup>7</sup>.

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<sup>1</sup> <https://wbg.org.uk/wp-content/uploads/2023/07/Gender-gaps-in-access-to-civil-legal-justice-WBG.pdf>

<sup>2</sup> <https://www.equalityhumanrights.com/sites/default/files/access-to-legal-aid-for-discrimination-cases-our-legal-aid-inquiry.pdf>

<sup>3</sup> <https://www.peoplemanagement.co.uk/article/1813806/lawyers-warn-hr-impact-employment-tribunal-backlog-tops-50000-cases>

<sup>4</sup> <https://www.theyworkforyou.com/wrans/?id=2023-01-26.133625.h&s=%22employment+tribunal%22#g133625.q0>

<sup>5</sup> <https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/maximise-judicial-resources-to-tackle-the-spiralling-employment-tribunal-backlog>

<sup>6</sup> <https://www.opendemocracy.net/en/5050/workplace-sexual-harassment-cases-tribunal-conservative-party/>

<sup>7</sup> <https://inews.co.uk/news/education/uk-universities-non-disclosure-agreements-silence-students-397200>

8. From our advice line, we know of examples of women being pressured and threatened into agreeing to NDAs that are not part of settlement agreements. One woman told us that the day after she reported sexual harassment to her employer, she was called into a meeting with an HR representative and senior management and presented with an NDA she was told to sign on the spot.
9. We know of examples of women who have entered 'private' NDAs outside of employment circumstances. A recent example includes an NDA drafted for a woman by an abusive partner (a lawyer) seeking to prohibit her from speaking out about the domestic abuse she had suffered in exchange for a financial award.
10. The women who call us tell us they enter settlements (and therefore NDAs) for various reasons but typically due to a fundamental breakdown in the employment relationship where it becomes untenable for them to continue working in their place of employment. The basis for this includes employers refusing to act upon, acknowledge or investigate a grievance; reluctance or refusal to uphold grievances; and refusing to place safeguarding measures for them to work in the workplace alongside the perpetrator. Settlement is often the best option available out of a few poor alternatives.
11. Many women we support are reluctant to report harassment to their employer for fear of their jobs being threatened or ruining their professional reputation or careers. They approach their employers in good faith expecting help and support which they do not receive. Many find themselves reluctantly entering formal grievances processes they would have preferred to avoid. However, many employers are unwilling to act on reports of sexual harassment unless submitted to them formally through grievances.
12. In our experience, employers upholding grievances about sexual harassment is not common practice. Employers have no incentive to accept liability for harassment and discrimination, which leaves them liable and open to litigation. Therefore, often there is no meaningful engagement from an employer to 'resolve' a sexual harassment grievance, so much as end the grievance. This is why most victims will be offered settlement agreements and exited from their employment, through no fault of their own, which women tell us feels like a punishment for reporting the harassment. Many women tell us had they known this they may never have reported it in the first place.
13. Women participating in internal grievance and investigation processes tell us that it is exhausting and brutal. They are left completely worn down and describe not being 'in a fit state of mind' when entering settlements, including NDAs. It is not uncommon for women to regret entering NDAs and at the time feel they had 'no other choice'. This can particularly be the case if they have been dismissed, made redundant or forced to resign because of the sexual harassment and needed the settlement sum to meet their immediate financial obligations, e.g., childcare costs, bills, rent or mortgage payments.
14. There is usually a considerable disparity of arms in the bargaining power between the victim and the employer. Women have reported that the pressure of receiving threatening and aggressive communications from lawyers, threats of being pursued for the employer's legal costs, unreasonable deadlines to agree to terms have all contributed to them entering settlements. Women describe feeling bamboozled and frightened into settlements by sophisticated lawyers, who can deploy high pressure tactics.
15. We know from our callers that it is not only the experience of sexual harassment (or any other type of discrimination) but also the process of reporting and settling with an employer that has an enormous and devastating impact on their lives. Many women tell us that they suffer acute physical and mental illness as a result, including PTSD, depression, anxiety, sleep problems and long-term effects on their self-esteem and confidence. Some women are unable to work for months, sometimes even years.

Women report being pushed into debt and homelessness due to being unfairly pushed out of their jobs despite being the victims. Some women tell us the settlement sum barely covers their legal costs or other expenses.

### **The role of legal professionals in NDAs**

**a) At what point is a legal advisor made available (if at all) to an individual who is being asked to sign an NDA?**

**b) What are individuals' experiences of having access to legal advice? Please consider in your response**

- **the extent to which an individual felt well informed, supported and that their interests were being protected during the process. For example, were the terms and effect of the NDA fully explained?**
- **the justification provided for keeping the information that was subject to the NDA confidential**
- **whether an individual experienced any behaviours or conduct by legal professionals (either acting on an individual's behalf or an opponent's behalf) that were considered to be unethical or fall short of their professional obligations. If so, please provide an explanation**

**c) How effective are the guidance and/or other published documents that are designed to warn against the misuse of NDAs. Please consider if they:**

- **provide clarity on when NDAs should not be used, the rationale behind this (e.g., where use is unlawful, a breach of code of conduct or unethical) and the consequences for legal professionals or employers of doing so**
- **reflect your knowledge of the use of NDAs in practice**
- **sufficiently explain what individuals who are asked to sign NDAs should do and where to go for support**

16. Legal advice about settlement terms is usually paid for by the employer and agreed upon as a fixed fee incorporated as part of the settlement terms. Victims who cannot afford to pay privately for legal advice usually accept this at face value and believe this is the best they can hope for in the circumstances. Employers can apply pressure in settlement negotiation around the contribution they will make to the victim's legal fees.

17. The scope of the legal advice about the settlement agreement terms, including NDAs, is usually limited to explaining terms and their effect, as they already stand. Typically, this will not extend to negotiating terms in the victim's best interests. Therefore, this legal advice can amount to little more than 'rubber stamping' the terms proposed by the employer. It is not a genuine opportunity to challenge the terms, which requires negotiation back and forth.

18. Without specific instructions from the client to challenge the NDA provisions, there will likely be no discussion at all as to their legitimacy. Some lawyers may seek to ensure that the NDA obligations are reciprocal and not one-sided on the victim, which can often be the case and many victims may not be informed does not need to be the case.

19. NDAs are presented as a standard part of a settlement agreement's terms. Most people will simply have not been offered any alternative. Most victims will lack the required legal knowledge and simply not know NDAs are not a required part of a settlement or that they have a right to push back or refuse them. While these NDAs are potentially legal, they are arguably unethical as they take advantage of vulnerable

laypeople lacking legal knowledge with limited access to legal advice or representation.

20. Common legal questions women ask us about NDAs include:

- whether they are required to agree to NDAs as part of settlement
- what would happen if they did break their NDAs, and
- what they can tell a potential future employer about the circumstances as to why they left a previous role.

21. It is common for women to tell us that they have been advised about confidentiality provisions that 'this is normal' and 'how it is always done'. Some are advised that an employer may refuse to settle without an NDA. However, that does not seem likely when litigating is nearly always the least desirable course of action and would be an absolute last resort when all the parties are encouraged to settle the claim at every stage of the legal process.

22. Indeed, it is common for employment lawyers to put off victims from litigation leaving claimants feeling like settlement is their only viable option. We know of women having their concerns and questions about NDAs minimised and dismissed as unimportant and illegitimate. This indicates a settlement culture in which NDAs are part and parcel and priced into how settlement works, where there is essentially no other alternative for victims.

23. While victims are entitled to compensation, this can seem paltry compared to the long-term pain and suffering they have experienced. This is not to say that victims do not want to settle claims, they do want to move on. However, some feel that it is unconscionable that it is they the victims, who already bear the risk and potential penalties (and any future penalties) and are further forced into agreements to suppress the allegations or acknowledge the truth of the existence of any processes. This can lead to feeling complicit in covering up toxic cultures they were trying to fight against. Naturally, this can feel like a punishment for 'doing the right thing' and lead to deep shame and indignation, especially if they learn the perpetrator has continued to harass others or flourished in their careers.

24. If NDAs are part of an ACAS COT3, victims will not usually receive any legal advice at all. COT3 agreements are typically drafted by the employer's lawyers, probably using a template settlement agreement document that include NDAs or terms lifted from one. This can amount to a settlement agreement via the 'back door' where victims will enter legally binding contracts on which they have not been independently legally advised.

25. We are also aware of the use of NDAs to conclude 'mediation' processes with victims and perpetrators, which may be used as an alternative to a formal grievance or disciplinary process. An outcome is agreed upon, for example, the perpetrator may agree to give the victim a verbal or written apology on the condition it be subject to an NDA. It seems possible and likely victims enter this type of NDA without independent legal advice, as they are not settlement agreements, where this is required to be binding on the parties.

26. NDAs are not justified, so much as assumed as a necessary condition of a settlement agreement. It has become widely normalised practice amongst employment lawyers to draft confidentiality clauses for clients as standard 'boilerplate' provisions in settlement agreements to be used in all circumstances.

27. Legal advice about NDAs does not usually extend any further than explaining the extent of the carve-outs, for example, reporting a criminal matter to the police or being able to report to a professional regulator. However, these carve-outs may be irrelevant if the conduct does not extend to criminal behaviour or there is no relevant professional

regulator. Professional regulation and criminal proceedings are different outcomes altogether than seeking accountability from an employer who failed in their duty of care to the victim. Victims should have a reasonable expectation that action be taken against harassment or discrimination, an investigation conducted, and appropriate disciplinary action be taken against the perpetrator, and efforts be made to prevent that behaviour happening in the future, not just for themselves but for others too. However, this is often not the case in practice, which then leaves a gap in accountability for employers and perpetrators, which is profoundly distressing and dissatisfying to victims.

28. NDAs are sometimes justified as something victims may want; however, Rights of Women do not receive this as a common legal enquiry. Most of the legal enquiries we receive about NDAs are about if and how victims can be released from historic NDAs and whether they are legally enforceable. Women have asked us if they can disclose their experience of abuse to the perpetrator's future employers, particularly if they work in a position of authority and power or a public-facing role. Indeed, some women feel they have a 'moral' or 'civic' duty to do so to safeguard others.
29. Grievances and investigation processes are usually ended once the victim is no longer employed. Disciplinary processes can be avoided altogether if no allegations have been upheld on which disciplinary action can be based. This is why it is not uncommon for women to tell us that other victims have been exited or have been forced to leave an organisation because of a perpetrator's behaviour. If no victim has been able to prove or uphold their allegations, the next victim is forced to 'start from zero', which is how it is possible for perpetrators to continue and escalate cycles of abuse. It is often the victim who leaves their employment and left feeling like the perpetrator and organisation 'got away with it'.
30. We know of no examples of victims having any previous knowledge of the SRA Warning Notice or EHRC guidance or being referred to the existing guidance before accessing legal advice through Rights of Women. Nor have we ever supported a woman seeking to report NDA misuse to a regulator. For the most part, lay people are unaware that they can report harassment and discrimination to the EHRC.
31. Rights of Women is aware that template settlement agreements and language around NDAs have been updated to specify that nothing should prevent a victim from reporting, in line with the latest guidance. However, the guidance misses the point because the problem is that when victims report, they find themselves unable to succeed due to a system heavily stacked against them and are held hostage to power imbalances from employers with access to sophisticated lawyers and legal advice. Most victims find themselves in settlements with NDAs that effectively conceal the discrimination, harassment or abuse they have experienced in the organisation. When this is not the exception but the rule, it begs the question, why should victims report in the first place? Grinding down victims into settlements has become routine for employers to escape accountability. NDAs facilitated by lawyers have been crucial to enforcing a culture of silence.
32. This has undoubtedly contributed to more and more victims feeling they have no choice but to take their allegations to the press<sup>8</sup>, which comes with a high risk of defamation and privacy legal action. Vulnerable victims can become open to possible exploitation by journalists or media organisations, who are not obligated or regulated to act in their best interest. More and more, we see that intense media scrutiny and reputational risk are arguably a more 'effective' means of seeking accountability and instigating long-

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<sup>8</sup> <https://www.theguardian.com/media/2022/feb/10/former-channel-4-news-employee-traumatised-after-signing-nda>

term organisational change for victims over internal reporting mechanisms, for example as was seen following the recent media coverage about allegations within CBI<sup>9</sup>. While the allegations about the CBI are by no means unique, the media scrutiny has forced the organisation to face the problem, which settlements agreements with NDAs allow other organisations to evade and even bury. All of this points to a system that does not work for victims and even works against them for 'doing the right thing' in coming forward, underpinned by the protection that the ubiquitous use of NDAs provides to employers and perpetrators.

33. Relevant examples of the use of NDAs include women reporting to us about perpetrators 'bartering' with employers to guarantee them confidentiality in exchange for resignation, redundancy, or early retirement if accused of harassment and discrimination and even sexual violence. Perpetrators are enabled and spared reputational damage, which lawyers facilitate through the concealment of allegations of harassment, discrimination, or abuse, i.e., the 'real reason' they are leaving the organisation.
34. Typically, NDAs cover the terms of a settlement agreement and the circumstances around it (including the allegations) and prohibit derogatory comments about the employer and the perpetrator. However, we are aware of examples of victims presented with NDA terms which specifically name and protect the perpetrator/s and go to great lengths to protect them, which has felt egregious and perverse to the victims. This can leave them feeling their employers are more interested in protecting themselves and perpetrators than victims.

**In addition to this, we invite you to consider the following:**

- a) Is there is anything else you would like to tell us about the misuse of NDAs?**
- b) Has reviewing our call for evidence prompted you to consider any other examples of potentially unethical conduct relating to legal professionals that you would like to raise?**
- c) How can regulators best address the role of legal professionals in the misuse of NDAs?**
- d) Please send us any further information that you consider relevant, which is not otherwise accounted for in the above questions.**

35. Regarding other unethical conduct relating to legal professionals, we are also aware of examples of grievances and investigation meetings where lawyers are present without prior knowledge or permission of the victim. Women describe this as means of intimidation and bullying to either withdraw grievances or settle claims. Although we do not recognise this as a common occurrence, there are clearly some lawyers who are prepared to do this on behalf of clients without fear of consequences from the regulators.

36. Finally, as already addressed, usually there will be no discussion as to the justification or legitimacy for the NDA, but instead in our experience of listening to women's accounts on our advice line, they will have been told they can be justified to protect all parties from the unintended consequences of unproven allegations without legal merit. However, NDAs are applied regardless of whether the allegations have been upheld

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<sup>9</sup> <https://www.theguardian.com/business/2023/apr/11/cbi-dismisses-director-general-tony-danker-after-conduct-complaints>

or not as part of an internal grievance or investigation process. This means even allegations with legal merit, acknowledged, and accepted by the employer as true can be concealed using NDAs. Currently, legal professionals can be called upon for this purpose. The guidance does not prohibit nor identify this as a misuse of an NDA and needs clarity as it points to unethical professional conduct of lawyers that undermines the rule of law.

37. The guidance focuses on victims being able to report freely and a duty not to take unfair advantage. It does not extend to whether NDAs about the very existence of allegations, grievances, or investigations about unlawful activity amounts to 'concealing' it. However, if this is the case, it is a widespread practice in the legal profession.

**Rights of Women**

**July 2023**