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The prevalence and use of Non-Disclosure Agreements (NDAs) in discrimination and sexual harassment disputes

Prepared by the Department of
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Executive Summary

This report was produced by the Research and Evaluation Unit in the Department of Children, Equality, Disability, Integration and Youth (DECDIY), in response to growing public awareness of the potentially unethical use of NDAs, and within the context of a review of Ireland's Equality Acts. It is also of particular relevance at this time due to the recent introduction of a Bill designed to regulate the use of Non-Disclosure Agreements (NDAs) (Ruane, et al., 2021). The objective of this report is to draw together what is known about NDAs in order to provide a resource to policy-makers in their deliberations about any future regulation of their use in the Irish context.

The report examines experiences of NDA use, with a specific focus on cases of alleged sexual harassment or discrimination, in Ireland and a number of other jurisdictions, including the UK, USA, Canada and Australia. Each of these jurisdictions has experienced increased scrutiny in recent years around the use of NDAs in potentially unethical circumstances, following revelations of their use by Hollywood producer Harvey Weinstein to silence victims of sexual assault and the resulting #MeToo movement. The main focus in these jurisdictions has been on the use of NDAs in the context of sexual misconduct within employment relationships and, in the case of the UK, the use of NDAs by universities dealing with misconduct allegations from both students and staff. To date, none of these countries has introduced national legislation regulating the use of NDAs. However, one Canadian province recently passed a Bill which is soon due to become law, a number of US States have passed laws, and a number of other US States are considering Bills that would regulate their use.

In Ireland, much of the media coverage over the past two years relating to the use of NDAs, has focussed on the requirement for Facebook's content moderators to sign NDAs as a condition of employment. These NDAs prevent moderators from discussing distressing aspects of their work, even after they have left the job. The case of Facebook moderators, while not specifically relating to sexual harassment or discrimination, highlights the potential for NDAs to isolate signatories from the support of their friends and family. A further indicator of NDA use in Ireland are the

media reports that two female staff members were requested to sign NDAs by an Irish university following their allegations of sexual harassment by a colleague (Gallagher, 2018).

The report draws on a literature review and engagement with informed stakeholders. The following themes are identified and discussed in detail:

- Power imbalances between signatories
- Negative impacts on complainants
- NDAs as a condition of employment
- Impacts on signatories' careers
- 3rd party effects: organisations and society
- Legislative approaches: prohibition or reform?

The report finds that patterns of sexual harassment and discrimination are difficult to identify due to the lack of transparency around the use of complaints, settlements and NDAs. However, there was also evidence that some complainants value the confidentiality that NDAs provide in the settlement of disputes. The effects of using NDAs are often experienced at individual, organisational and wider societal levels. Therefore reform in this area must recognise both the individual level impacts and the broader social impacts of the use and abuse of NDA contracts. These individual and organisational impacts include:

- Victims feeling isolated, and unable to confide in family and friends;
- Organisations using NDAs to silence victims and avoid challenging or reforming organisational cultures that facilitates harassment, abuse and discrimination;
- Perpetrators being facilitated to continue harassing others, with NDAs preventing patterns being identified and exposed;
- Researchers and policymakers struggling to identify the prevalence and nature of sexual harassment and discrimination due to the secrecy surrounding NDAs.

The desk based research conducted for this report indicates that NDAs are commonly used in a range of contexts within Ireland and other jurisdiction; however there are significant research and data gaps relating to the use and prevalence of NDAs in cases of sexual harassment and discrimination both in Ireland and internationally. The inherent secrecy of these contracts presents challenges in

rectifying this. In addition to presenting our own inevitably time-bound and preliminary research, this report identifies potential methods for a more comprehensive investigation of this topic.

There would appear to be a consensus among all stakeholders that some change is needed. However, there are differing perspectives on the optimum legislative response to the challenges presented by the use of NDAs in potentially unethical circumstances. The report describes how some commentators and practitioners are in favour of the effective prohibition of NDAs in cases of sexual harassment or discrimination, while others favour their regulation, but still see an important role for them in the ethical resolution of disputes and worry of unintended consequences should they be prohibited. Those advocating for regulation often emphasise that some people will only feel comfortable reporting sexual harassment or discrimination and pursuing complaints if they know that the complaint can be dealt with confidentially. Victims often worry that without confidentiality they will be labelled as 'difficult' and be effectively blacklisted within their sector. Others challenge this, arguing that 'confidentiality clauses' could protect the privacy of complainants without preventing them from discussing their own experiences, if they so wish.

Further research would better inform policymakers about this important yet poorly understood issue, as NDAs face closer scrutiny and government regulation in the coming years.

1. Introduction

This report was produced by the Research and Evaluation Unit in the Department of Children, Equality, Disability, Integration and Youth (DECDIY), in response to growing public awareness of the potentially unethical use of NDAs, and within the context of a review of Ireland's Equality Acts. It is also of particular relevance at this time due to the recent introduction of a Bill designed to regulate the use of Non-Disclosure Agreements (NDAs) (Ruane, et al., 2021)[1].

This report examines experiences of NDA use in cases of alleged sexual harassment or discrimination, in Ireland and a number of other jurisdictions, including the UK, USA, Canada and Australia. However, there is also acknowledgement within the report of the wider use of NDAs (Coyle, 2021; Kelleher, 2021; Pollak, 2021). Each of these jurisdictions has experienced increased scrutiny in recent years around the use of NDAs in potentially unethical circumstances. U.S. cases in which NDAs were used to silence victims of sexual assault, such as those concerning Hollywood producer Harvey Weinstein were covered in depth in the media of other jurisdictions (Kenny, 2021). This focus is credited with prompting the emergence of the global #MeToo movement, and highlighting discussions of the issues relating to NDAs in local contexts.

The main focus in the literature and debates in the international jurisdictions examined, has been on the use of NDAs in the context of sexual misconduct within employment relationships; and in the case of the UK the use of NDAs by universities dealing with sexual assault and harassment allegations made by both students and staff. To date, none of these countries has introduced national legislation regulating the use of NDAs, but a number of US States have passed laws and a number of other States are considering Bills that would regulate their use.

There is little reference to the use of NDAs in the settlement of employment disputes relating to discrimination on grounds such as age, race, disability or sexual orientation

[1] The Private Members Bill (PMB), entitled: 'Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021' (Bill 82 of 2021), was sponsored by Senators Lynn Ruane, Eileen Flynn, Frances Black, and Alice-Mary Higgins, on the 1st of June 2021 (Ruane, et al., 2021).

in the international literature with some exceptions (DBEIS, 2019; HCWEC, 2019). However, data from the Workplace Relations Commission (WRC) and engagement with stakeholders indicate that employment disputes frequently concern discrimination on such grounds, and it is therefore likely that NDAs are used in these settlements (WRC, 2020, p. 24; Crushell, 2021). Further evidence of this comes from the Free Legal Advice Centre (FLAC), who reviewed their case files from 2017 until the present and found that 4 of the 10 discrimination cases that they had taken (they specified that these cases were settled — not adjudicated on, or mediated) included an NDA in the settlement agreement (Lucey, 2021). None of their equality cases from this period related to sexual harassment, the majority (9 of the 10) related to the race ground, and access to goods or services (Lucey, 2021). Therefore although the majority of the international sources referenced within this report focus primarily on the use of NDAs in cases of sexual harassment or assault, our discussions with Irish stakeholders were inclusive of the use of NDAs in the context of discrimination disputes and much of the analysis is applicable to this wider context.

The experience of using NDAs in sexual harassment and discrimination disputes in Ireland and internationally raises several key themes or challenges, which can be usefully described in six main ways:

- **Power Imbalances between signatories:** Complainants are often junior staff or students, while alleged perpetrator are often more senior staff or other figures of authority (Macfarlane, 2020; Batty, et al., 2017; Carlson, 2021). The status of an institution is 'built around the reputation of its most important members', therefore if a complaint of sexual harassment or discrimination is made against an individual whose reputation is 'entangled' with that of the institution, the institution may prioritise the preservation of the accused's reputation in an effort to shield the organisation as a whole (Macfarlane, 2020, p. 109). Additionally, the organisation will typically have greater access to legal advice than the individual complainant or the accused (Murphy, 2019; Carlson, 2021; Kissane, 2019; Macfarlane, 2020; Speak out Revolution, 2022a). Many signatories report that they got no independent legal advice prior to signing an NDA (Olivia (pseudonym), 2021).

- **Negative impacts on complainants:** Some signatories suffered from feelings of isolation in the aftermath, as they were unable to confide in friends and family. Fellow victims (of sexual harassment, discrimination etc.) were unable to identify and support one another due to the secrecy imposed by the NDA (Olivia (pseudonym), 2021; Brennan, 2021; Speak out Revolution, 2022a).
- **NDAs as a condition of employment:** Signing an NDA prior to commencing employment is frequently required by employers. These 'pre-emptive' NDAs may prevent signatories from discussing sexual harassment, discrimination or trauma prior to their having experienced it (Brennan, 2021; Edwards, 2021; Wemple, 2016; Sockin, et al., 2021a). Therefore they may sign these documents with an incomplete understanding of the future consequences.
- **Impacts on signatories' careers:** There were many reports of victims of sexual harassment or discrimination who signed NDAs losing their jobs and being unable to find work within their sector again (Sumaraysay, 2018; Carlson, 2021; Walsh, 2021; Speak out Revolution, 2022a). Conversely, NDAs were identified as a means by which signatories could prevent other employers from knowing that they had made a complaint and thereby avoid being labelled a 'troublemaker' and therefore blacklisted within their sector (WEC, 2019; Crushell, 2021).
- **Effect on 3rd party organisations and broader society:** NDAs can allow patterns of abuse to continue undetected within an organisation, contributing to an organisational culture in which sexual harassment and discrimination become endemic (AAUW, 2019; AHRC, 2020; Speak out Revolution, 2022a). Additionally, they can facilitate the transfer of perpetrators from one community or organisation to another unsuspecting community or organisation where they may victimise others (Macfarlane, 2020; Yeoh, 2021; Croxford, 2019).
- **Debates regarding legislative approaches:** Some commentators advocate for the effective prohibition of NDAs in cases of sexual harassment or discrimination citing harms to both individual signatories and wider society; others caution that such an approach could have unintended consequences

and while supporting reform, emphasise the importance of providing the choice of an NDA to complainants. Some advocates of prohibition suggest one sided confidentiality clauses, which protect the privacy of complainants while preserving their right to speak out about their experiences if they wish, as an alternative to NDAs (Macfarlane, 2020, p. 124; Croxford, 2019). Conversely, those advocating for regulation rather than prohibition make various recommendations for best practice and potential reform (outlined below) (Spooner, 2020; Mendonca-Richards, 2021; Crushell, 2021; WEC, 2019).

Each of these themes is discussed in more detail within the report, with reference to examples from Ireland and the chosen international jurisdictions. Additionally debates and proposed legislative and HR approaches to the use of NDAs in these cases are discussed throughout this report.

The objective to this report is to draw together what is known about NDAs in order to provide a resource to policy-makers in their deliberations about any future regulation of their use in the Irish context. The findings of this preliminary analysis are set out over six main sections. The first section details the methodological approach and limitations. The second section review common research methodologies which could be used to overcome such limitations in the future. The third section reviews the international experience, and the subsequent section looks at evidence in the Irish case. The final section addresses the six key themes that emerge from our analysis, summaries above.

2. Report Methodology

The confidential nature of NDAs, and the lack of Irish data relating to their prevalence, presents challenges in assessing the nature of their use in Ireland. Given the challenges of researching this topic a mixed method approach was undertaken. The research for this report, was conducted between 30 July 2021 and 15 October 2021.The office of Senator Lynn Ruane shared a number of resources with the report authors, which had been gathered as part of the process of researching and drafting of the Bill. Additionally, Dr Julie Macfarlane, Professor of Law at the University of Windsor and Georgina Calvert-Lee, Senior Counsel with McAllister Olivarius, who assisted Senator Ruane's team in drafting the *Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021*, shared a number of key resources. These included Dr Macfarlane's 2020 memoir on the topic: 'Going Public: A Survivor's Journey from Grief to Action', in which she addresses topics such as sexual violence, institutional responses to allegations of misconduct, and the impacts of NDAs.

In addition, the research process for this report included searches of databases such as Google, academic journals, government publications and newspaper archives. As a result, the report references a wide range of sources that include newspaper articles, academic journal articles, government reports, podcasts, books, websites, and blogs relating to the topic of NDAs. Sources used in the report relate to documents published in, or relating to, Ireland, UK, Australia, the USA and Canada.

One method used for this report, was searching newspaper archives for use of the term 'non-disclosure agreement' in articles published within the last decade. The archives of three national newspapers, the *Irish Times*, *Irish Examiner* and *Irish Independent*, were searched and the number of results from within the past ten years noted, and all relevant articles from the past two years reviewed in detail. A limitation of this method is that it relied both on the quality of the newspapers' online search engines, and it only provided data on examples of the use of NDAs which had been picked up and reported on by these newspapers. Future research could include a search of a broader range of print and online media sources, including television and radio sources, as well as social media.

In addition to a review of the existing literature and other written resources, the authors contacted over 40 stakeholders, by phone and email. These (mostly Irish) stakeholders included: Solicitors (18); Unions (6 Trade Unions, 2 Student Unions); Legal Practitioners' associations (2); Academics (6, primarily UK-based); NGOs (6); two independent public bodies; and one HR consultant. Stakeholders were asked for their perspectives on the use of NDAs in the circumstances outlined, and to share any data, resources, or expertise relevant to the content of this report. A total of 20 stakeholders responded, with the majority of those providing resources, answering questions, suggesting other contacts, and in one case agreeing to a telephone interview. The authors also consulted with colleagues within the DCEDIY and other professional contacts, to help identify additional data sources. The stakeholder input provided valuable insight into the use of NDAs both in Ireland and internationally. Additionally, the input from academics consulted for this report helped identify and evaluate some potential methodologies for future research in the use of NDAs in Ireland that relate to allegations of sexual harassment or discrimination.

From an analysis of the sources outlined above, the authors identified six recurring themes, which have been written up as thematic sections within this report:

- Negative impacts on complainants
- Power imbalances between signatories
- NDAs as a condition of employment
- Impacts on signatories' careers
- Effects on 3rd party organisations and broader society
- Debates regarding legislative approaches.

3. Common Research Methodologies: Accessing Data on the Use and Prevalence of NDAs

The use of NDAs is largely unexamined in an Irish research context, and one finding of this initial exploratory report is that there is scope for a more extensive investigation. In light of this, a key component of this report is the identification of methodologies that could be used by researchers to generate more comprehensive and rigorous data on the use and prevalence of NDAs in Ireland.

The methods outlined below were identified through dialogue with a number of academics and other experts, and through a review of publications (academic, government and media) examining the topic within other jurisdictions. Research methods identified in the development of this report include: public consultations that seek both written and oral submissions; submitting freedom of information requests to gather information on the topic from organisations; survey questionnaires; documentary analysis of NDA texts; and the use of NDA amnesty agreements and waivers. The opportunities and challenges presented by these methods will now be discussed.

3.1 Written and Oral Submissions

Dr. Anna Louise Bull, Lecturer in Education & Social Justice at the University of York described soliciting submissions as an 'unscientific' but still useful method of data collection on NDAs, as it can provide a good 'cross section' of experiences (Bull, 2021). In 2019, the *UK House of Commons Women and Equalities Committee (WEC)* gathered data for their report on 'The use of non-disclosure agreements in discrimination cases' through soliciting written and oral submissions from interested parties (WEC, 2019). Following the publication of the WEC report, the *UK Department of Business, Energy and Industrial Strategy* conducted an additional consultation process relating to NDAs and received 582 responses from a range of

stakeholders (DBEIS, 2019). The Australian Human Rights Commission also used this method in its 2019 national inquiry into workplace sexual harassment, aided in part by NDA waivers issued by 39 employers, which will be discussed in more detail below.

3.2 Freedom of Information Requests

Journalists such as Rianna Croxford at the BBC and David Batty from the Guardian, have used Freedom of Information requests to investigate and expose the prevalence of bullying and sexual harassment in UK universities. This includes the practice of using NDAs to silence victims and protect the reputation of the universities involved (Croxford, 2020; Croxford, 2019; Batty, et al., 2017; Batty, et al., 2017). The BBC FOI campaign revealed that "nearly a third of universities have used NDAs for student grievances since 2016". They documented 300 NDAs between 2016 and 2020, and that 45 universities had paid £3.1million in settlements. Individual pay-out amounts ranged from £250 to £40,000 (Croxford, 2020).

However, in 2019 David Batty of the Guardian highlighted the potential fallibility of this method. Prior to the BBC's investigation, the Guardian had, in 2016, sent FOIs to 'more than 120 UK universities' seeking information on, 'sexual harassment, misconduct and gender violence by university staff' and the use of NDAs by universities in settling these disputes. In response, Batty (2019) reported that:

> …only three institutions confirmed that they had used NDAs or confidentiality clauses in settlements for complaints. However, since then I have become aware of three more universities who used such clauses in sexual misconduct cases (Batty, 2019).

One potential explanation for this discrepancy is legal advice: 'Anecdotally, I've been told that some universities' legal departments have determined that NDAs trump their duties under freedom of information law to reveal the existence of such gagging clauses' (Batty, 2019). Batty (2019) recommends that if such legal advice is widespread in the UK, that: 'then the information commissioner needs to step in'.

In the Irish context, solicitors McCann Fitzgerald (2020) wrote a blog discussing the tension between confidentiality and the 'presumption favouring disclosure within the FOI regime', when it arose in 2020 in two cases brought by Ireland's Information Commissioner and adjudicated within the Irish Supreme Court. In both cases, the Court ruled that the FOI bodies from whom information had been requested under the FOI Act could not simply refuse to disclose such information in cases in which they asserted that the information was 'confidential', or 'commercially sensitive'. The second of the two cases was the refusal of UCC to disclose information, that they deemed 'commercially sensitive' to RTÉ. In this case, Ireland's Information Commissioner asserted UCC's obligation to justify its refusal under the 2014 FOI Act. The trial Judge Ms Justice Baker outlined that in order to meet their obligation under the FOI Act, even in cases where a public body asserts that the information requested falls under one of the statutory exemptions, they must do the following:

(a) identify the records requested;
(b) assess whether or not they contain any commercially sensitive information;
(c) determine whether the public interest justifies disclosure; and
(d) if a decision is made to refuse disclosure, provide the requesting party with a comprehensive explanation for this refusal (McCann Fitzgerald, 2020).

McCann Fitzgerald (2020) wrote that: 'The Court was clear in its view that an FOI body cannot generate confidentiality by its own actions where there is no contractual or statutory basis to do so'. It would likely be deemed advisable for public bodies to seek out legal advice to ensure that they meet their obligations under the FOI Act, in circumstances in which the confidentiality of information is protected by an NDA. Researchers using FOIs to research the use and nature of NDAs could consult the publications of the Information Commissioner for insight into their rights under the FOI Act, and in certain circumstances the may opt to request that the Information Commissioner conduct an independent review of refusals which they suspect to be unlawful (Information Commissioner, 2021).

3.3. Survey Questionnaires

Survey questionnaires were identified by some academics and other experts consulted in the development of this report, as being a potentially more scientific method than requesting submissions or using Freedom of Information (FOI) requests. However, it also comes with its own challenges. Dr. Anna Louise Bull, Lecturer in Education & Social Justice at the University of York wrote:

> Survey methods could also be challenging, as it would be necessary to make sure the right person fills out the survey - i.e. someone with knowledge of whether the institution is using NDAs or not - and such people would, I imagine, be nervous about filling out such a survey unless it came from a very trusted source (Bull, 2021).
>
> Complainants - especially those who have experienced harassment from their institution during the complaints process - who have signed an NDA may be unclear about the extent of the NDA's powers. This could inhibit data gathering, as they may be concerned that they are breaking their NDA by talking about it for research purposes (Bull, 2021a).

In recognition of the likely concerns of signatories, Bull suggested that if surveys were to be used, 'lawyers who advise on NDAs' (Bull, 2021) would probably be the best group to target, similarly Georgina Calvert-Lee (Senior Counsel for McAllister Olivarious) recommended the use of: 'a survey of litigation and employment lawyers to see how frequently they use or agree NDAs in settlement agreements, or employment/service contracts' (Calvert-Lee, 2021).

Speak out Revolution is a UK-based not-for-profit organisation founded in 2020 with the mission of empowering victims of workplace bullying and harassment to 'have their complaints taken seriously, addressed rapidly and resolved appropriately' (Speak Out Revolution, 2021). They have used an online survey to research the use of NDAs in cases of discrimination, harassment and abuse across the world. As of 27 September 2021 they had received 650 survey responses, the majority (n=521) of which referred to incidents that occurred within the UK. Although they have collected some data from Ireland, the sample size is small (n=6). In asking respondents whether they had signed an NDA, the survey allows them to select one of four

possible answers: 'yes', 'no', 'unknown' or 'unable to answer for legal reasons' (Speak Out Revolution, 2021). This approach may make signatories of NDAs more comfortable in deciding to participate in the survey.

Another UK-based study which gathered data on a related issue via online survey, was conducted in 2019 by the *National Union of Students* (NUS) and *The 1752 Group*. *The 1752 Gro*up describe themselves as 'a UK based research, consultancy and campaign organisation dedicated to ending staff sexual misconduct in higher education' (The 1752 Group, 2021). A total of 1,839 current and former UK students completed the survey, which asked questions relating to experiences of sexual misconduct in UK universities, which they described as 'a continuum of sexualised and predatory behaviours'. The report cautioned that this was not intended as a 'prevalence study' but that it was 'descriptive,' and aimed to shed light on the 'patterns of experiences of students who responded' (NUS, 2019, p. 8). A study of prevalence would require a random sample such as those used in panel surveys, as was suggested by Prof. Richard Moorhead in email correspondence with the authors of this report (Moorhead, 2021).

3.4 Qualitative Analysis of NDA texts

Qualitative analysis of NDA texts can identify typologies of NDAs, or specific clauses within NDAs. NDAs may be one-way, or two-way; they can be time-bound, or of indefinite duration; and they can be relatively broad, or highly specific (Sockin, et al., 2021; Brennan, 2021; Macfarlane, 2020a; UK Government, 2015). Analysis of an extensive archive of these documents could shed light on the characteristics of the types of NDAs being drafted and signed.

Dr. Anna Louise Bull recommended establishing an archive of NDA texts to analyse what they say, why and how they are being used, and their impacts. She argued that studies that focus on determining the prevalence of NDAs and their abuse 'aren't a good use of time/resources' and proposed that a better research goal would be to: 'establish an archive of NDA texts that are in use, to find out what people are being asked to sign up to, and/or to carry out qualitative studies of why and how they are

used and their impacts'. She acknowledged that this method would require a 'sophisticated recruitment strategy' (Bull, 2021). A researcher pursuing this method might follow a similar strategy to groups such as *Speak Out Revolution*, by running an online campaign inviting those affected to participate, or they could contact solicitors and request that they or their clients share templates of NDAs they have drafted or signed.

A prominent campaigner and expert in this area (and a co-founder of Speak out Revolution), Dr. Julie McFarlane has pursued this approach in the course of her research into NDAs, establishing a 'databank of sample clauses' (unpublished) from NDAs, or components of NDAs shared with her by various signatories, which have contributed to her understanding of the characteristics and nature of these documents.

3.5 NDA Waivers

The confidential nature of NDAs is frequently cited in the literature, and by the experts consulted for this report, as being a barrier to research into their use and prevalence. One strategy for overcoming this may be the use of 'Amnesty Agreements' in the form of NDA waivers, which allow signatories to speak about their experiences under specific circumstances. Amnesty programmes or waiver agreements have been used to facilitate internal organisational investigations into wrongdoing (Brandstätter, 2013).

Such amnesties could be used to facilitate investigations into the use of NDAs relating to sexual harassment or discrimination, to help identify prevalence and patterns of behaviour. Companies could offer their employees, past and present, an amnesty from NDAs to take part in investigations or research, on the condition that identifiable details would be treated confidentially by researchers. This strategy was pursued by the *Australian Human Rights Commission* (AHRC), who sent letters to large company CEOs requesting that they issue waivers allowing any past and present employees who had signed NDAs to participate in the AHRC's 2019 national inquiry into sexual harassment at work. The request was also shared with all employers via

various mass and social media communications channels, and through employers' organisations. However, the AHRC expressed disappointment that only 39 employers issued these limited waivers (AHRC, 2020, p. 558). They also criticised the choice of some employers to require their employees to undergo an application process should they wish to avail of their NDA waiver (with the notable inclusion of Public Service organisations) (Whyte, 2019).

See section on 'Australia' for additional discussion of the 2019 AHRC study, including key findings. Overall, although Australia does not currently have any legislation regulating the use of NDAs (Ilanbey, 2021), their use was highlighted in the AHRC report referenced above. The AHRC noted in this report that the use of NDAs in these circumstances had been described as having both benefits and disadvantages, and they recommended that they (the AHRC), in partnership with the *Workplace Sexual Harassment Council*: 'develop a practice note or guideline that identifies best practice principles to inform the development of regulation on the use of NDAs in workplace sexual harassment disputes (AHRC, 2020, p. 32).

4. International Context

There has been increased international scrutiny in recent years of the use of NDAs; particularly in cases of sexual misconduct following allegations of abuse by Hollywood producer Harvey Weinstein, and the resulting #MeToo movement. The following section examines the responses, including legislative responses where relevant in the UK, USA, Australia, Canada and Ireland.

4.1 United Kingdom

To date, the UK has not introduced legislation to limit or reform the use of NDAs; however the legal standing of individual NDAs has been the subject of court cases and political debate.

One example of this was the case of *ABC v Telegraph Media Group Ltd*, in which the judge upheld the NDAs on the grounds that the signatories had received independent legal advice, had the right to disclose information to regulatory bodies, there was no evidence or coercion, and out of recognition of the public benefit of enforcing contracts (McCann Fitzgerald, 2018). However, the case: 're-ignited the debate around the appropriate use of NDAs in the context of harassment allegations', prompting then Prime Minister Theresa May to bring 'forward measures for consideration and consultation to improve the regulation of non-disclosure agreements, noting in the House of Commons that "it is clear that some employers are using them unethically"' (McCann Fitzgerald, 2018).

In 2019 the *UK House of Commons Women and Equalities Committee* (WEC) published a report called: 'The use of non-disclosure agreements in discrimination cases', hereafter referred to as the *WEC Report*.

The key recommendations of the *WEC Report* were (HCWEC, 2019, pp. 3-4):

- That the government should ensure that NDAs are not used to avoid discussing or investigating 'allegations of unlawful discrimination' within an organisation. A balance must be struck between avoiding cover-ups while

preserving the right of 'victims to be able to make the choice to move on with their lives'

- Require plain English confidentiality and non-derogatory clauses which clearly stipulate 'what information can and cannot be shared and with whom'
- 'Strengthen corporate governance requirements' and impose a 'mandatory duty on employers' to 'protect those they employ from discrimination and harassment,'
- 'Require named senior managers at board level or similar to oversee anti-discrimination and harassment policies and procedures, and the use of NDAs in discrimination and harassment cases'
- Additionally, they call for an improvement in the 'remedies that can be awarded at employment tribunals' and a reduction in the costs associated with taking a case.

The *WEC Report* quotes the law firm *McAllister Olivarious*, who claim that NDAs are frequently used to quash the allegation and preserve the reputation of both the accused and the institution:

> We have handled cases, particularly at universities, where institutions have agreed with an accused employee that he can leave quietly in exchange for valid charges being dropped and suppressed by an NDA (HCWEC, 2019, pp. 10-11).

Prior to the publication of the WEC Report, in 2017 Guardian journalist David Batty and colleagues used FOIs to investigate the extent of sexual harassment in higher education and published data indicating that there is significant use of NDAs in cases of sexual harassment, in this sector within the UK. (Batty, et al., 2017).

The BBC also used FOIs to investigate this issue and found that UK universities had spent £87 million on settlements which had included an NDA, in the prior two years. However it is unclear what proportion of these settlements and NDAs related to cases of discrimination, sexual harassment or bullying, as due to the nature of the document: 'many of the institutions were unable to disclose why the NDAs were signed' (Murphy, 2019). In 2020, BBC Sounds reported that £1.3 million was spent by the higher education sector, on settlements including NDAs in the previous four years, with settlement payments ranging from between £250 and £40,000. The episode featured interviews with two female students who reported sexual assaults

to their university and ultimately signed NDAs preventing them from openly discussing their experiences.

One student reported that she had been raped by another student to her university. She reported feeling that she had no choice but to sign the 'no contact agreement' that she was offered, which included an NDA, so that the safety clauses would come into effect. She claims that she received no legal advice prior to signing the NDA, was given seven days to make her decision, and told that she would be expelled if she spoke about her experience (Olivia (pseudonym), 2021). The 1752 Group who campaign end sexual misconduct in higher education, recommended guidance prohibiting the use of NDAs in future settlements:

> New guidance should be provided by the Office for Students and Universities UK to prevent the use of non-disclosure agreements in future settlements between universities and students, to allow greater transparency and trust to build between students and the sector (NUS, 2019, p. 48).

In 2018, the *Solicitors Regulation Authority* (SRA) for England and Wales issued a *Warning Notice on the Use of Non Disclosure Agreements* (later updated in November 2020). The SRA outline their concerns, emphasising that NDAs should not be used to obstruct lawful investigations and protected disclosures:

> This warning notice and the SRA's Standards and Regulations, do not prohibit the use of NDAs. However, we are concerned to ensure that NDAs are not used to prevent reporting to us, other regulators and law enforcement agencies, or making disclosures which are protected by law. We are also concerned to ensure that those we regulate do not take unfair advantage of the other party when dealing with NDAs (SRA, 2020, p. 1).

Additionally, the SRA have confirmed that a number of reports relating to the improper drafting or use of NDAs in cases of discrimination or sexual harassment have been referred to the Solicitors Disciplinary Tribunal (SDT), and a proportion of these have resulted in a finding of wrongdoing and in some cases the imposition of fines or other sanctions. Up to date data on the precise number of reports, investigations and findings are not currently available, as the relevant documents are being prepared (Toole, 2022); however the SRA have previously reported that

between late 2017 and March 2019 they received 19 reports 'about the inappropriate use of NDAs', 13 of which related to 'discrimination or harassment'. As of March 2019, 12 of those 13 reports were under investigation, two of which had been referred to the SDT, and one of which was closed as the 'NDA did not give cause for concern' (Solicitors Regulation Authority, 2019).

Concern over the ethical use of NDAs within the UK, is evident in the advice offered by the SRA, the *1752 Group*, the *WEC report*, and the investigations of both the BBC and Guardian. However, it is not unique in its increased scrutiny of NDAs in recent years; which reflects the increased focus internationally on NDAs following controversy surrounding their use in the US in cases of sexual harassment and assault.

4.2 United States

NDAs were originally used in the US to protect confidential business information (Spooner, 2020). For Yeoh (2021), the use of NDAs has since evolved, and often includes non-disparagement clauses in which employees are required not to speak ill of their employer in any form of communication, written or spoken, during and after their period of employment. Sockin, Sojourner and Starr argue that NDAs such as these: 'perpetuate harmful conduct by preventing people who survived abuse, harassment, discrimination and other harrowing experiences at work from telling their stories' (Sockin, et al., 2021). In an effort to improve the evidence base for the impact of NDAs on both the 'sharing' and 'withholding' of 'employees' experiences, they conducted a study in which they compared employers' ratings on the website 'Glassdoor' before and after three US states had 'passed laws that "narrowed NDAs" by prohibiting firms from using NDAs to restrict workers from sharing about unlawful conduct, and strengthened workers' anti-retaliation protections for speaking out' (Sockin, et al., 2021a; Sockin, et al., 2021). They found that:

> On average, these laws reduced ratings of firms by approximately 5%, with stronger effects in industries where NDAs are more prevalent. The rise in negative information pertains to many dimensions of jobs, including a 22% increase in reviews related to problems with harassment (Sockin, et al., 2021a)

The #MeToo movement has revealed the widespread use of NDAs in sexual harassment and assault claims. As a result, the use and regulation of NDAs has become a topic of debate (Yeoh, 2021). As of November 2021, there is no federal law regulating the use of NDAs. There have been a number of proposed bills seeking to regulate NDAs in the context of sexual harassment and assault at this level, but none has made it past Congress. According to Yeoh (2021), individual states have moved to pass laws explicitly barring enforcement of confidentiality provisions in workplace sexual harassment settlements. According to Spooner's 2020 report, the following 12 states had as of January 2020, passed laws regulating the use of NDAs:

Table 1: US laws regulating the use of NDAs

State	Regulation of Non-Disclosure Agreements as of January 2020
Arizona	Prohibits the use of a NDA to prevent a victim from testifying in a criminal proceeding
California	Prohibits a provision in a settlement that bars disclosure of factual information relating to sexual assault or harassment, but it requires that a formal legal complaint is made (a complaint to an employer would not be sufficient) in order to be invoked
Illinois	Bans all non-disclosure and non-disparagement clauses in agreements between employers and employees
Maryland	Does not include NDAs specifically but they are likely to be included in the voiding of any provision in an employment contract that waives any substantive right to a future claim of sexual harassment
Nevada	Banned NDAs from settlement agreements if the NDA restricts a complainant from disclosing information concerning a sexual offense
New Jersey	Prohibits enforcement of all NDAs relating to discrimination or harassment after 18th of March 2019
New York	Requires that an NDA only be used if it is a complainant's preference
Oregon	Prohibits any NDA that prevents disclosure of sexual assault unless the complainant requests it
Tennessee	States that an employer may not require an employee enter into an NDA concerning sexual harassment as a condition of employment after 15th May 2018
Vermont	Bans employers from asking employees to waive their rights concerning sexual harassment, with the legislation covering not just employees but everyone hired to perform work or services
Virginia	Prohibits employment agreements that conceal the details relating to a claim of sexual assault, though the legislation does not address sexual harassment
Washington	Prohibits employers from requiring employees to sign an NDA to conceal sexual assault or harassment.

Source: (Spooner, 2020)

Additional states considering bills as of January 2020 were Connecticut, Florida, Hawaii, Iowa, Kansas, Massachusetts, Pennsylvania, Rhode Island, Texas and West Virginia. The proposed bills generally repeat legislation already passed in other states banning the use of NDAs in employment agreements. Some proposed bills provide exceptions to allow confidential settlement agreements in sexual harassment cases while others explicitly ban it. Since Spooner's report, California has passed further legislation, the 'Silenced No More Act'. This Act extends the protections of the #MeToo era 'STAND' (Stand Together Against Non-Disclosures) Act (described in the table above), which restricted the use of NDAs in cases of sexual harassment, to other forms of harassment or discrimination. Passed on the 7th of October 2021, the Act ensures that: 'Workers in California will be legally protected for speaking out about discrimination based on race, religion, sexual orientation, gender identity, ancestry, disability, and age' (Schiffer & Hollister, 2021).

Both Spooner (2020) and Yeoh (2021) claim that the enforcement of an NDA in the context of sexual harassment or whistle-blowers remains to be tested in the courts. However, Macfarlane (2020a) cites examples of NDAs related to other forms of sexual misconduct, such as child molestation, being overturned in US courts due to their incompatibility with public safety and the fulfilment of public organisations' duty of care to students (such as in a public school) and other third parties. In *Bowman v. Parma Board of Education* the court ruled that an NDA, which prevented a teacher's former employer (a public school) from disclosing the reason for his termination to his subsequent employer, was void as it was not in line with public policy. The court said that it would '"expose [the] most vulnerable citizens to …unacceptable… harm"' (Macfarlane, 2020a, p. 366).

Yeoh (2021) describes two types of agreement in the US that are associated with the settlement of harassment disputes. The first forbids employees from making disparaging comments about their employer either during or after their employment. While used, this type of agreement can breach US federal labour law. The *National Labour Relations Act of 1935*, also called the *Wagner Act*, forbids employers from stopping employees from making bad remarks about them or stopping them from reporting sexual harassment. The second type of agreement is a settlement in which

employees are paid to forgo their claims. According to Yeoh (2021) the National Labour Relations Board has not opposed this type of agreement and in practice favours a private and amicable solution to labour disputes whereby employee waives their rights and receives a benefit in return.

Spooner (2020) states that although NDAs relating to sexual harassment or assault have remained largely untested in US courts, case law on business-related NDAs offer several insights regarding how the courts may treat these NDAS. She suggests that if the information regarding sexual harassment or assault covered by an NDA were to reach the public, that NDA would no longer be enforceable. Additionally, for an NDA to be enforced, it must be specific, precise and reasonable; geographic and chronological terms must be defined, and that common law exceptions would apply to the enforcement of NDAs, such as duress, unconscionability or acting against public policy. However, in these circumstances litigation would be required, which may act as a barrier for complainants due to litigation being a lengthy and expensive process.

Similarly, Yeoh (2021) finds that US courts have in certain limited circumstances refused to enforce NDAs in the name of public policy and in the interest of public disclosure, but also argues that courts are reluctant to interfere with contracts without being clear about the wider impacts of such actions on the relevant social policies. In her analysis of the role of NDAs in obstructing educational institutions and their employees from giving accurate references following sexual misconduct in the workplace, Macfarlane concludes: 'While by no means yet settled, the likelihood that an NDA does not protect a former employer who provides inaccurate information or fails in a duty to warn appears to be growing, at least in relation to educational institutions' (2020a, p. 368).

4.3 Canada

At present, there is no national legislation regulating the use of NDAs in Canada; however, in November 2021 Prince Edward Island (PEI) became the first province in Canada to restrict their use in cases of sexual misconduct. Once it becomes law, Bill

118: Non-Disclosure Agreement Act will 'allow parties to enter such an agreement in cases of harassment or discrimination only if it's in accordance with the wishes of the person who made the allegations' (Chang, 2021; Chang, 2021). The Bill has passed its third reading at the legislature, having been voted in by both the government and opposition MLAs, however it must receive royal assent before it becomes law (Neatby, 2021; Chang, 2021).

The instigator of the bill, Lund, argues that even without this legislation, NDAs could not have legally prohibited signatories from reporting crimes to the police, however many signatories were unaware of this and she was unable to find any cases of such NDAs being challenged in court. Lund's Bill specifies that: 'these agreements cannot restrict individuals from seeking mental health or victim services support or from reporting to law enforcement', and is designed to provide clear guidance on the legal limitations of NDAs (Neatby, 2021). It also 'provides mechanisms for those who do enter NDAs to waive their confidentiality in the future, and raises the requirements under which such agreements can be enforceable' (Chang, 2021).

According to Macfarlane (2020), the use of NDAs became widespread in Canada during the 1980s for the purpose of protecting confidential business information, but were soon used in employment termination agreements. There is no guidance from Canadian law societies on the use of NDAs (Merrifield, 2020) or on the ethical boundaries for lawyers drafting these agreements (Gay, 2019). As elsewhere, the #MeToo movement brought attention to the use of NDAs in sexual harassment and assault cases in Canada, and there have been general calls for their regulation to follow the lead of the UK and the US (Merrifield, 2020). The recent passing of the NDA Bill in PEI is evidence of the success of such campaigns. Gay (2019) argues that NDAs are unenforceable in Canada where disclosure of the conduct is protected by legislation or where the action subjected to the NDA is of criminal wrongdoing. However, courts have typically upheld NDAs which do not relate to criminal activity and which the signatories consented to sign. Both Gay and Macfarlane suggest that this may be changing, as in the wake of #MeToo courts have been more willing to roll back NDAs when they represent a risk to public safety.

4.4 Australia

At present, Australia does not have legislation regulating the use of NDAs, though there have been calls for regulation. On the 7th of June 2021, the newspaper *The Age* wrote that the government of the state of Victoria is currently reviewing the use of NDAs in sexual assault cases (Ilanbey, 2021). The state government is looking in particular at how the use of NDAs silences victims and perpetuates the cover-up of sexual assault within the workplace.

A national inquiry into workplace sexual harassment was launched by the *Australian Human Rights Commission* (AHRC) in June 2018. The report from the Inquiry, published in March 2020, found that:

> Workplace sexual harassment is prevalent and pervasive: it occurs in every industry, in every location and at every level, in Australian workplaces. Australians, across the country, are suffering the financial, social, emotional, physical and psychological harm associated with sexual harassment. This is particularly so for women (AHRC, 2020, p. 13).

According to the AHRC (2020), the use of non-disclosure agreements (NDAs) in sexual harassment matters was a 'particularly topical and challenging issue that arose during the Inquiry'. The AHRC reported that it had heard about:

> the benefits of NDAs in sexual harassment matters in protecting the confidentiality and privacy of victims and helping to provide closure. However, there were also concerns that NDAs could be used to protect the reputation of the business or the harasser and contribute to a culture of silence (AHRC, 2020, p. 32).

The AHRC recommended that:

> in conjunction with the Workplace Sexual Harassment Council, it develop a practice note or guideline that identifies best practice principles to inform the development of regulation on the use of NDAs in workplace sexual harassment matters (AHRC, 2020, p. 32).

5. Ireland

There is little existing research on the use or prevalence of NDAs in cases of sexual harassment or discrimination in Ireland. As described earlier the authors of this report sought to establish an understanding of the use of NDAs in Ireland by reaching out to a range of stakeholders, and consulted with non-academic resources, such as solicitors' blogs and newspaper archives. As will be demonstrated below, this preliminary research indicates that NDAs are used in Ireland. They are used pre-emptively in employment arrangements and in the settlement of employment disputes (Carney, 2021; Brennan, 2021b; Crushell, 2021). Despite the absence of media coverage regarding the use of NDAs in cases regarding sexual harassment and discrimination within the last two years; our engagement with stakeholders and other anecdotal evidence, including media reports confirms that they are sometimes used in the settlement of these disputes (Lucey, 2021; Crushell, 2021; Gallagher, 2018). However, the confidential nature of such agreements acts as a barrier to determining the prevalence, or indeed nature of their use and there is extensive scope for further research in this area.

5.1 Evidence of NDA Use in Ireland

As in other jurisdictions, a considerable amount of Irish media attention relating to NDA use concerns their use in high profile cases involving US-based celebrities, such as Harvey Weinstein, and centre around the international #MeToo movement. However, a review of the archives of three national newspapers (*Irish Times*, *Irish Independent*, *Irish Examiner*) over a two year period (Aug 2019-Aug 2021) found no articles referencing the use of NDAs in specific cases of sexual harassment or workplace discrimination within Ireland during this period. However, one article published prior to this period describes an investigation into sexual harassment allegations at UCC which appears to confirm that NDAs have been used in this context in Ireland.

In addition to a review of the media coverage, a range of stakeholders were contacted by the authors of this report, and the websites of solicitors' firms were consulted in order to establish whether or not NDAs are widely used in Ireland and in what contexts they are used. Stakeholder views are discussed in more detail in the next section, while this section will focus primarily on data provided by via email by the *Free Legal Advice Centre* (FLAC), and data from various reports by the *Workplace Relations Commission* (WRC).

The lack of media coverage of the use of NDAs in cases of sexual harassment or workplace discrimination within Ireland during the last two years, contrasts with the assertion that NDAs are typically a standard component of settlements following disputes of this nature in workplace settings (Crushell, 2021). Some stakeholders expressed frustration at this lack of transparency; the *National Women's Council of Ireland* (NWCI) stated that, 'NDAs are used in Ireland, but it is notoriously difficult to ascertain how often and in what way given that they are, by their nature, confidential' (McCarthy Flynn, 2021).

In response to a request for data on the use of NDAs in cases of sexual harassment or discrimination, the FLAC went through all of their equality cases from 2017 to 17th of September 2021. They found no cases relating to either employment or sexual harassment, however of their 10 equality cases from that period 4 included an NDA in the settlement agreement. They specified that these 10 cases were 'settled (not adjudicated on) and were not the subject of mediation- where the agreement is automatically confidential'. The majority of the cases related to access to goods and services, and discrimination on the grounds of race. Further details can be seen in the table below (see Table 1) (Lucey, 2021).

Data on the number of disputes referred to the WRC under the *Equal Status Acts*, and the *Employment Equality Acts* are provided, both on their website and in their annual reports. Some of these disputes are settled via arbitration which does not involve the use of NDAs as it is already confidential. Complainants can also apply to have their dispute heard by a WRC adjudicator. However, following a recent Supreme Court decision, the WRC 'can no longer guarantee hearings will be in private or that decisions would be anonymised', according to Wheatley this may dissuade some

complainants, organisations and/or accused perpetrators from opting to have their case heard before an adjudicator (Wheatley, 2021). This could potentially increase demand for disputes to be settled confidentiality with the aid of an NDA.

While not referring specifically to the use of NDAs, the data in Tables 2 and 3 is useful in identifying the types of equality disputes arising in Ireland. The equality dimension most commonly cited for referrals under the *Equal Status Acts* (in 2018 and 2019) was race, while the dimension most commonly cited during this time for referrals to the WRC under the *Employment Equality Acts* was age. The tables also provide some insight into the year-on-year fluctuations in the number of complaints relating to each equality dimension. For example, Table 2 which includes data on complaints under the *Equal Status Acts*, shows increases of 89% and 100% in the rate of disputes relating to Religion and Sexual Orientation between 2018 and 2019. Conversely, complaints related to Civil Status and Race fell by 77% and 46% respectively during this same period. Similar fluctuations can be seen in Table 3, which for example indicates that there was a 117% increase in the number of complaints relating to the Civil Status (formerly referred to as marital status) ground between 2018 and 2019.

Table 2: Statistics on referrals under the Equal Status Acts in 2018 and 2019

Equal Status	2018	2019	% Difference in cases
Age	62	62	0%
Civil Status	22	5	-77%
Disability	90	73	-19%
Family Status	33	24	-27%
Gender	116	89	-23%
Member of the Travelling Community	124	97	-22%
Race	292	159	-46%
Religion	19	36	89%
Sexual Orientation	6	12	100%
Housing Assistance (HAP)	104	91	-13%
Total	868	648	-25%

Source: (WRC, 2020, p. 24)

Note: Of the 439 Equal Status complaints received, this showed 648 results, when viewing the grounds, as the complainant can choose more than one ground when they make the specific complaint. So, some specific complaints will have more than 1 ground. % rounded to the nearest whole number

Table 3: Statistics on referrals to the WRC under the Employment Equality Acts in 2018 and 2019

Employment Equality	2018	2019	% Difference in cases
Age	714	452	-37%
Civil Status	36	78	117%
Disability	292	329	13%
Family Status	154	184	19%
Gender	318	431	36%
Member of the Travelling Community	6	2	-67%
Race	213	183	-14%
Religion	31	50	61%
Sexual Orientation	28	24	14%
Total	868	648	-25%

Source: (WRC, 2020, p. 25)

Note: Of the 1,288 Employment Equality complaints received, this showed 1,733 results, when viewing the grounds, as the complainant can choose more than one ground when they make the specific complaint. So, some specific complaints will have more than 1 ground. % rounded to the nearest whole number

Additionally, the *HR Company*, a business which specialises in providing Human Resource (HR) Management support to Small and Medium Enterprises (SMEs) provided data to the authors of this report, relating to the use of NDAs in circumstances other than sexual harassment or discrimination. They estimated that they 'created somewhere in the region of 7,287 NDAs last year, and probably more than that'. Regarding the nature of these NDAs the company stated 'We have not ever prepared NDAs for use in discrimination or sexual harassment disputes. Our NDA's cover things like trade secrets, inventions, non-competition, confidentiality, etc.' (Carney, 2021).

Further insight into the broader use of NDAs in Ireland can be gleaned from media coverage. Reviewing two years of articles containing the term 'non-disclosure agreement' and relating to their use within Ireland indicated that the majority of the coverage on this topic related to a small number of specific cases, to their use in business deals, and to their proposed regulation. Two articles related to the use of NDAs in litigation between rugby players who suffered concussions and the *Irish Rugby Football Union* (IRFU) (Watterson, 2020; Cummiskey, 2020). Other media articles addressed the use of NDAs in pricing agreements between the HSE and drug

companies (Coyle, 2021) and potential contracts for the provision of broadband services between Elon Musk's *SpaceX's Starlink* platform and Kerry County Council (Lucey, 2021; Taylor, 2021; Hoare, 2021; Lucey, 2021; Kelleher, 2021; Lucey, 2021).

Two of the most prevalent stories regarding NDAs were those on the use of NDAs by Facebook in their employment of content moderators (Pollak, 2021; Edwards, 2021; Black, 2021; Devane, 2021; Ward, 2021; Ward, 2021; Brennan, 2021; Brennan, 2021a; Brennan, 2021b; Brennan, 2021c) and *CervicalCheck* campaigner Vicky Phelan's decision not to sign an NDA following her legal action regarding her cervical smear test results (Mullallly, 2020; Irish Independent, 2020; Molloy, 2021; McGrath Bryan, 2021; O'Donoghue, 2021; Keane, 2021). A number of articles related to the use of NDAs in the entertainment and filming sector, including an interview with Laura Madden an Irish woman and former employee of Harvey Weinstein's. Although the interviewee is Irish, the article does not discuss NDAs signed within Ireland (Barker, 2021; Finn, 2021; Henry, 2019; Irish Independent, 2020; Enright, 2019). Four other articles covered the use of NDAs in financial and commercial cases or deals (Lee, 2021; Weston, 2019; Pogatchnik, 10; Barker, 2021).

Some articles concerned Irish politics (Ryan, 2021), including one that included an interview with Senator Lynn Ruane, which discussed her political objective for introducing the Private Members Bill regulating the use of NDAs (Bracken, 2021). Much of the most recent coverage relates to Senator Ruane and colleagues' Private Members Bill (PMB) which seeks to regulate the use of NDAs (O'Halloran, 2021a; Rogue Collective, 2021; Bracken, 2021; Kenny, 2021; O'Halloran, 2021), and Minister Roderic O'Gorman's commitment that research would be conducted 'to ensure "we are properly identifying and addressing this issue" while not preventing an individual employee from making their own choices' (O'Halloran, 2021a). The PMB in question is entitled: *Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021 (Bill 82 of 2021)*, and it was sponsored by Senators Lynn Ruane, Eileen Flynn, Frances Black, and Alice-Mary Higgins, on the 1st of June 2021 (Ruane, et al., 2021).

As mentioned at the beginning of this section, one article published in February 2018, titled 'Alleged victims in UCC harassment case asked to sign confidentiality

agreements' appears to confirm that, despite a lack of widespread media coverage, NDAs have been used in this context within Ireland. The article states that:

> University College Cork (UCC) has asked two staff members who complained of sexual harassment by a lecturer to sign confidentiality agreements (Gallagher, 2018).

This request followed accusations of sexual harassment being made by two UCC staff members and a student (all female) against a UCC lecturer. While the article notes that the student involved was not asked to sign the agreement, it also states that the staff members could face 'serious disciplinary action' if they were to 'break the agreement'.

In this newspaper article, the author suggests that the request to sign NDAs in this case was a standard component of UCC's formal process for investigating complaints:

> The policy states when a formal investigation takes place into a staff member, "all aspects of the investigation, including the report and findings must be treated as confidential by all parties concerned."
>
> "Breach of confidentiality by a party of the investigation shall be deemed to be a serious breach of this policy which may result in the invoking of disciplinary proceedings under the university's statutes" (Gallagher, 2018).

5.2 Stakeholder views

There appear to be divergent views among Irish solicitors regarding the use of NDAs in disputes of this nature (sexual harassment, or discrimination). In response to increased scrutiny of such NDAs in the UK, one Irish firm published an article for employers regarding the enforceability of NDAs in Ireland. This article included general guidelines that firms should follow to ensure that their NDAs would be enforceable in the Irish court system (McCann Fitzgerald, 2018). Conversely another firm published two articles by their own solicitors who referred to the 'risk of the "gagging effect" of NDAs' (O'Malley, 2019; O'Malley & O'Rourke, 2021). In one article they described the PMB: 'seeking curtail the use of NDAs in cases where discrimination or sexual harassment are alleged', as: 'a significant development in the

law of equality in Ireland, along with being a watershed moment in the #MeToo movement' (O'Malley & O'Rourke, 2021). In an interview for this report, solicitor Barry Crushell stated that his clients, 80% of who he estimates are employees rather than employers, frequently request that an NDA be included as part of their settlement agreement following an employment dispute (Crushell, 2021).

When asked if he had any concern about legislative reform and the future legal standing of NDAs, Barry Crushell stated that his: 'biggest fear is unintended consequences'. He said that in his experience he has never seen an employee made to sign an NDA without compensation or legal advice and that 'an NDA usually forms part of a wider agreement'. He argued that legislation shouldn't reduce the number of options open to employees who have been victims of sexual harassment or discrimination at work:

> Legislation which would preclude people from a settlement agreement would compel people to go to the courts, to the Labour Court, or the Workplace Relations Commission. A lot of people, particularly employees, would not want this. It would take options off the table for victims. There should be safeguards in place, but victims should not be precluded from settlements or NDA agreements (Crushell, 2021).

Crushell however, did see some room for reform, suggesting that legislation could require that the validity of NDAs depend on 'independent legal advice' (for signatories), and that they should include a 'cooling off period' and a 'compensation clause'. Crushell's recommendations share some similarities with the advice to employers offered by Solicitors McCann Fitzgerald in their blog on the enforceability of NDAs. With reference to recent cases in the UK, they, note that 'the issue has yet to be considered in an Irish context', but suggest that the UK judgements could provide some guidance to employers who wish to ensure that their NDAs are enforceable:

> Employers should ensure that (a) an employee or former employee obtains independent legal advice, (b) the circumstances in which the compromise agreement is signed do not give rise to any indication of bullying or duress; and (c) the compromise agreement includes appropriate exclusions allowing the employee to disclose information to the appropriate legal and regulatory

> authorities. Adopting these measures will put the employers in a good position to defend its NDA (McCann Fitzgerald, 2018).

A leading gender equality NGO, the National Women's Council of Ireland (NWCI), has advocated for reform, and recommends that 'employers should be prohibited from using nondisclosure agreements (NDAs) to prevent women and all workers from disclosing the details of discriminatory, harassing and other unacceptable behaviours and treatment unless the survivor-victim requests one' (McCarthy Flynn, 2021). The NWCI cited the well-documented use of NDAs in the settlement of sexual harassment disputes in the UK higher education sector, and stated: 'NWC believes this unacceptable legal tactic is undermining broad access to justice principles and contributes to erasing the reality of harassment and violence in society and needs urgent reform' (McCarthy Flynn, 2021). The Union of Students in Ireland (USI) are also critical of the use of NDAs with students in Higher Education settings, stating that 'USI would always advise against the use of NDAs with students' (Adebowale, 2021).

Overall, engagement with stakeholders seemed to indicate that some NGOs have a largely negative perception of the use of NDAs in cases of sexual harassment or discrimination, while other NGOs acknowledge that they are used in such circumstances but offer no opinion as to the desirability of their use. Solicitors appear to have a range of views, but tend to emphasise that certain steps should be followed to ensure that an NDA is both ethical and ultimately enforceable. The academics contacted tended to focus on the challenges presented in attempts to study these confidential documents, and to suggest methods that could overcome these challenges (Bull, 2021; Calvert-Lee, 2021; Moorhead, 2021).

6. NDAs: Key issues and challenges

The experience of NDAs in Ireland and internationally raises several key themes or challenges, which can be usefully described in six main ways:

- Power imbalances between signatories
- Negative impacts on complainants
- NDAs as a condition of employment
- Impacts on signatories' careers
- Effect on 3rd party organisations and broader society
- Debates regarding legislative approaches

Each of these themes will now be discussed in more detail.

6.1 Power imbalances between signatories

In many of the scenarios outlined within the literature, the complainant or victim occupies a less powerful position than the accused. For example, complainants are often students or junior staff members within an organisation, while those accused are often in positions of comparative power such as professors or senior managers (Batty, et al., 2017; Macfarlane, 2020; Carlson, 2021). Additionally, abuse, harassment and discrimination often happen within institutions. Macfarlane (2020) has highlighted the fact that the status of an institution is 'built around the reputation of its most important members'. Therefore if a complaint of harassment or discrimination is made against an individual whose reputation is 'entangled' with that of the institution, the institution may prioritise the preservation of the accused's reputation in an effort to shield the organisation as a whole (p. 109). These institutions may have greater access to resources including legal advice than either the complainant, or indeed the accused (Murphy, 2019; Carlson, 2021; Kissane, 2019; Macfarlane, 2020). This imbalance of power may see the interests of that institution, whether reputational or otherwise, win out to the potential detriment of the individual complainant (Murphy, 2019; Macfarlane, 2020).

The desire for confidentiality is often referenced as a preference for both complainants and institutions, many of whom appear to favour arbitration and other confidential methods for settling disputes (Stempel, 2016; Wemple, 2016). However, some complainants wish to be able to speak openly about their experiences for both therapeutic and activist reasons, and out of concern that a confidential setting will see the interests of a well-resourced institution dominate. As referenced in earlier sections, Gretchen Carlson opted to sue her former boss Roger Ailes, personally and in a different state to the one in which she was employed by Fox News, in order to avoid the closed door arbitration mandated by her contract (Wemple, 2016; Carlson, 2021).

The divergence in access to resources (particularly legal advice), between a complainant and the accused, or the institution within which the harassment, abuse or discrimination took place has been associated with unethical practices. For example, reports by some signatories of NDAs indicate that they were not allowed to keep a copy of the document that they had signed (Hull, 2019; Brennan, 2021; Spooner, 2020); some signatories reported signing NDAs without access to independent legal advice (Olivia (pseudonym), 2021); and, some signatories reported feeling coerced or rushed into signing an NDA (Speak out Revolution, 2022a; Branley, 2020).

Many of the sources reviewed for this report tie these practices to the significant power imbalances between the institution or employer and the complainant. Section 6.3 below discusses the requirement for Facebook's content moderators to sign NDAs, with no end date, prior to commencing employment. Such moderators frequently include agency staff who not directly employed by Facebook and potentially even more vulnerable than other employees (Brennan, 2021a). In a 2019 *Irish Independent* interview with Laura Madden, the Irishwoman who spoke out against Harvey Weinstein, Madden described her fear of speaking out against her powerful former employer, even though she had not signed an NDA:

> Madden had never signed a non-disclosure agreement but even so, it wasn't a straightforward decision. "The reason for not going on the record was the fear of being sued, the fear that this big, bad, powerful man was going to take you

> down," she tells me, two years on. “I don't have resources. I was struggling financially, a single mum. Then there's that terrible fear of your career being reframed” (Enright, 2019).

Macfarlane (2020) has argued that her own university was insensitive to the power imbalance between students and a professor against which accusations of bullying and inappropriate behaviour were being made. A student confided in Macfarlane that the university had insisted that the student attend the interview with the investigator alone, and that she not tell anyone about it. Macfarlane outlined to the university three conditions that the student felt were necessary to feel reassured when talking to the investigator: the promise of future confidentiality and anonymity; safety (with plans in place regarding potential ‘future harms’); and the ‘support of the university if the professor were to bring a future legal action against her’ (2020, pp. 117-118).

One interview with a student exemplifies the power imbalance between students and universities. *Olivia*, a student interviewed by the BBC described feeling that she had no choice but to sign an NDA, as it was one clause within a wider agreement provided by her university which would prevent the fellow student that had raped her from contacting her. *Olivia* felt that she had to sign the contract, which included an NDA to enact the safety clauses (Olivia (pseudonym), 2021). Perhaps in response to experiences such as that described by *Olivia*, a common recommendation for the regulation of NDAs is that they should only be considered valid where all signatories have benefitted from independent legal advice, have fully understood the nature of the document that they are signing, and have in no way been coerced into signing (HCWEC, 2019). Additionally, some experts have cautioned that an NDA that has not met these requirements may be effectively unenforceable (McCann Fitzgerald, 2018).

6.2 Negative Impacts on Complainants

The negative psychological impacts of the prohibition on signatories talking about their traumatic experiences, have been noted in a number of other sources (Olivia (pseudonym), 2021; Pollak, 2021). A striking example is a BBC News interview on *Business Daily* with Nuala Walsh, Founding Director of *the Global Association of*

Applied Behavioural Scientists. In the interview, Walsh stated that her research revealed that after the initial dopamine rush of reporting, the overwhelming majority of complainants regret reporting their harassment, due to retaliation from individuals and institutions. She referenced a study from the *California Law Review* of eighty-four whistle-blowers (many of whom had reported sexual harassment) (Walsh, 2021). The study found that, '82% experienced harassment after blowing the whistle, 60% were fired, 17% lost their homes, and 10% admitted to attempted suicide' (Sinzdak, 2008, p. 1655). As of the 3rd of February 2022, 71% of the proportion of Speak out Revolution's 698 survey respondents (the majority of whom are based in the UK) who had formally reported sexual harassment, stated their mental health had deteriorated as a result of the reporting process, while 54% reported that they had been forced to leave their company (Speak Out Revolution, 2022).

Some signatories suffer from feelings of isolation as they were unable to confide in friends and family. Fellow victims are unable to identify and support one another due to the secrecy imposed by the NDA (Olivia (pseudonym), 2021; Brennan, 2021). *Olivia* claimed that when she told her university that if she felt unsafe following her rape, they told her that she should stay in her room. She reported feeling so isolated by her inability to confide in friends and family (due to signing the NDA) that she went on to develop Post Traumatic Stress Disorder (PTSD). The isolation experienced by *Olivia* and others, highlights the potential for NDAs to re-traumatise victims by isolating them from their support networks (Charlotte (pseudonym), 2021; Olivia (pseudonym), 2021; Brennan, 2021). *Olivia* described the university's response to her sexual assault as being worse than the assault itself (Olivia (pseudonym), 2021).

Founded by Zelda Perkins and Prof. Julie MacFarlane, the organisation and website 'Can't Buy My Silence' includes anonymous testimonies from NDA signatories, as well as some testimonies from people who refused to sign an NDA despite pressure to do so. The testimonies come from individuals in a range of jurisdictions, including the UK and Canada. Many of their testimonies include descriptions of severe mental health impacts, financial and career setbacks, and social isolation, with some referencing suicidal ideation following their decision to sign an NDA. The website also includes testimonies from people who chose not to sign an NDA but who have faced ongoing

distress due to refusals by their organisation to investigate their complaint, or due to 'bullying', 'reprisals' or threats following their complaint. There are also testimonies from individuals who are proud of or empowered by their decision not to sign an NDA despite the pressures they faced (Can't Buy My Silence, 2021).

Macfarlane argues that many victims feel increased levels of trauma when subjected to abuse within organisations (universities, churches, workplaces etc.), or at the hands of individuals who they know and in whom they trust. She references 'Betrayal Trauma Theory,' which posits that such victims experience higher levels of dissociation and are likely to minimise their own trauma – a phenomenon she refers to as 'betrayal blindness' (Macfarlane, 2020). She suggest that this is in part due to the fact that institutions inspire loyalty among their members, which may mean that victims of harassment, abuse or discrimination within those institutions may make excuses for and delay reporting mistreatment:

> A would-be complainant is usually acutely conscious of the damage their claims may inflict on an institution to which they feel personal loyalty, and they may have held off complaining for a long time (Macfarlane, 2020, p. 109).

Such loyalty may then compound the feelings of isolation and betrayal many victims feel, when the institution that they trusted prioritises the preservation of its own reputation over their welfare.

6.3 NDAs as a Condition of Employment

The use of broad pre-emptive NDAs which employees must sign prior to commencing employment is well documented (Sockin, et al., 2021a; Balasubramanian, et al., 2021), and is particularly prevalent in the technology sector. However, Sockin et al (2021) argue that these broader NDAs have significant negative consequences and have 'little economic benefit to society'. They prevent the exposure of workplace harms, such as harassment and discrimination, through preventing employees from speaking honestly about their experiences; thereby making it more difficult for potential employees to identify good employers and making it more difficult for 'high-road' employers to distinguish themselves. They also argue that workers get little, if any,

compensation in the form of higher salaries in return for signing such restrictive agreements (Balasubramanian, et al., 2021; Sockin, et al., 2021; Sockin, et al., 2021a).

In her memoir, 'Going Public,' McFarlane (2020) included an anonymous message received from a PhD student, to illustrate the harm that can be caused by unwitting signatories of 'pre-emptive NDAs' – confidentiality agreements that signatories sign as part of the normal process of commencing a job or college course. Signatories may not realise that they are pre-emptively signing away their right to discuss any harassment or discrimination that they may suffer within that organisation. The anonymous student wrote:

> In the past year I was pushed into a sexual relationship with a professor in my department. Eventually it became clear that my marks in his class and my future career all rested on pleasing him sexually…When I talked to the department head… I was…reminded…of the Academic Confidentiality forms we signed as students when we came to (this university). I was informed that if I talked to anyone the school would have the right to sue me for breach of contract. I was told that (a student) who talked to the media years ago has since had her reputation ruined, is known as a slut everywhere, and is broke because of the lawsuits and problems (Macfarlane, 2020, pp. 116-117).

This issue was also raised in the case of sexual harassment at US-based news corporation *Fox News*. The employment contract that *Fox News* employees signed in order to commence their employment included a pledge to resolve any disputes via arbitration – a confidential process in which participants would be prevented from discussing either the dispute itself or the resolution process (Carlson, 2021; Wemple, 2016).

A related issue is the requirement by some organisations that complainants sign an NDA as a condition of investigation into their complaint about sexual harassment or discrimination (Macfarlane, 2020, p. 125; Can't Buy My Silence, 2021). An NDA, such as this, which is not strictly time bound risks leaving a victim unable to get the support they need and may restrict them from openly critiquing the investigation, even if they are ultimately unsatisfied with how their complaint has been handled.

As discussed earlier, in Ireland *Facebook* content moderators sign NDAs prior to, and as a condition of, the commencement of their employment (Brennan, 2021). 'A non-disclosure agreement given to Facebook content moderators requires them to keep information confidential from friends and family members even after they have left their role (Brennan, 2021b).' A statement by *Covalen*, the agency from which *Facebook* have hired Content Moderators points to the ubiquity of NDAs in Irish businesses:

> The company said the use of non-disclosure agreements "is a normal and widespread business practice in every sector" (Brennan, 2021b).

6.4 Impacts on Signatories' Careers

One key finding, of the 2019 House of Commons WEC report, was that signing an NDA can have negative impacts on the future employability and career prospects of a complainant:

> NDAs can have a detrimental effect on people's lives with many signatories suffering emotionally, psychologically, and financially, often due to losing their job and facing difficulties finding work in the same sector again (HCWEC, 2019, p. 3).

Gretchen Carlson, a former employee of *Fox News* and member of the *Hear our Voices* campaign, stated that in her experience women who report sexual harassment at work and go through arbitration, never work in their sector again, because they cannot explain why they have left their previous position (Carlson, 2021). Carlson argued that many women end up in a 'lose-lose scenario' in which they have found themselves in a toxic work environment, but are prevented from seeking employment elsewhere if they report harassment to their employer (Carlson, 2021). Similarly Nuala Walsh cited the high rates at which whistle-blowers (which she counted those who lodge complaints of sexual harassment or discrimination among) are retaliated against or lose their jobs (Walsh, 2021; Sinzdak, 2008).

Conversely, the WEC (2019) received submissions from some employment lawyers who argued that signing an NDA can be in the best interests of both the employer

and the employee. Emma Webster, from *Your Employment Settlement Service* argues that NDAs can be used by complainants to pursue their careers without being labelled a 'troublemaker':

> [A] lot of my clients want these confidentiality clauses themselves…They want to be able to continue their careers without being blacklisted and without being cast as a troublemaker and without being the person who has raised the fact that their previous employer has discriminated against them (p.8).

Irish employment solicitor Barry Crushell made a similar point when contacted as part of the research for this report:

> NDAs usually contain a non-derogatory clause, i.e. each party is usually precluded from making negative comments about the other in public. For someone leaving a workplace, there is also usually an agreed exit narrative that will be used by both parties. Sexual harassment and discrimination clients are often unfortunately concerned about their standing with future employers and so in most circumstances, these provisions (exit narrative, non-derogatory clause, etc.) are also sought by the employee/complainant. Irish industries tend to be very small and clique-y, and complainants do worry about reputational risk (Crushell, 2021).

However while the WEC Report acknowledges this perspective, it suggests that employment lawyers defending the use of NDAs in such cases may not always be fully aware of the potential downsides of signing an NDA. The report argues that while an NDA may appear to be in the best interests of the complainant in the short term, there can be negative longer-term consequences:

> Although employees may be encouraged to sign NDAs by the immediate circumstances, the evidence we have seen demonstrates that in the longer term serious problems can arise for the employee. These include difficulty in moving on with their career, intense fear of repercussions if the agreement is breached, barriers to accessing professional or emotional support for the discrimination or harassment they suffered and other personal and emotional repercussions (WEC, 2019).

There was also evidence of this in anonymised testimonies published on the 'Can't Buy My Silence' website, with some people reporting difficulties in getting a new job

and maintaining their career when they could not speak freely about their previous employment, or provide a complete reference from their previous employer (Speak out Revolution, 2022a).

6.5 3rd party effects: Organisations and Society

Even in cases where all parties (accuser, complainant and institution) agree to sign an NDA, some argue that this may not be in the wider public or organisational interest. This can be the case where the use of NDAs prevents detection of patterns of accusation, when they serve to preserve toxic work environments and block organisational change, and where they obstruct investigation and prosecution of discrimination and harassment cases.

NDAs can prevent the detection of patterns of multiple accusations against specific individuals, within a specific organisation or organisations, or within a specific industry. The Australian Human Rights Commission's enquiry into Workplace Harassment, for example, pointed to the potential for wider negative societal impacts when patterns of abuse remain undetected due to the use of NDAs (AHRC, 2020). NDAs may prevent the identification of people against whom multiple accusations of harassment, abuse or discrimination have been made, thereby enabling them to continue to operate largely undetected (Yeoh, 2021; Macfarlane, 2020). Perhaps the most well-known US-based example of this was the repeated use of NDAs by Harvey Weinstein to obscure a pattern of recurring accusations of workplace sexual misconduct.

NDAs can serve to preserve toxic workplace environments, when used by an organisation or industry to avoid a wider intervention or conversation about the nature of the working culture and promoting a 'culture of secrecy' (AAUW, 2019). The *WEC report* concluded that 'NDAs effectively covers up unlawful discrimination and harassment, allowing management behaviour and organisational culture to go unchallenged and unchanged' (p.9). *Champions of Change* acknowledge that the promise of an NDA may incentivise an employer to compensate an employee who

has suffered harassment or discrimination within their organisation, but that it is not an effective tool to bring about wider organisational or societal change:

> While the current legal system has been important in giving rights and avenues for redress to victims, we know this approach hasn't been effective in eradicating sexual harassment. The use of non-disclosure agreements in particular has silenced people impacted, allowed the behaviour to continue and at times, appeared to condone it (Champions of Change Coalition, 2020).

Macfarlane (2020) and Croxford (2019) have argued that institutions are typically preoccupied with defending their reputations, and this concern is central to determining how they respond to allegations of harassment, abuse or discrimination. As we have seen earlier, there has in recent years been a research and media focus on the use of NDAs in UK universities. Georgina Calvert-Lee, a senior barrister at McAllister Olivarius has outlined some of her concerns to British MPs regarding the risks of using NDAs in such circumstances:

> The danger is that you may have one complaint put in, it's settled with an NDA, but then the university takes no action to prevent the misconduct happening again, and this exposes others to further misconduct by the same perpetrator (Croxford, 2019).

Macfarlane (2020) also criticises universities, claiming that 'low numbers of reported assaults' are sometimes assumed to indicate a 'safe campus' but might instead indicate an institution that discourages reporting and has an 'unwelcome reporting process' (p.111). For Macfarlane (2020) and Yeoh (2021), point to practices whereby NDAs facilitate the transfer of perpetrators from one community or organisation to another (Macfarlane, 2020, p. 125; Yeoh, 2021). Several authors point out that protecting a culture of secrecy can end up costing companies significantly in terms of managing sexual harassment claims, 'a superstar employee that is creating that toxic work environment is probably costing that company more than he or she is bringing in' (Golshan, 2017).

Finally, NDAs can obstruct investigations of unlawful discrimination or harassment. The characterisation of NDAs as a public safety issue has been explored by commentators with reference to case law. Roxanne Davis, an employment lawyer in

Calgary (Canada), has suggested that a lack of legislation regulating the use of NDAs in cases regarding sexual misconduct has led to some (Canadian) courts interpreting NDAs in a manner of their own choosing (Merrifield, 2021). While Davis presents an ambiguous picture, other Canadian commentators such as Macfarlane and Gay argue that courts are increasingly prioritising public safety when an NDA is deemed to be in conflict with preserving it (Macfarlane, 2019; Macfarlane, 2020; Gay, 2019). Gay (2019) attributes this to the influence of the #MeToo campaign on both Canadian courts, and wider society.

6.6 Debates regarding legislative approaches

A key aspect of the debate within the literature, media coverage, and opinions of experts consulted for the purposes of this report, centres around whether to prohibit NDAs entirely in the context of sexual misconduct, or to create legislation regulating their use. A key point of contention within this debate is whether NDAs silence victims or offer them privacy. In order to address problems relating to the silencing of victims of sexual harassment, some commentators have offered suggestions on how to reform the NDA process. This section reviews some of the key arguments in this debate, beginning with a discussion around the possible prohibition of NDAs, before progressing to some suggestions regarding the potential reform of NDA regulation and practice.

6.6.1 Prohibition

According to Dale (2019), some key commentators, such as Ruth Bader Ginsburg, former Associate Justice Supreme Court in the US, support the outright prohibition of NDAs in circumstances relating to sexual assault, and potentially more widely. For Ginsburg, quoted in Dale 2019, the impact of the #MeToo movement had led her to suspect that 'we will not see those agreements anymore' (Dale, 2019). Several commentators, including those who have signed NDAs, argue that they should banned. Zelda Perkins and Prof. Julie MacFarlane are among a number of activists who are campaigning for the prohibition of NDAs: 'when used to "buy" the silence of victims in order to protect sexual predators, bullies, racists and abusers'. They identify five key problems with this use of NDAs: NDA perpetuate the problems, fail to

protect the victims, permanently gag victims, and chill the climate for those wishing to speak up about abuse (Can't Buy My Silence, 2021).

6.6.2 Regulatory and Practice Reforms

Others, however, have 'pushed back on Ginsburg's view', such as Debra Katz and Gloria Allred, both US-based lawyers with experience representing women in cases relating to sexual misconduct (Dale, 2019). They believe that NDAs are 'essential to securing settlements and protecting their clients' privacy,' particularly when clients are looking to find work again (Dale, 2019). Irish solicitor Barry Crushell holds a similar view (Crushell, 2021). For Katz, who represented Christine Blasey Ford in her Senate testimony against Supreme Court Justice Brett Kavanaugh, it is not the responsibility of victims to change the culture (Dale, 2019).

Commentators raise concerns about the 'unintended consequences' of prohibiting NDAs. According to Irish employment solicitor Barry Crushell:

> An NDA usually forms part of a wider agreement. Legislation that would preclude individuals from executing a settlement agreement, containing an NDA clause, may force those individuals to go to the Workplace Relations Commission, the Labour Court or Civil Courts for alternative redress. A lot of employees are reluctant, or unable, to take this route… There should be safeguards in place, but victims should not be precluded from the option of signing a settlements agreement, with an NDA clause, if it suits their circumstances (Crushell, 2021).

Australia's Sexual Discrimination Commissioner, Kate Jenkins, has suggested that NDAs are, in particular circumstances, a valuable tool to protect a victim's privacy (Branley, 2020). For many a choice is a key consideration (Champions of Change Coalition, 2020; Utz, 2021). For the *Champions of Change Coalition*, transparency issues around NDAs can be resolved if the victim agrees to an NDA in which the organisation is able to be transparent about certain aspects of sexual harassment, and provided that the anonymity of the complainant is respected (Champions of Change Coalition, 2020). Others have suggested that organisations should also make it clear to the employee 'that there are also carve outs for bringing the matter to the attention of appropriate law enforcement agencies' (Utz, 2021). Utz's report presents

a benefit/risk analysis of various approaches to NDAs, including a 'traditional NDA', a 'new form NDA or release agreement,' and 'no NDA' (See Table 4, below).

Table 4: Benefit/risk analysis of varying NDA forms*

Types of NDA	Common features	Benefits	Risks
Traditional NDA	• Strict confidentiality clause • Non-disparagement clause in favour of the organisation • Claw-back clause allowing organisation to recover settlement sum and instigate proceedings against complainant if NDA is not complied with	• Preserves complainant's identity (should they require anonymity) • Bars the complainant from making disparaging remarks • Prevents reputational risks of media attention and public scrutiny of the matter • Avoids risk of claims by the respondent (such as defamation claims)	• Reputational risk if the NDA is breached and the conduct is made publicly known, as the organisation may be seen to have 'silenced' the complainant • Limits potential structural and cultural change within an organisation if the complaint is not dealt with transparently • Alleged perpetrator's identity kept confidential, which may allow them to reoffend or commit the same behaviour
New form NDA or release agreement (A 'new' form NDA can take a range of forms)	• Tailored non-disparagement and confidentiality clauses, providing avenues for a complainant to speak about their experience • Clause allowing an organisation to disclose an alleged perpetrator's identity where there is a legitimate public or stakeholder interest • Carve-out clauses included where appropriate, allowing a victim to speak to law enforcement agencies • Avenue for organisation to make statement about investigation(s) and any outcome(s) • A communication to the workplace that is contractually agreed to by the parties	• Can protect complainants whilst allowing them to speaking out about their experience in particular contexts • May aid in a complainant's healing and recovery • May drive cultural change within an organisation • Can hold alleged perpetrator to account • Agreed statements may allow for greater transparency with respect to the misconduct	• Defamation risk from an alleged perpetrator is higher, where they are identified in the complainant's statements and those are publically known • Workers' compensation claim for psychological injury by complainants / respondents • Other claims from respondents including constructive dismissal

No NDA	• - No confidentiality agreement or release of any kind	• Allows a complainant to speak out about their experience • May drive cultural change within an organisation • Can hold alleged perpetrators to account • Transparency allows boards and stakeholders a clearer picture for addressing sexual harassment and remedial action required	• Reputational risk if sexual misconduct perpetrated gains media attention • Defamation risk from the alleged perpetrator • Retaliatory conduct against complainants • Workers' compensation claim for psychological injury by complainants / respondents • Other claims from respondents including constructive dismissal

Source: Clayton Utz, 2021, pp. 24-25

***Note:** Table 4 Outlines the costs and benefits, from the perspective of the organisation or employer, to whom a complaint has been made (Utz, 2021).

6.6.3 One-Sided Confidentiality Clauses

A solution to the challenges posed by NDAs that has been proposed by some experts in the area, is the use of one-sided 'confidentiality clauses'. As we have seen, confidentiality is a preference for many sexual harassment and assault complainants. According to *New York Times* journalist Jodi Kantor, when interviewed by CBC journalist Carmen Merrifield (2020), victims of sexual assault and harassment tend to want privacy, but 'don't necessarily want secrecy'. Instead, they want 'how much to tell, what to tell, to be under their control' (Merrifield, 2020). While victims may believe that the only way to ensure their own privacy is to agree to an NDA that protects the accused, it is possible for confidentiality clauses to be one-sided, in favour of the complainant, allowing for 'a complainant to choose to speak out in future if they wish to waive this' (Macfarlane, 2020, p. 124).

A BBC article written by Rianna Croxford, and published on the 17th of April 2019, described the case of Emma Chapman. Chapman, an award-winning astrophysicist, says she was sexually harassed at *University College London* (UCL), and received a £70,000 payout after a two-year legal challenge. She refused to sign an NDA, instead being granted a one-sided 'confidentiality waiver,' reported to be (potentially) the first

of its kind. Now a campaigner with The *1752 Group* to end sexual misconduct in higher education, Chapman, quoted in Croxford (2019) wants to see:

> this culture of silence banished and confidentiality waivers being given as standard, so that victims can protect their careers and universities are held to account (Croxford, 2019).

For its part, UCL says it no longer uses NDAs for cases of bullying, harassment and sexual misconduct, but acknowledges that '"historically"' it has '"not always got the balance right"' (Croxford, 2019). One sided confidentiality clauses may be an innovative way for victims of harassment or discrimination to preserve their privacy while maintaining their right to speak openly about their experiences. However, there is a concern that employers or those accused of misconduct would see no advantage for themselves in such agreements and they may be less willing to agree to settlements accompanied by confidentiality clauses than those accompanied by traditional NDAs.

7. Conclusion

This report has explored the use of NDAs in cases of alleged sexual harassment or discrimination, in Ireland and a number of other jurisdictions, including the UK, USA, Canada and Australia. As discussed throughout the report, this topic has experienced increased scrutiny internationally in recent years, following the revelation that Hollywood producer Harvey Weinstein used NDAs to cover up his pattern of repeated sexual harassment and assault of women. Although this case sparked an international media focus on the use of NDAs in this context, a review of Irish media from the previous two years found no reference to the use of NDAs in domestic sexual harassment or discrimination disputes, although it did indicate that they are widely used by businesses in a range of contexts. Additionally, an article published in the Irish Times in 2018 concerning an NDA which two female staff members of University College Cork (UCC) were asked to sign following their allegations of sexual harassment against a lecturer at the same university appears to confirm that; despite a lack of media coverage, NDAs are used in this context within Ireland (Gallagher, 2018).

This report examined the impact of NDAs on both signatories and wider society, focussing on a number of recurring themes, and recommendations for best practice from both national and international sources, including the following:

- All parties should receive legal advice prior to signing (Crushell, 2021; HCWEC, 2019) (McCann Fitzgerald, 2018);
- Signatories should not be rushed or coerced into signing an NDA (HCWEC, 2019; McCann Fitzgerald, 2018);
- Employees who sign NDAs should be provided with a copy of the agreement (Hull, 2019; Brennan, 2021; Spooner, 2020);
- Complainants would benefit from an agreed exit story and/or non-derogatory clause (Crushell, 2021; WEC, 2019) between employer and employee, to ensure that they can successfully pursue employment elsewhere;
- NDAs should not prevent complainants from being able to draw upon personal and social supports, exemptions should be made for discussing their experiences with close friends, family members, medical personnel and regulatory authorities (Olivia (pseudonym), 2021; Brennan, 2021; Champions of Change Coalition, 2020; Utz, 2021; Mendonca-Richards, 2021);

- Ensure that NDAs are not used to preserve toxic workplace cultures or to stifle investigations of misconduct (WEC, 2019; Champions of Change Coalition, 2020);
- NDAs should not act as a barrier to researching sexual harassment or discrimination, amnesties should be granted to allow signatories to discuss their experiences with researchers or in public in anonymised format (AHRC, 2020; Utz, 2021);
- NDAs should be time bound (Lambert & Lambert PLC, 2015).

The key recommendation for employers was that: prevention is key; HR practices should encourage reporting and foster a workplace culture that does not tolerate sexual harassment or discrimination. However, in cases in which a settlement following a dispute, includes an NDA, employers should ensure that best practice (as outlined above) is followed.

Despite the increased scrutiny on the use of NDAs in the context of sexual harassment or discrimination disputes, and the resulting calls for either their prohibition or regulation in such contexts; to date, none of the other jurisdictions examined have introduced national legislation regulating the use of NDA. However, one Canadian province has recently voted for a Bill, a number of US States have passed laws, and a number of other US States are considering Bills, that would regulate their use. If the recent Private Members Bill, designed to regulate the use of Non-Disclosure Agreements (NDAs) (Ruane, et al., 2021) in Ireland, becomes legislation, it will be the first national legislation of its kind internationally (O'Malley & O'Rourke, 2021).

This report provides an overview of both international literature on the use of NDAs in cases of sexual harassment and discrimination, and evidence of the use of NDAs within Ireland, gathered from engagement with stakeholders and a review of other resources. However, this report also emphasises that there are significant research and data gaps relating to the use and prevalence of NDAs in cases of sexual harassment and discrimination, both in Ireland and internationally. Potential methods for further research include:

- Inviting signatories of NDAs concerning sexual harassment or discrimination to provide anonymous written and oral submissions;
- Issuing Freedom of Information requests to relevant organisations;

- Survey questionnaires;
- Documentary analysis of NDA texts;
- Requesting employers to issue limited NDA waivers, for research purposes.

The objective to this report was to draw together what is known about NDAs in order to provide a resource to policy-makers in their deliberations about any future regulation of their use in the Irish context. However, further research is required if policy makers are to have a clearer picture of this important issue for which there is currently little available Irish data and analysis, as NDAs face closer scrutiny and government regulation in the coming years. A key goal of this report, was therefore, to provide recommendations of methods for further enquiry, as outlined above and in greater detail within the report.

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