Can’t Buy My Silence – global campaign toolkit

This toolkit will be regularly updated as we develop the campaign so watch this space for the latest version
Can’t Buy My Silence Global toolkit

Join our coalition!

Welcome to our global toolkit which explains how you can support the Can’t Buy My Silence (CBMS) campaign in your country and join a powerful coalition for change.

Currently the campaign has been launched in the UK and Canada, with supporting campaigns in the Republic of Ireland, California and Australia. However, we want to build the CBMS coalition across the world to challenge the use of NDAs and achieve legislative change, support victims and ensure all organisations commit to a more transparent approach to the settlement of complaints and lawsuits.

We know there are already many organisations in different countries working on this agenda, so our goal is to connect all of us together in one powerful global movement for change. If where you live, no organisation is campaigning against NDAs we hope we will inspire you start a campaign using our resources and support.

Our approach is to be an “open source” of knowledge and tools to make it as easy as possible to become part of the CBMS coalition. All our materials and resources are available to you. Joining the coalition is simple – your organisation or group just needs to commit to our five principles by signing the form on the website and provide us with your organisation’s contact details and the actions you are either doing or plan to undertake to support CBMS. We look forward to hearing from you.

Zelda Perkins and Professor Julie Macfarlane

What is in the Toolkit?

The contents of the toolkit set out the key things you need to know about the campaign:

1. The purpose of CBMS – the problem & our solution
2. What CBMS is trying to achieve
3. Joining the coalition – our principles
4. Driving change – how you can help CBMS achieve its goals

www.cantbuymysilence.com
Twitter: @cbmssilence
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1. **Purpose of CBMS – the problem and our solution**

We have one core goal - ending the use of NDAs to gag victims, whistle-blowers and others who are part of settling a complaint or lawsuit.

**The problem**

Non-disclosure agreements (NDAs) have become the default solution for organisations, corporations, individuals and public bodies to settle cases of sexual misconduct, racism, bullying and harassment, pregnancy discrimination and other human rights violations. These agreements, which are being used to threaten people with legal consequences, are being used to cover up abuse, and in some cases criminal acts.

**NDAs....**

- Allow a person who has behaved abusively and possibly criminally to stay put, or move to another workplace without revealing any information about what they have done.
- Gag victims permanently, preventing them reporting, speaking to family & friends about their own experiences, or warning others about the perpetrator.
- Benefit the employer’s reputation and the career of the perpetrator, not the victim who can be protected by a simple confidentiality clause
- Require the victim and in some cases their colleagues to tell lies, or risk being sued for “defamation”.
- Are usually pressed on victims who are told they “must” sign to protect the other party if they want a settlement - this is just a negotiating tactic, but many victims believe they have no choice.
- Chill the climate for anyone wishing to speak up about wrongdoing whilst leaving victims living in fear of breaking the agreement.

**The solution**

The goal of our campaign is legislative and regulatory change that will make NDAs unenforceable for anything other than their original purpose – the prevention of sharing confidential business information (“intellectual property”) and trade secrets.

**The benefits of change**

Blanket NDAs or gags are unnecessary to protect victim identity, are catastrophically damaging to innocent parties, and hide harmful information from the public. We believe that greater transparency and accountability will ensure better organisations – addressing issues openly will ensure our workplaces are better, safer and more productive places to be. Most importantly victims who want to speak out should be able to choose to share their experience and what happened to them, and show why change is necessary.
Why now?

Heightened awareness and global discussion around the misuse of NDAs has resulted in policy changes in some organizations including the BBC and Conde Nast, new guidance from some regulators (e.g. the Solicitor’s Regulatory Authority in England and Wales) and new laws in some US states (e.g. California, New Jersey and Ohio) and most recently in Ireland, where Julie and Zelda were instrumental in writing the proposed new NDA amendment to the Employment Equality Act. But this isn’t enough. NDAs are still being used regularly. That is why CBMS has been launched. We need change now.

2. **What CBMS is trying to achieve**

The campaign will focus on 5 key strategies:

1. Building public awareness of the immoral use of NDAs
2. Lobbying government and regulators to recognise that NDAs are currently being used to create dangerous employment environments and to change the law.
3. Giving people the information and power to say “no” to signing NDAs.
4. Providing a safe platform for people who have been pressured to sign an NDA to anonymously step forward and share how it has affected them.
5. Advocating that businesses and institutions adopt a code of practice that will not allow NDAs to hide from the public information about harmful people, malpractice, or products.

Although these 5 strategies are inter-linked, our priority goal is to drive legislative change as quickly as possible. Every day that goes by there are new victims being pressured into signing NDAs while the person or organisation responsible for the abuse does not face accountability. There are many vested interests who benefit from this system and will oppose attempts to reform it. Rapid change will only happen when new laws are put in place to end the misuse of NDAs and protect victims.

3. **Joining the coalition – our principles**

CBMS is committed to building a coalition of organisations across the world advocating for the end of NDAs. We want to get as many organisations to join our CBMS coalition as possible. Here are the 4 key principles that we need you to support as part of this commitment:

**CBMS principles**

1. *Legislative change to ban all NDAs (other than protection of commercial proprietary information) is our ultimate goal*
2. This is supported by regulatory reform of legal practice and business codes of practice, banning the use of NDAs outside protecting intellectual property.

3. Prioritizing the protection of victims, including identity protection (at their option) and no constraints on speaking about any personal experiences other than usual legal obligations.

4. Transparency and accountability of workplace harassers/abusers/bullies, tortfeasors*, institutions and employers.

   - A tortfeasor is anyone found to have harmed another party in civil law.

To join the coalition please email us at info@cantbuymysilence.com

4. Driving change – how you can help CBMS achieve its goals in your country

As we outlined in section 2, we have 5 key strategies for driving change. Below we explain how you can help put these into action.

a) Building public awareness of the immoral use of NDAs

   - Despite many high profile cases - for example Harvey Weinstein, Arcadia and Pinterest - the use of NDAs continues. The key message that CBMS wants to communicate is that the use of NDAs not only enables workplace abusers and harassers covering up their crimes and misconduct and gagging their victims - it has also become a dangerous default for many, many legal agreements. NDAs are used, for example, to stop whistle-blowers reporting faulty medical products, mechanical and technological failures, inadequate care in care homes, consumers speaking publicly about poor and even dangerous services, the abuse of minors in sports academies and educational facilities, as well as abuse and harassment in universities. Communicating this reality is critical so the public become aware that we are all vulnerable to the use of NDAs, not just people in big industry or Hollywood, and that real change has not yet happened.

   - One of the most effective ways to achieve this is by building a group of high profile endorsers willing to speak out on this issue as well as well-known organisations that will commit to not using NDAs. Zelda and Julie have already developed a group of well-known endorsers whose names and quotes are included in this toolkit that you can use. It is also important to build a list of endorsers in your own country, from politicians to celebrities. In addition, you could ask high profile victims who have spoken out about harassment and the use of NDAs to back the campaign. Inevitably the challenge is that there are many victims who do not come forward for fear of legal retribution from breaking their NDAs and speaking out – that is why well-known endorsers are critical in helping to break the silence.
b) Lobbying government and regulators to recognise that NDAs are currently being used to create dangerous employment environments and to change the law.

- The core focus of this campaign is the introduction of new legislation to limit the use of NDAs and prevent them being used inappropriately to gag victims. The rationale for this is that incremental change, for example getting progressive organisations to ban NDAs, or the development of court decisions that strikes them down, will be too slow; and that the quickest way to fix this broken system is to put legal constraints around NDAs, that regulators must then enforce.

- To pioneer this approach, CBMS has worked with Republic of Ireland senator Senator Lynn Ruane on a new law which will amend employment legislation to outlaw NDAs in relation to workplace sexual harassment, discrimination based on race, gender, sexuality, age, disability or family status. This is currently going through their Parliamentary system (see attached box featuring the bill). The idea behind this approach is to show what can be achieved with the right political backing and support and therefore challenge other countries who are dragging their feet on introducing legislation. This bill provides one example of the way forward – see next page.
The Republic of Ireland NDA act

AN BILLE UM CHOMHIONANNAS FOSTAÍOCHTA (LEASÚ) (COMHAONTUITHE NEAMHNOCHTA), 2021
EMPLOYMENT EQUALITY (AMENDMENT) (NON-DISCLOSURE AGREEMENTS) BILL 2021

Bill

entitled

An Act to restrict the use of non-disclosure agreements as they relate to incidents of workplace sexual harassment and discrimination.

Be it enacted by the Oireachtas as follows:

Interpretation

1. In this Act—

“Minister” means the Minister for Children, Equality, Disability, Integration and Youth;

“non-disclosure agreement”, means a provision in writing in an agreement, however described, between an employer and an employee whereby the latter agrees not to disclose any material information about the circumstances of a dispute between them concerning allegations of sexual harassment or discrimination which are unlawful under this Act;

“Principal Act” means the Employment Equality Act 1998;

“relevant employee” means the employee who has experienced or made allegations about the sexual harassment or discrimination;

“relevant individual” means the person who committed or is alleged to have committed the sexual harassment or discrimination.

Amendment of Principal Act

2. The Principal Act is amended by the insertion of the following section after section 14A:
Non-disclosure agreements

14B. (1) Other than in accordance with subsection (2), an employer shall not enter into a non-disclosure agreement with a relevant employee where

(a) the employee has experienced or made allegations of sexual harassment (within the meaning of section 14A), or

(b) the employee has experienced or made allegations of discrimination which are unlawful under this Act, and the non-disclosure agreement has the purpose or effect of concealing the details relating to a complaint of discrimination or harassment under paragraphs (a) or (b).

(2) An employer may only enter into a non-disclosure agreement with a relevant employee in accordance with this section if such an agreement is the expressed wish and preference of the relevant employee concerned.

(3) Where an agreement is made under subsection (2), the agreement shall only be enforceable where—

(a) the relevant employee has been offered independent legal advice, in writing, provided at the expense of the employer,

(b) there have been no undue attempts to influence the relevant employee in respect of the decision to include a confidentiality clause,

(c) the agreement does not adversely affect—

(i) the future health or safety of a third party, or

(ii) the public interest,

(d) the agreement includes an opportunity for the relevant employee to decide to waive their own confidentiality in the future, and

(e) the agreement is of a set and limited duration.

(4) An employer may not enter into a separate non-disclosure agreement solely with the relevant individual where the agreement has the purpose or effect of concealing the details of a complaint relating to the sexual harassment or discrimination concerned.

(5) Where a non-disclosure agreement following an incident of workplace sexual harassment or discrimination is made that does not comply with subsections (3) or (4), that agreement shall be null and void.

(6) An employer who enters into a non-disclosure agreement after the coming into operation of this section that is not made in accordance with this section is guilty of an offence.
(7) Where a non-disclosure agreement was made before the coming into operation of this Act, it shall only be enforceable if it was made in accordance with subsection (3), save for any provisions protecting the identity of the relevant employee, which shall remain in effect.

(8) An agreement made in accordance with subsection (2) shall not apply to—

(a) any disclosure of information under the Protected Disclosures Act 2014, or

(b) any communication relating to the harassment or discrimination between the relevant employee and:

(i) An Garda Síochána;

(ii) a legal professional;

(iii) a medical professional;

(iv) a mental health professional;

(v) a relevant State regulator;

(vi) the Office of an Ombudsman;

(vii) the Office of the Revenue Commissioners; (viii) a prospective employer; or

(ix) a friend, a family member or personal supporter.

(9) An agreement made under subsection (2) shall, insofar as is possible, be written in plain English.

(10) The Minister shall make regulations to provide for the standard form for an agreement to be made under subsection (2) and for any other purpose to enable this Act to have full effect.

(11) The Minister shall publish guidelines for employers, employees and legal professionals to aid compliance with this section.

(12) In this section, all references to a non-disclosure agreement shall be taken to also reference non-disparagement agreements where a non-disparagement agreement has the effect or purpose of concealing details relating to an incident of sexual harassment or discrimination.”.

Short title and commencement
3. (1) This Act may be cited as the Employment Equality (Amendment) (Non-Disclosure Agreements) Act 2021.

(2) This Act comes into operation three months after its passing or on such earlier day as the Minister may appoint by order.
c) **Give people the information and power to say “no” to signing NDAs.**

While the CBMS coalition lobbies for legislative change, there will still be many individuals who are being pressured to sign NDAs as you read this. One of the biggest challenges for victims who have experienced psychological distress and trauma is that they feel isolated and unable to access support and help. CBMS is aiming to create a safe community globally where people can access independent advice on our website and read other victims’ testimonies. We believe that building this sense of community solidarity will help victims and ensure they realise they are not alone.

There are other organisations seeking to provide similar support in different countries. We believe that by building a coalition we can make these efforts even more powerful by cross-promoting what we do and ensuring that people are aware of the resources and support in their own countries. And if you feel that there is a gap in your country, please use this toolkit to help build your own local CBMS group.

**Background on the growth of NDAs**

- It is very common for a legal or trade union representative supporting a victim to tell them that they **must** sign a non-disclosure agreement or NDA in order to achieve a settlement. Some lawyers have predicted that **up to 95%** of settlement agreements now include an NDA, with little or no discussion of whether this is necessary or whether the complainant/plaintiff/grievor actually wants this.
- NDA are presented as inevitable part of any agreement to resolve a case and get compensation. But this is not true. NDAs have become more and more “fashionable” in the last 10 years but for the past 30 years around 95% of all legal cases have settled before a trial with OR WITHOUT an NDA.
- The only required clause in a settlement agreement is a “release” that says that the person must agree not to continue their legal action or complaint, or to bring a future legal action based on these same facts. This makes sense, since the other side wants to know the matter is over.
- But the addition of an NDA into settlement agreements, often rolled into the release, has become more and more common in the last 10 years. An NDA says something quite different from a standard “release” (above) – it restricts a person **from saying anything about what happened to you to anyone for ever.** Whatever you may be told, this is NOT a necessary part of settlement.
• NDAs are convenient for lawyers who want to settle a case and very useful for both employers and perpetrators who want to keep everything secret. A person’s identity protection can be achieved from a simple one-sided confidentiality clause

Here are some common myths about NDAs that you may hear when you challenge the idea of signing one:

<table>
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<tr>
<th>Myth</th>
<th>Reality</th>
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<tbody>
<tr>
<td>NDAs protect victims after a traumatizing event</td>
<td>NDAs often retraumatize victims by isolating them from potential supports and preventing them from discussing what happened</td>
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<tr>
<td>NDAs are necessary to protect victims’ confidential information</td>
<td>It’s straightforward to draft confidentiality clauses that protect victims’ information while still allowing them to speak out if they choose</td>
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<td>Employers won’t settle disputes if NDAs aren’t an option</td>
<td>When victims push back against NDAs, employers frequently agree to settle disputes without restricting a victim’s right to tell their story</td>
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<td>It’s important for employers to be able to protect their reputations with NDAs</td>
<td>NDAs should never be used to protect an employer’s reputation if they allow employers to “pass the trash” and put other people at risk</td>
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<tr>
<td>NDAs are reasonable and not overly restrictive</td>
<td>NDAs are often too broad, and can prevent victims from speaking to friends, family, and even therapists about what happened</td>
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Providing a safe platform for people who have been pressured to sign an NDA to anonymously step forward and share how it has affected them.

One of the challenges of confronting the widespread use of NDAs is that victims feel unable to step forward for fear of the legal consequences. On our CBMS’ s website we are creating a space where people can share their experiences anonymously and securely. All contributions will be screened against our moderation policy to check that we are protecting the victim by ensuring that no specific organisation or identifying information is included. Once they have completed that check we will publish them to help reveal how NDAs are being used to cover up horrific abuses. The more testimonies we can collect and share the better.

We have also partnered with Speak Out Revolution who have created a comprehensive survey and dashboard on NDAs and wider workplace issues. We will be encouraging people via our website and campaigning to fill out this survey.

As ‘Everyone’s Invited’ has shown, the sheer scale of compelling personal stories can shock politicians and regulators into taking action. We hope that you can support CBMS in gathering testimonies and help direct people to our website through cross-promotion.