



The Bar Council

Consultation on regulations to prevent the misuse of NDAs in cases of workplace harassment or discrimination

July 2026

About us

The Bar Council is the voice of the barrister profession in England and Wales. Our 18,000+ members – self-employed and employed barristers – make up a united Bar that aims to be strong, inclusive, independent and influential.

As well as championing the rule of law and access to justice, we lead, represent and support the Bar in the public interest through:

- Providing advice, guidance, services, training and events for our members to support career development and help maintain the highest standards of ethics and conduct
- Inspiring and supporting the next generation of barristers from all backgrounds
- Working to enhance diversity and inclusion at the Bar
- Encouraging a positive culture where wellbeing is prioritised and people can thrive in their careers

- Drawing on our members' expertise to influence policy and legislation that relates to
- Sharing barristers' vital contributions to society with the public, media and policymakers
- Developing career and business opportunities for barristers at home and abroad through promoting the Bar of England and Wales
- Engaging with national Bars and international Bar associations to facilitate the exchange of knowledge and the development of legal links and legal business overseas

To ensure joined-up support, we work within the wider ecosystem of the Bar alongside the Inns, circuits and specialist Bar associations, as well as with the Institute of Barristers' Clerks and the Legal Practice Management Association.

As the General Council of the Bar, we're the approved regulator for all practising barristers in England and Wales.

We delegate our statutory regulatory functions to the operationally independent Bar Standards Board (BSB) as required by the Legal Services Act 2007.

Introduction

This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Department for Business and Trade consultation on Make Work Pay: Consultation on regulations to prevent the misuse of NDAs in cases of workplace harassment or discrimination.¹

References

¹ [Consultation](#)

Summary of NDA consultation questions

Question 1. Do you agree it should be a condition that the worker has received independent advice on the terms and effect, and the legal limitations of a proposed excepted agreement, before entering into the agreement?

a) Yes

b) No

c) Don't know

d) If no, please explain why.

Question 2. Do you agree that the independent advice must be given in writing?

a) Yes

b) No

c) Don't know

d) If no, please explain why.

Many cases settle during proceedings when time is of the essence if the parties are to reach an agreement and in reality a requirement that advice must *always* be given in writing may have a chilling effect on settlement. While it is of course preferable that parties consider alternative dispute resolution early in proceedings, the reality has always been that many agreements are reached at the doors of the court / tribunal or even part way through evidence at trial / final hearing of the matter. Whilst it is preferable for the independent advice to be given in writing we consider there should be a provision that allows for advice to be given orally and for it to be confirmed that such advice has been given in the same way as for effective compromise agreements of claims under the Employment Rights Act 1996 and Equality Act 2010; see for

example section 203 Employment Rights Act 1996 and sub-section 203(3) in particular. A similar structure may prove useful in this context.

Question 3. Do you agree that employers should not have to cover the cost of independent advice?

a) Yes

b) No

c) Don't know

d) If no, please explain why.

There are many cases in which there is a fundamental inequality of arms with the employer being in a much stronger position to access and pay for legal advice and representation than a claimant-employee who is much more likely to be unrepresented or to have limited access to legal assistance. However there are other categories of case in which employees are economically well-matched in proceedings e.g. senior executive cases. In that admittedly smaller category of cases, the employee may be well placed to pay for legal advice. Ultimately it should remain a matter for the parties as to whether an employer offers to pay for the necessary advice in order to ensure any excepted agreement is enforceable but not compelled.

Question 4. For private settlement agreements, do you have any concerns about requiring the worker to receive independent written advice on the terms and effect, and legal limitations of the NDA?

a) Yes

b) No

c) Don't know

d) If yes, please explain what these concerns are, what might be the costs or implications and how might these be mitigated.

Question 5. For Acas facilitated COT3 agreements, do you have any concerns about requiring the worker to have received independent advice in writing on the terms and effect, and legal limitations of the NDA?

a) Yes

b) No

c) Don't know

d) If yes, please explain what these concerns are, what might be the costs or implications and how might these be mitigated.

Many cases settle during proceedings when time is of the essence if the parties are to reach an agreement and in reality a requirement that advice must *always* be given in writing may have a chilling effect on settlement. While it is of course preferable that parties consider alternative dispute resolution early in proceedings, the reality has always been that many agreements are reached at the doors of the court / tribunal or even part way through evidence at trial / final hearing of the matter. It is at these times that Acas officers' assistance is frequently sought in order to reach a binding COT3 agreement in the time there is. Whilst it is preferable for the independent advice to be given in writing we consider there should be a provision that allows for advice to be given orally and for it to be confirmed that such advice has been given in the same way as for effective compromise agreements of claims under the Employment Rights Act 1996 and Equality Act 2010; see for example section 203 Employment Rights Act 1996 and sub-section 203(3) in particular. A similar structure may prove useful in this context with a carve out allowing COT3s to be agreed without such advice.

Question 6. Should Acas conciliators should be included as relevant independent advisors?

a) Yes

b) No

c) Don't know

d) Please explain why.

They are already able to advise in a way that satisfies the requirements for a binding compromise of rights arising under legislation such as the Equality Act 2010. It would be inconsistent with this for Acas not to be able to advise and assist in reaching a COT3 where an excepted agreement is involved.

Question 7. Should an independent advisor be required to provide other advice in writing to a worker, in addition to those proposed in this section, on:

- The terms and effect of the proposed NDA; and
- The legal limitations of the NDA.

a) Yes

b) No

c) Don't know

d) If no, please explain why.

e) If yes, please explain what other advice you think should be provided in writing and

why.

No, we consider that the advice which it is proposed that the independent advisor will provide is sufficient and to require more advice to be provided would be disproportionate to the aims of protection and may indeed cause further delay and complicate the process of settlement / agreement. Given that the proposal does not envisage that the employer will pay for this advice (with which we agree), this will

also add a further cost burden to the person seeking advice, which we consider to be inappropriate in the circumstances.

Question 8. Do you agree that it should be a condition in the regulations that the worker has expressed their preference for an excepted agreement in writing following the receipt of independent advice on the proposed agreement?

a) Yes

b) No

c) Don't know

d) If no, please explain why.

Question 9. Do you agree that the regulations should not prescribe the form and style of the worker's preference?

a) Yes

b) No

c) Don't know

d) If no, please explain why.

Clarity and certainty are valuable in this context so the parties know if they are reaching terms on an enforceable basis and to avoid disputes or even litigation further down the line. It should be relatively simple to provide that the worker's preference should be expressed in writing and signed and dated with a confirmation that it post-dates the independent advice in question, and with a carveout for Acas facilitated settlements.

Question 10. Should an employer be able to suggest confidentiality to their workers?

a) Yes

b) No

c) Don't know

d) Please explain why.

Either party should have the freedom to make a proposal, so long as it is not oppressive in nature. The mere suggestion on confidentiality by an employer without more is not oppressive and should continue to be allowed.

Question 11. For private settlement agreements, do you have any concerns about requiring a worker to express their preference in writing to enter into the agreement?

a) Yes

b) No

c) Don't know

d) If yes, please explain what these concerns are, what might be the costs or implications and how might these be mitigated.

Question 12. For Acas facilitated COT3 agreements, do you have any concerns about requiring a worker to express their preference in writing to enter into the agreement?

a) Yes

b) No

c) Don't know

d) If yes, please explain what these concerns are, what might be the costs or implications and how might these be mitigated.

Many cases settle during proceedings when time is of the essence if the parties are to reach an agreement. It is at these times that Acas officers' assistance is frequently

sought in order to reach a binding COT3 agreement in the time there is. Whilst it is preferable for the worker's post advice preference to be expressed in writing, we consider there should be a provision that allows for this information to be given orally to Acas and for it to be confirmed that such confirmation has been given in the same way as for effective compromise agreements of claims under the Employment Rights Act 1996 and Equality Act 2010; see for example section 203 Employment Rights Act 1996 and sub-section 203(3) in particular. A similar structure may prove useful in this context with a carve out allowing COT3s to be agreed without a written statement of preference.

Question 13. Do you agree that an excepted agreement should be required to include a cooling off period?

a) Yes

b) No

c) Don't know

d) If no, please explain your answer.

Parties who are negotiating agreements before or during proceedings conclude are looking for finality and certainty. It would have a chilling effect on ADR for there to be a cooling off period where a hearing has already started. Put simply, if parties agreed terms during a hearing, which then resulted in withdrawal of claims and a claim being dismissed on withdrawal or a Tomlin order for example, the existence of a cooling off period would cause substantial practical and legal difficulties. The risk of the litigation being re-opened would have a chilling effect and the cooling off period may of itself cause employees or workers to ruminate and reach a decision contrary to their own interests. Much depends on what the government's policy choices are in this regard, which we do not comment on. An already choked Employment Tribunal system has little if any bandwidth to deal with re-opened proceedings and relisting a hearing may take *years* not months in today's reality.

Question 14. Do you agree that 14-days is a sufficient length of time for a cooling off period?

a) Yes

b) No

c) Don't know

Question 15. If no, what length of cooling off period would you consider appropriate, and why?

a) 7 days

b) 10 days

c) Other.

d) Please explain why.

This does not logically follow from question 14. However, our view is that 7 days is sufficient (and therefore as responded to in question 14, 14 days is also sufficient but is more than we consider necessary). This does not obviate the difficulties referred to in respect of question 13.

Question 16. Should any required cooling off period only apply to the confidentiality clauses within an excepted agreement?

a) Yes

b) No

c) Don't know

d) Please explain why.

It is the very mischief which these regulations are to address and therefore is little rational sense in striking down any other elements of an agreement if the parties are

content to abide by them. The difficulty of course is that for many settlement agreements various payments and actions will be conditional or contingent upon confidentiality and so if the provision / NDA can be unravelled after a cooling off period this may have a chilling effect overall in terms of settlements being reached especially once a hearing has started.

Question 17. Should workers be allowed flexibility to waive the cooling off period?

a) Yes

b) No

c) Don't know

d) Please explain why.

If the principle is that workers / employees need protection in the form of a cooling period so they can be sure as to their intentions and decisions then being allowed to waive this protection undermines its very basis.

Question 18. Do you have any concerns about requiring a 'cooling-off' period for private settlement agreements?

a) Yes

b) No

c) Don't know

d) If yes, please explain what these concerns are, what might be the costs or implications and how might these be mitigated.

Parties who are negotiating agreements before or during proceedings conclude are looking for finality and certainty. It would have a chilling effect on ADR for there to be a cooling off period where a hearing has already started. Put simply, if parties agreed terms during a hearing, which then resulted in withdrawal of claims and a claim being dismissed on withdrawal or a Tomlin order for example, the existence of

a cooling off period would cause substantial practical and legal difficulties. The risk of the litigation being re-opened would have a chilling effect and the cooling off period may of itself cause employees or workers to ruminate and reach a decision contrary to their own interests. Much depends on what the government's policy choices are in this regard, which we do not comment on. An already choked Employment Tribunal system has little if any bandwidth to deal with re-opened proceedings and relisting a hearing may take *years* not months in today's reality.

Question 19. Do you have any concerns about requiring a 'cooling off' period in an Acas facilitated COT3 agreement?

a) Yes

b) No

c) Don't know

d) If yes, please explain what these concerns are, what might be the costs or implications and how might these be mitigated.

Parties who are negotiating agreements before or during proceedings conclude are looking for finality and certainty. It would have a chilling effect on ADR for there to be a cooling off period where a hearing has already started. Put simply, if parties agreed terms during a hearing, which then resulted in withdrawal of claims and a claim being dismissed on withdrawal, the existence of a cooling off period would cause substantial practical and legal difficulties. The risk of the litigation being re-opened would have a chilling effect and the cooling off period may of itself cause employees or workers to ruminate and reach a decision contrary to their own interests. Acas often facilitates agreements where settlement occurs partway through a hearing. Much depends on what the government's policy choices are in this regard, which we do not comment on. An already choked Employment Tribunal system has little if any bandwidth to deal with re-opened proceedings and relisting a hearing may take *years* not months in today's reality.

Question 20. Do you agree that there should not be a mandatory statutory review period before an excepted agreement is entered into?

a) Yes

b) No

c) Don't know

d) If no, please explain why and what length the review period should be.

Given the proposal to mandate independent legal advice, the statutory review period is in our view excessive, doubly so if to be mandated in addition to a cooling off period. The New York regime is not a good comparator to the UK labour law jurisprudence and legislation. It would not be consistent with the sensible regime in place for compromise agreements in general for those with NDAs i.e. confidentiality provisions contained within them to be elevated to this level of protection and is too wide an incursion into the principle of freedom of contract.

Question 21. Should both a review and cooling off period be conditions of an excepted agreement?

a) Yes

b) No

c) Don't know

d) Please explain why.

This is excessive for the reasons given above, will cause fewer claims to settle in our view, which is hazardous in the current climate of backlogs and huge delays in cases being heard and inconsistent with the regime in place for settling employment claims generally.

Question 22. Do you agree that a written copy of the excepted agreement should be provided to all parties to the agreement?

a) Yes

b) No

c) Don't know

d) If no, please explain why.

Question 23. Do you agree it should be a requirement that an excepted agreement is made available to the parties in any accessible format they may need?

a) Yes

b) No

c) Don't know

d) If no, please explain why.

Question 24. Should an excepted agreement be written in plain language?

a) Yes

b) No

c) Don't know

d) Please explain why.

Every agreement should be written in language that facilitates the parties' understanding of its terms. Here where the concern is inequality of bargaining power and protected of potentially vulnerable parties, it is important that an excepted agreement is written in a way that facilitates clarity and comprehension, but what that means in each case will vary. Plain language is a subjective concept.

Question 25. Should regulations require an excepted agreement to be in plain language?

a) Yes

b) No

c) Don't know

d) Please explain why.

Every agreement should be written in language that facilitates the parties' understanding of its terms. Here where the concern is inequality of bargaining power and protected of potentially vulnerable parties, it is important that an excepted agreement is written in a way that facilitates clarity and comprehension, but what that means in each case will vary. Plain language is a subjective concept. To simply require agreements to be in "plain language" without more is not useful. To emphasise the need for parties to be able to fully understand the agreement and how its clauses operate and interact is useful. To avoid jargon or technical language without clear explanations could also be usefully mandated.

Question 26. Should guidance, rather than regulations, set out that an excepted agreement should be written in plain language?

a) Yes

b) No

c) Don't know

d) Please explain why.

Every agreement should be written in language that facilitates the parties' understanding of its terms. Here where the concern is inequality of bargaining power

and protected of potentially vulnerable parties, it is important that an excepted agreement is written in a way that facilitates clarity and comprehension, but what that means in each case will vary. Plain language is a subjective concept. To simply require agreements to be in “plain language” without more is not useful. To emphasise the need for parties to be able to fully understand the agreement and how its clauses operate and interact is useful. To avoid jargon or technical language without clear explanations could also be usefully highlighted.

Question 27. Do you agree it should be a condition that an excepted agreement can only be entered into where it would prevent a worker speaking out about an incident of relevant harassment or discrimination which has already taken place?

a) Yes

b) No

c) Don't know

d) If no, please explain why.

To do otherwise would be oppressive and disproportionate. The worker / employee has no means of weighing up the consequences of some statutory tort that is yet to occur. This is akin to the position when settling complaints of personal injury in tribunal claims where the injury has accrued as of opposed to future claims.

Question 28. Should the confidentiality obligations relating to relevant harassment and discrimination in an excepted agreement be required to be time-limited?

a) Yes

b) No

c) Don't know

d) Please explain why.

There is no principled basis for placing a time limit on an otherwise enforceable agreement of this kind.

Question 29. If a time-limit is required, should government stipulate a maximum time-limit?

a) Yes

b) No

c) Don't know

d) Please explain why.

Question 30. If yes, what should the maximum time-limit be? Please explain why.

a) 1 year

b) 2-3 year

c) 4-5 years

d) 6-10 years

e) No set duration, the worker is able to choose a time-limit if they would like to

f) [Open text response]

The option should remain available for parties to negotiate a time limited agreement if they wish to.

Question 31. Are there any other conditions or safeguards that should be required for excepted agreements to help prevent the misuse of NDAs in cases of discrimination and harassment?

Please describe any additional conditions you would recommend and explain how they would help address potential risks or improve protections for individuals.

The requirement for independent legal advice is sufficient.

Question 32. Do you agree a worker should be able to make disclosures to the individuals and bodies included in the proposal above, when a worker has entered into an excepted agreement?

Please select from the list those individuals and/or bodies which you agree workers should be able to make disclosures to.

- a) Any person who has law enforcement functions.**
- b) A qualified lawyer**
- c) Any individual who is entitled to practise a regulated profession or a tax advisor**
- d) Any individual who provides a service to support victims
- e) A regulatory body.**
- f) A trade union representative accompanying workers in grievance and disciplinary cases, a trade union equality representative, or a trade union representative authorised to give advice on settlement agreements.
- g) A person who is authorised to receive information on behalf of a person mentioned in all of the above**
- h) Close family members**
- i) Don't know
- j) If no to any of the above, please explain why.

It is important to have regard to the provisions contained in section 17 Victims and Prisoners Act 2024 and the whistleblowing provisions contained in Employment

Rights Act 1996 to ensure that NDAs / their enforceability does not become even more of a patchwork quilt of obligations and exceptions. There is no principled basis for preventing someone from accessing advice and support from a regulated professional, whether medical, healthcare, or legal, for example, or making disclosures as required by law even where an excepted agreement is concluded. This recognises that regulated professionals are under duties of confidentiality / professionally obliged to treat confidential information with probity. While this does not apply to close family members, it is recognised as being highly oppressive to prevent someone from disclosing matters to a close family member and a carve out for this purpose is a common feature of NDAs. The difficulty with allowing unregulated persons to be on a safe list for disclosure is that it fundamentally devalues the NDA and creates risks contrary to the agreement which has been negotiated. Persons who provide support services to “victims” as defined need have no regulatory duties or obligations at all and may indeed be assisting in the context of campaigning activities. There are obvious difficulties in allowing disclosures to trade union representatives who may be colleagues or involved in sensitive workplace issues affecting other staff which may create a host of problems and conflicts.

Question 33. Are there any individuals or organisations not included in the proposal above that you think a worker should be able to make a disclosure to?

- a) Yes
- b) No
- c) Don't know
- d) If yes, please explain who and why.

On the face of it the proposal does not include prescribed persons to whom a worker would ordinarily be entitled to make a public interest disclosure to under the

provisions of Employment Rights Act 1996. Not all cases involving NDAs in the context of harassment etc. will involve protected disclosures, but many will or might do and again it is important to harmonise the scheme of protection and enforcement where possible having regard to the Employment Rights Act 1996, Victims and Prisoners Act 2024 and Higher Education Freedom of Speech Act 2024, all of which say something slightly different.

Question 34. Should individuals with excepted agreements be able to disclose to prospective employers?

a) Yes

b) No

c) Don't know

d) Please explain why.

This fundamentally affects the bargain of confidentiality reached within the context of the protections provided and undermines the NDA considerably. This is not akin to a worker's need to access support in terms of legal or healthcare (in the wider sense) support and advice.

Question 35. Should individuals with excepted agreements be able to disclose to close family, as defined above?

a) Yes

b) No

c) Don't know

d) If no, please explain why and any changes you think should be made to the definition of "close family".

Question 36. Should individuals with excepted agreements be able to disclose to any other individuals for example wider family members, friends or anyone else?

a) Yes

b) No

c) Don't know

Question 37. If you answered yes to Question 36, how would you define the wider group of individuals?

[Open text response].

Question 38. Should section 202A apply to individuals who work for someone other than their employer?

a) Yes

b) No

c) Don't know

Question 39. If yes, what additional individuals should be covered?

a) Agency workers

b) Secondment workers

c) Others. Please explain why.

Question 40. Should section 202A apply to individuals not covered by the usual definition of “worker” in Section 230(3) of the Employment Rights Act 1996?

a) Yes

b) No

c) Don't know

Question 41. If yes, what additional individuals should be covered? Please explain why.

a) Work experience placement

b) Nurses and Midwives in training

c) NHS worker

d) Other. Please state. [Open text response]

e) Please explain why.

Question 42. Are there any specific groups of self-employed individuals that should be covered by section 202A that have not be outlined in this section?

a) Yes

b) No

c) Don't know

d) If yes, please explain what specific groups these are and reasons you think they should be covered by section 202A.

Contact

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