



An Roinn Leanaí, Comhionannais,
Míchumais, Lánpháirtíochta agus Óige
Department of Children, Equality,
Disability, Integration and Youth

The prevalence and use of Non-disclosure Agreements in sexual harassment and discrimination disputes

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Outline of presentation:

- Methodologies
- Objectives
- Experiences of other jurisdictions: UK, USA, Australia and Canada
- Evidence of NDAs in Ireland
- Perspectives of Irish stakeholders
- Common themes
- Conclusions and recommendations



Objectives

- To draw together what is known about NDAs, to provide a resource to policy makers in their deliberations about any future regulation of their use in the Irish context e.g. 'Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021' and the ongoing review of Ireland's Equality Acts.
- To recommend methodologies for further research, in recognition of the challenge of researching confidential contracts and the resulting data gaps in this area.



Report Methodology

Getting started

Contacting Senator Lynn Ruane's office, and reading her Private Member's Bill 'Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021'

Literature Review

Newspaper articles, journal articles, governmental reports, podcasts, books, websites and blogs from Ireland, UK, Australia, USA and Canada

Contacting Stakeholders

Solicitors, Unions, Legal Practitioners' associations, Academics, NGOs, HR consultants

Searching newspaper archives

Searched the Irish Times, Irish Independent, Irish Examiner online archives for use of the term 'non disclosure agreements' in the past decade, and reviewed articles from the last two years



NDA research methods

Freedom of Information Requests

BBC News and the Guardian have used FOI requests to expose alleged bullying and sexual harassment within UK universities and the use of NDAs in settlements regarding these disputes.

Consultation and Calls for submissions

The UK House of Commons Women and Equalities Committee (WEC) and the Dept. of Business, Energy and Industrial Strategy gathered data for their reports on NDAs through soliciting written and oral submissions from interested parties. As did the **Australian Human Rights Commission** in its enquiry into workplace sexual harassment, aided in part by **NDA waivers** issued by 39 employers.

Surveys

This method was suggested by some of the academics contacted for this report. eg. surveying lawyers who advise on NDAs using panel surveys.

Qualitative Analysis of an archive of NDA texts

Establishing an archive of NDA texts to analyse what they say, why and how they are being used, and their impacts.



Looking to other jurisdictions

- Report examines experience of other countries in researching and addressing the use of NDAs in cases of sexual harassment and discrimination
- Sections dedicated to the **UK, USA, Canada and Australia**
- All of these jurisdictions have seen **increased scrutiny** of the use of NDAs in **potentially unethical circumstances** in recent years, following the revelations of their use to silence victims of sexual assault by Hollywood producer Harvey Weinstein and the launch of the **#MeToo movement**
- **None of these countries have introduced national legislation** regulating the use of NDAs, however a Canadian province and number of US states have passed laws and a number of other states are considering bills, regulating their use



Looking to other jurisdictions

- The main focus in these jurisdictions has been the use of NDAs in the context of **employment** relationships, however in the UK there has been a lot of scrutiny of the use of NDAs by universities in dealings with their students
- **Fox News: Gretchen Carlson sued former boss Roger Ailes for sexual harassment (USA)**
 - Power imbalance: Ailes was more senior than the multiple women he harassed
 - Pre-emptive NDAs: Fox's employment contract mandated that sexual harassment cases be settled via confidential arbitration
 - NDAs prevent Ailes' victims from speaking openly about their experiences





Evidence of NDA Use in Ireland

- Newspaper reports

Searching the archives of the Irish Times, Irish Independent and Irish Examiner for the term ‘non-disclosure agreement’ returned a number of articles referencing the use of NDAs in Ireland.

Many reported the requirement for Facebook content moderators to sign NDAs which prevent them from discussing their work and ‘trauma’ with friends or family.

Many others discussed the cervical check scandal and campaigner Vicky Phelan’s refusal to sign an NDA. When asked what she was most proud of, she cited this:

“Not signing a nondisclosure agreement. That one decision has saved lives, helped other women to get the support they needed and has opened up a wider conversation about women’s health and women’s issues in Ireland (Irish Independent <http://www.independent.ie> 7 March 2020) ”



Evidence of NDA Use in Ireland

- Newspaper reports

‘Alleged victims in UCC harassment case asked to sign confidentiality agreements’(Irish Times, 12th of February 2018)

The Irish Times reported that University College Cork (UCC) asked two staff members who complained of sexual harassment by a lecturer to sign confidentiality agreements

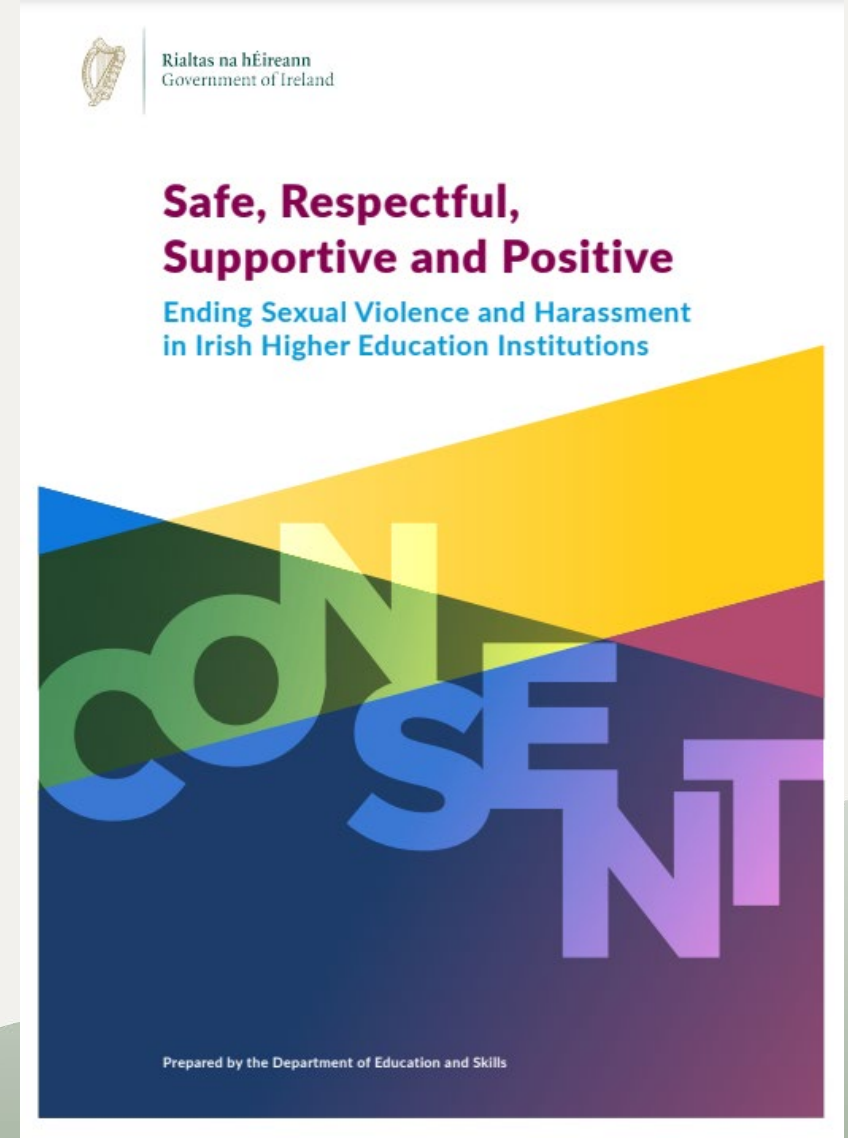
“Breach of confidentiality by a party of the investigation shall be deemed to be a serious breach of this policy which may result in the invoking of disciplinary proceedings under the university’s statutes” (Gallagher, 2018).



- The Framework for ending Sexual Violence and Harassment in Irish Higher Education Institutions was launched on 5 April 2019.

‘A HEI’s procedures and processes should uphold the principles of natural justice. Both parties have a right to a good name and therefore their right to confidentiality and anonymity is respected (issues relating to child protection are a distinct issue). Importantly, this principle is not used to silence students (in non-disclosure agreements etc.) (Department of Education and Skills, 2019).’

- UCC’s Framework Action Plan was submitted to the HEA in March 2021





Evidence of NDA Use in Ireland

- **Statements by solicitors**

A number of solicitors have written blogs referencing the use of NDAs in Ireland, some with a specific focus on their use in cases of discrimination and sexual harassment.

In an article in *Employment Law* published on the 5th of July 2021 in response to this Bill, Solicitors Catherine Jane O'Rourke and Breda O'Malley wrote:

'Non-disclosure agreements ("NDA") have been heavily scrutinised in recent years, particularly since the #MeToo movement, and since stories have emerged of victims of workplace harassment and discrimination being prevented from speaking publicly.'



Evidence of NDA Use in Ireland

- **Statements by solicitors**

When asked if he had any concern about legislative reform and the future legal standing of NDAs, one Irish solicitor stated that his: *'biggest fear is unintended consequences*

'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'



Evidence of NDA Use in Ireland

- **Solicitors and other organisations advertising NDA services**

Some organisations and individuals with expertise in the area offer their services in drafting or advising on NDAs, and some websites allow users to download an NDA template in return for a small fee

- **Statements from Employers**

Many employers reference their use of NDAs in professional contexts.

For example: A statement by Covalen, the agency from which Facebook 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” (Irish Examiner, 12th of May 2021



Perspectives of Irish stakeholders

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'

The Union of Students of Ireland (USI) stated they would:

'always advise against the use of NDAs with students'

Another organisation lamented that:

'NDAs favour the powerful'



Recurring themes of NDA use in cases of harassment and discrimination

- Power imbalances between signatories
- Signatories being blacklisted and unable to find employment in their sector again
- Potential conflict between the interests of individual victims who value confidentiality, and society as a whole
- A pattern of multiple accusations against a single individual may not be detected
- Preservation of toxic workplace environments
- NDAs being used to obstruct investigations of unlawful discrimination or harassment
- Desire to avoid court and protect confidentiality
- Signatories feeling isolated from family and friends
- Legal advice being one sided employer only



Prohibition or Reform?

Some stakeholders advocate for effectively prohibiting NDAs in cases of sexual harassment and discrimination, others argue that effective regulation is preferable and that NDAs must remain an option for victims

- **Prohibition advocates suggest one-sided confidentiality agreements**
- **Regulation advocates recommend:**
 - Agreements should be **time bound**
 - **Parties to whom signatories can legally disclose should be identified** e.g. Gardaí, regulatory organisations, and some close friends or family members
 - All parties should receive **legal advice** prior to signing
 - No one should be **coerced** into signing an NDA, and they should be given **sufficient time to think over the decision**
 - **Exit stories** should be agreed between employees and employers to ensure complainants are not **blacklisted**



An overview of conclusions and recommendations from stakeholders

- **Prevention** is key: employers should have **HR practices** that encourage reporting and a workplace culture that does not tolerate harassment or discrimination
- Academics focussed on the **inherent barriers to researching the use and impact of confidential agreements** and suggested methods for overcoming this.
- **Further research and better data** on the topic is required e.g. via engagement with the Workplace Relations Commission
- There was **abroad consensus that some reform is needed**, but disagreement as to the optimum legislative response



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Thank you for listening

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You can read
the full report
here

