



A Briefing Note for Universities and Colleges Considering Taking the University Pledge October 2024

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What is [Can't Buy My Silence](#)?

Can't Buy My Silence (CBMS) was co-founded by Zelda Perkins (the first person to break her non-disclosure agreement with Harvey Weinstein in 2017) and Dr. Julie Macfarlane (Member of the Order of Canada, and Distinguished Professor of Law, University of Windsor). Dr. Macfarlane worked at the University of Windsor until she discovered the university allowed a colleague with a history of sexual predation to move to another employer under an NDA; Macfarlane later resigned in protest.

Julie and Zelda launched their campaign in September 2021. Since then, they have built alliances with organizations around the globe and heard from thousands of individuals affected by NDAs. Julie and Zelda's combined experience has made them key experts who advise legislators, educators and organizations, and speak with international media. In addition to raising public awareness and providing a safe platform for those affected by NDAs [to speak out](#), the ultimate goal of the *Can't Buy My Silence* campaign is [legislative reform](#) to ban the misuse of NDAs to hide discrimination, harassment and other abusive behaviour. In this regard, they have achieved many milestones.

What are NDAs?

Also known as “gag orders” and confidentiality agreements, non-disclosure agreements are contractual agreements that were originally created to protect trade secrets in 1990s Silicon Valley. NDAs are now pervasive in workplaces — including universities — where they are used in settlement agreements to silence victims of abuse and harassment. Recent US and Canadian estimates show that up to *one-third* of employees have signed an NDA.

NDAs enable secret settlement agreements that are used to hide wrongdoing, and sometimes criminal acts, by buying the silence of victims or whistleblowers. Victims are regularly pressured to sign agreements that protect perpetrators in order to protect their own privacy; sometimes they have to sign just to get the money they're owed. This enables perpetrators to move to other organizations without any record of their abusive behaviour, and allows abusive organizations to continue covering up mistreatment.

NDAs also chill the climate for anyone thinking about reporting abuse in the workplace. Data shows that 31 percent of those considering making a complaint about harassment or discrimination don't proceed because they believe they will be asked to sign an NDA.

This is exactly the opposite of what #MeToo, Black Lives Matter, and related movements have been encouraging, and is significantly undermining public discourse about sexual harassment, racism, disability discrimination, homophobia and other misconduct.

Research also shows serious mental health impacts on individuals who sign NDAs, which typically include a ban on speaking to family, friends, colleagues and even therapists, and add to the layers of trauma the person has suffered. Case law even supports the continuation of an NDA after the death of a perpetrator.

How the University Pledge Began

On January 18, 2022, Michelle Donelan, Minister for Further and Higher Education in England, announced that universities must stop using NDAs for complaints about sexual harassment, bullying and other forms of misconduct. She said, "I am determined to see this shabby practice stamped out on our campuses."

Because of the time it would take to legislate, especially during a divisive period in the English government, this voluntary pledge was a first step backed by Minister Donelan and *Can't Buy My Silence*. The Pledge committed a signatory university to:

"...commit to not using Non-Disclosure Agreements to silence people who come forward to raise complaints of sexual harassment, abuse or misconduct, or other forms of harassment and bullying."

With the initial support of four university Vice-Chancellors and ongoing lobbying by student union groups, by May 2022 — just four months into the campaign — the number of university pledgers had risen to 58. (This includes additional pledgers in Scotland, Wales and Northern Ireland, which do not fall within the jurisdiction of the English Minister of Education.) A policy for reporting and investigating alleged breaches of the Pledge has also been developed.

On February 7th 2023, English Parliament voted through an amendment to the *Higher Education (Freedom of Speech) Bill*, which requires all English universities and their constituent colleges to stop using non-disclosure agreements to cover up sexual misconduct, harassment and bullying. The Bill will be in force in early 2024, and there are currently 90 English university and constituent colleges that have pledged.

How Could This Work in Nova Scotia?

Legislative change has moved much faster in Canada. There are provincial Bills in British Columbia, Saskatchewan, Ontario and Nova Scotia which extend the same ban on abusive NDAs to all workplaces — including universities — in cases of harassment, discrimination and other abuses. A ban went into effect in PEI in July 2022.

In May of 2023, Senator Marilou McPhedran tabled the federal *Can't Buy Silence Act*, which would bar federally funded agencies from using federal dollars to fund or enforce NDAs in cases of harassment and discrimination.

In addition, [an amendment to legislation on sexual violence prevention in Ontario universities and colleges](#) has passed via a cross-party coalition of MPs. This prevents Ontario universities and

colleges from enforcing any term that, directly or indirectly, prohibits the institution, or anyone related to the institution, from disclosing an allegation or complaint that an employee committed an act of sexual misconduct toward a student. Any exception is subject to the conditions in the PEI *Non-disclosure Agreements Act*, and any such term in an agreement is void.

[Can't Buy My Silence](#) has begun promoting the University Pledge in provinces where legislation has been introduced to build support and public awareness of NDA abuse in universities.

FURTHER INFORMATION ABOUT NDAs

When and how do Universities typically use NDAs?

Aside from their legitimate use to protect research information of commercial value (the original purpose of NDAs), there are three different points in the formal university complaint process where complainants may be asked to sign a non-disclosure agreement.

1. Before an investigation is begun

These agreements may be only for the duration of the investigation, but increasingly they are forever. For example:

"(These) confidentiality requirements do not expire after the case closes. Users must maintain confidentiality during a case and after it has concluded."

Universities claim the practice of preventing complainants from discussing even the existence of an investigation is intended to limit the university's defamation liability against the individual being investigated. However, there has never been a successful defamation case under these circumstances.

2. In order to access the full decision

Students and other complainants are frequently told they cannot see the full decision regarding their complaint, or an NDA is required before they can access it. For example:

"Recipient agrees they will be provided with an opportunity to read the confidential information in a confidential and secure manner ... [The] Recipient will not publish, disclose or disseminate the confidential information and the Recipient agrees to take reasonable precautions to prevent any unauthorized use, disclosure, publication or dissemination of confidential information."

3. To settle/resolve the complaint

Complainants are regularly told their cases cannot be settled unless they sign a non-disclosure agreement, which would prevent them from discussing the terms of the settlement or even disclosing its existence. This is typically a permanent commitment and silences complainants, rendering them unable to speak about their complaint; sometimes it also explicitly includes other students and/or named staff. For example:

"The parties confirm that they agree to keep the existence and terms of this Agreement and the circumstances surrounding it confidential..."

In complaints where the university has terminated a staff member for abusive behaviour — sexual harassment, discrimination, bullying, etc. — the university sometimes signs an additional NDA with the staff member, thereby protecting the reputations of both the perpetrator and the university. These agreements regularly include a promise by the university to remove all complaints from the

perpetrator's HR files and to provide a letter of recommendation. For example:

"The University shall remove all records of complaints or discipline issued to X and material related thereto from his personnel file and shall seal the report rendered by X and all material related to their investigation and report."

"The Provost and the Vice President Academic shall issue to X the letter of reference attached here as Schedule A and forming part of the settlement. The Provost and the Vice President Academic shall respond to all enquiries from third parties and prospective employers with said letter of reference."

FAQ

Q: Aren't NDAs supposed to protect commercially sensitive materials, intellectual property and research/innovation?

A: Yes. NDAs were originally developed for this purpose in the 1990s during the tech boom in California. Our proposals will not change this, but instead limit the extension of NDAs to cover up misconduct, discrimination, fraud and even crime.

Q: How are NDAs being used now?

A: It is estimated that 95 percent of civil settlements now include an NDA as part of the standard release from a claim. They are not only used to settle cases of sexual harassment, discrimination and other human rights abuses, but also improper real estate transactions, malpractice lawsuits, misconduct by financial institutions, neglect in medical care, construction defects, government affairs and many more.

Q: But aren't NDAs essential for settling cases?

A: Long before the arrival of NDAs, civil cases settled at a rate of roughly 90-95 percent, and that has largely remained unchanged. In fact, recent data shows that, since NDA legislation was introduced in multiple states, settlement rates (at the [Equal Employment Opportunity Commission which oversees human rights complaints at a federal level](#)) actually went up, not down.

There are many incentives to settle cases, including cost and time, and because employers want to prevent incidents of harassment and discrimination from appearing in court or tribunal decisions, which are public. So while many push for NDAs to control and silence victims, a public hearing often represents a worse outcome than a settlement with no NDA.

Can't Buy My Silence wants to remove the option of an NDA at all in these negotiations, because we believe that covering up misconduct is bad for organizations and bad for society — and the employer is still protected from untrue or unfounded statements through defamation law.

Q: But don't victims want confidentiality?

A: Yes! But this can be achieved in a one-sided confidentiality clause that protects the victim.

Q: What about non-disparagement clauses?

A: Non-disparagement clauses — for example, "no adverse or derogatory comment that may bring X into disrepute" — go much further than the legal duty not to defame by saying something untruthful. Instead, a non-disparagement clause prohibits any type of negative comment, truthful or not. This is an indefensible constraint on freedom of speech, and our Model Bill includes non-

disparagement clauses within the definition of an NDA.

Q: Don't victims get more money for signing an NDA?

A: The vast majority of the individuals who contact CBMS were pressured to sign NDAs, didn't understand what they were signing, and deeply regret it. Moreover, their settlements were not large and were intended to compensate for the harm they experienced — not for their silence. A 2022 Pregnant Then Screwed survey of 542 UK women who had signed an NDA for pregnancy and maternity discrimination found that almost 20 percent received a settlement of less than \$5,000. The Center for Employment Equity analyzed US employment data and found that, from 2012 to 2016, monetary compensation for being sexually harassed at work was on average \$24,700. Half of those complainants received less than \$10,000. In the process, many lost their jobs and benefits.

Q: Is this an equity issue?

A: Definitely. While multiple data sources now show that one in three workers has signed some form of NDA, emerging data shows a graver impact on vulnerable groups who disproportionately experience income insecurity. Low-income individuals (many of them hospitality or retail workers) are more likely to experience sexual harassment and other forms of workplace mistreatment, and Speak Out Revolution data shows that Black women report having signed an NDA at a 25% higher rate than their White counterparts.

Q: Why should universities take the Pledge?

A: Universities are meant to provide an environment free from harassment, discrimination and other abuses, and to foster equality and free speech. NDAs are antithetical to this mission, and they harm victims and protect abusers. What's more, public sentiment regarding NDAs has also shifted, and institutions that employ them to silence victims risk significant public backlash. Meanwhile, those that take the Pledge, especially the early adopters, are behaving ethically and inclusively before broader workplace bans take effect in the future.

Referring to those who stepped forward at his University to expose a known predator, President William Lahey, President of King's University College,

“The impact they have had, and thanks to the Pledge, illustrates the change in the world that victims of sexualized violence can have if they are not silenced by NDAs.”

MAJOR LEGISLATIVE AND POLICY DEVELOPMENTS IN CANADA, 2022-2024

April 2022: Nova Scotia's [Non-Disclosure Agreements Act](#) gets its first reading

May 2022: PEI's [Non-Disclosure Agreements Act](#), the first of its kind in the country, comes into force

May 2022: The Nova Scotia Union of Public and Government Employees (NSGEU) becomes the first union to resolve to ban NDAs in cases of workplace sexual harassment

June 2022: The National Union of Public and General Employees (NUPGE) becomes the first national union to resolve to ban NDAs in cases of workplace sexual harassment

November 2022: As part of Manitoba's [Non-Disclosure Agreements Act](#), parliamentarians hold a committee hearing where more than 20 members of the public [testify about their NDAs](#)

December 2022: Ontario Government passes a law [banning universities from using NDAs](#) to cover up faculty/student sexual misconduct

February 2023: A Canadian Bar Association [AGM resolution](#) discouraging members from using NDAs in cases of abuse, discrimination and harassment passes by 94 percent. It also commits the CBA to lobbying for legal reforms

March 2023: British Columbia's [Non-Disclosure Agreements Act](#) gets its first reading

May 2023: Senator Marilou McPhedran tables federal [Can't Buy Silence Act](#), which would bar federally funded agencies from using federal dollars to fund or enforce NDAs in cases of harassment and discrimination

May 2023: Sports Canada announces [it will remove the current NDA clause](#) from its athlete contract template (not yet acted on)

June 2023: Ontario's [Stopping the Misuse of Non-Disclosure Agreements Act](#), tabled by Ontario MPP and NDP Justice Critic Kristyn Wong-Tam, gets its first reading

July 2023: Ontario's [Strengthening Post-Secondary Education](#) amendment, which prohibits Ontario universities from using NDAs to cover up faculty sexual misconduct, comes into force

November 2023: Saskatchewan NDP introduces the [Employment \(Fairer Workplace, Better Jobs\). Amendment Act](#) to restrict the use of NDAs

June 2024: Atlantic School of Theology becomes the [first Christian university to sign the University Pledge](#)

Fall 2024: Parliamentary petition to restrict the use of abusive NDAs reaches target and submitted to federal House of Commons

For [more information](#) and [victim testimonies](#), please visit [Can't Buy My Silence](#).
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