

Misuse of Non-Disclosure Agreements (NDAs) Preventing the Harm they Cause

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Community Legal
Assistance Society



Objectives

Image 2

1. Legal Obligations against NDAs
2. Legislative Options Restricting NDAs
3. Challenging NDAs in Practice

Poll Question

In what percentage of your settlements does an NDA/non-disparagement clauses arise?

- a. Less than 20%**
- b. 35-50 %**
- c. 50-70 %**
- d. 70-85%**
- e. 85-100 %**

Existing Legal Protections

- **Duress and Unconscionability**
- **Public Policy**
- **Privileged Statements (e.g. to police)**
- **Specific obligations:**
 - **Workers Compensation requirements**
 - **BC Public Interest Disclosure Act, s.45**
- **Professional Ethics**

Solicitors Regulation Authority (UK)

Image 4

Warning notice: Use of non disclosure agreements (2018 , updated Nov 2020)

“Your duty to act in the best interest of your client does not override your professional obligations to uphold the proper administration of justice, act in a way that maintains public trust and confidence, and to act with independence and integrity.”

Law Society (Eng/Wales)

Practice Note

- **Unenforceable – if report a criminal offence**
- **Cannot prevent disclosing/reporting**
 - **Unlawful acts that have not yet occurred**
 - **To regulators**
 - **Protected public interest disclosures**
(legal obligations, miscarriage of justice, health and safety, environmental damage, whistleblowing)
- **Exceptions or restrictions in clear simple English**

Law Society of British Columbia

Image 10

Rule 2.1 “,,promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the courts,..”

Rule 2.1-1(a) “duty to the state, to maintain its integrity and its law”

Rule 5.6-1 “encourage public respect for and try to improve the administration of justice”

Trauma-informed Practice

Image 1

How does the use of NDAs accord with a trauma-informed approach?

What can or should we do in practice?

- **More than exception clauses**
- **Ask why**

Anonymous Complainant

“I wanted the power to decide whether or not I get to talk about it. I didn’t want that to be by the hand of someone who harmed me.”

Katie DeRosa, “I have to have my voice!: Victims push to restrict non-disclosure agreements in workplace sexual harassment,” Vancouver Sun, September 26, 2022

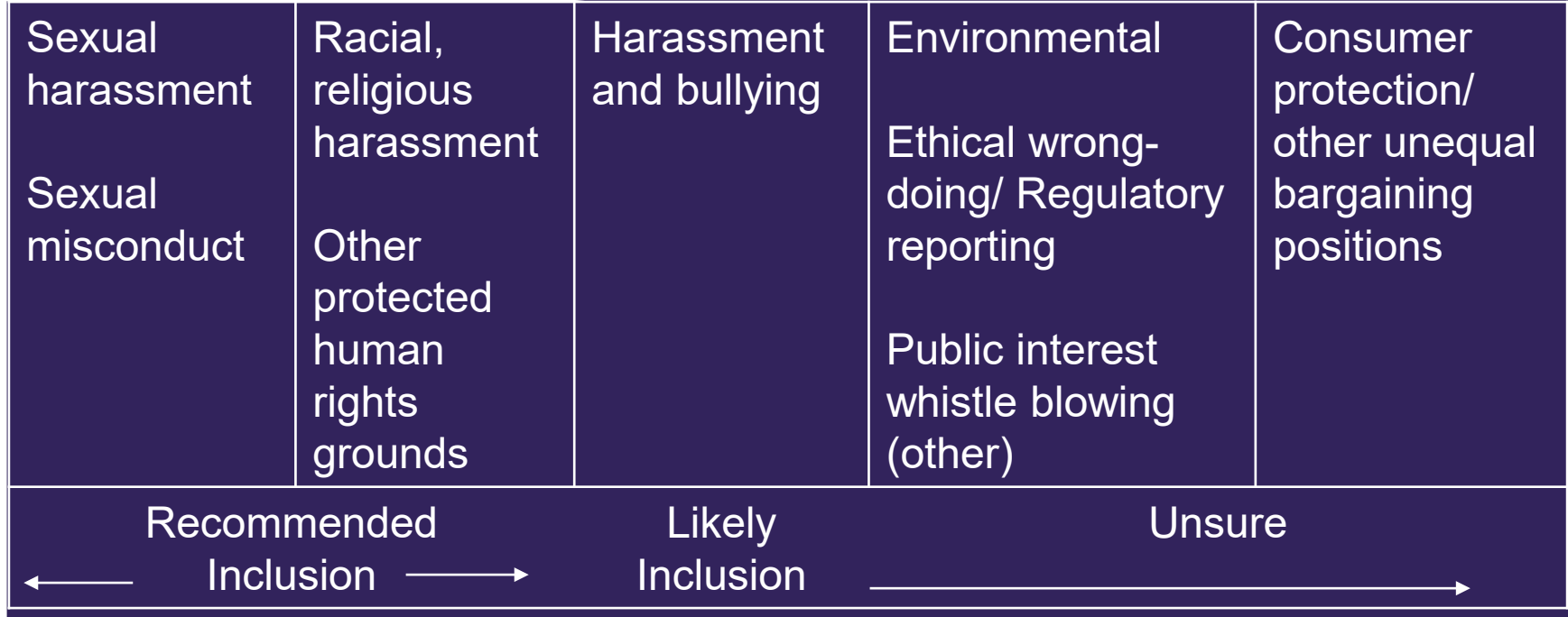
PEI NDA Act

Scope of Conduct

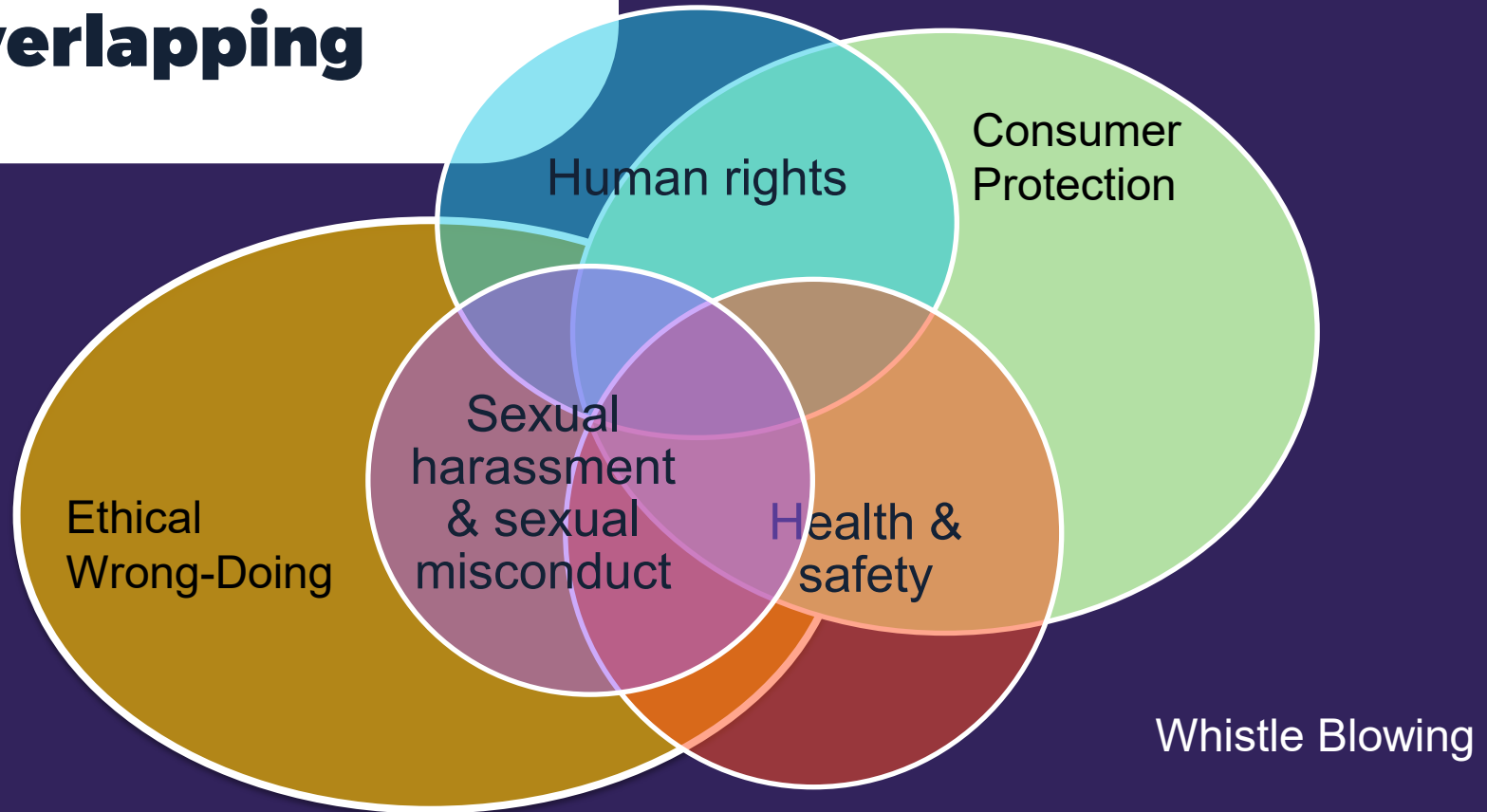
“harassment and discrimination”

“harassment” means any action, conduct or comment that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to a person and, without limiting the generality of the foregoing, includes actions, conduct or comments of a sexual nature, “

Continuum of Conduct



Overlapping



Poll Question

What conduct must legislation to restrict NDAs address?

- a) Sexual harassment and sexual misconduct**
- b) All human rights discrimination**
- c) Harassment and bullying**
- d) Ethical wrong-doing**
- e) Public interest disclosures (whistleblowing)**
- f) Consumer protection/unequal bargaining**
- g) Retaliation**

Legislative Options

Image 4

- **Ban**
- **Restrict**
- **“Permissive” Legislation**

Different approaches

Image 5

“express wish and preference” - P.E.I. s. 4(2)

Ban in situations of sexual harassment or sexual assault in employment

- Hawaii Revised Statutes, s 378.2.2(a)

“deemed against public policy and unenforceable against current or former employee”

- N.J. Stat. 2022, c.114, s. 10:5-12.8(a)

Poll Question

Have you negotiated a settlement significantly higher than Tribunal/court awards because the complainant agrees to an NDA?

- a. Never**
- b. Rarely**
- c. Sometimes**
- d. Often**
- e. All the time**

Ban Option

Benefits

- Clear unambiguous statement of protected public policy interests
- No possibility that complainants asked to sign NDAs that they do not fully understand and feel pressured to sign

Concerns

- Parties limited by not being able to chose settlement with NDA
- Possible lower settlements?
- Chilling effect on settlements?
-

Protections

NDA Act P.E.I. s. 4(3)

Independent legal advice

No undue influence

Not affect others: health and safety or public interest

Waive their confidentiality in the future

Time limited: “of a set and limited duration”

s.6 offence with fine \$2,000-\$10,000

Examples of other protections

Image 3

- **Cooling off period: 7 calendar days to revoke agreement (Illinois, 820 ILCS 96, s. 1-30(6))**
- **Public funds can't be used (draft Fed bill, Arizona 12-720)**
- **Costs against employers enforcing NDAs (Colorado, Revised Stat. ss. 22-1-135.5, 24-50.5-105.5)**
- **Employee entitled to lawyer's fees (Illinois, 820 ILCS 96)**
- **Unenforceable against employee, enforceable against employer (New Jersey, NJ Stat. S 10:5-12.8)**

Basic Position

- **Any constraint on a complainant telling their own story is potentially harmful**
- **Human rights violations create significant harm**
- **People process harm by talking**
- **NDA's increase the harm of the initial events**
- **Feelings associated harm often arise again in future and need to be addressed**

What Complainants Say

- **Staying silent about what happened to them was worse than initial harassment**
- **Real anguish at not being able to protect others by warning them**
- **Frustration and anger at being silenced, feeling of powerlessness**
- **Affected by the experiences - need to explain themselves and their reactions**

When can Constraints Arise

- **Confidentiality requirements in investigations**
- **Requirements in settlements that complainants**
 - **not discuss what happened to them**
 - **not say anything negative about respondents**
- **Publication bans in legal proceedings**

Settlements

Image 11

- **Terms of settlement agreement confidential**
- **Forbid complainant from talking about experience of discrimination, underlying circumstances**
- **Prevent the complainant from saying anything negative about employer/service provider**
- **Constraining discussion of settlement terms different from constraining discussion of what happened, and how the respondent reacted**

Language re Settlement Terms

- **Generally settlement term language not inherently objectionable**
- **Ensure exceptions for legal and financial advisors and health care providers**
- **Requirement to obtain a promise of confidentiality from anyone told is okay**
- **Avoid language that makes the complainant responsible for others keeping the information confidential**

Language: Underlying Circumstances

Image 3

- Any language that limits what a person can say about what happened to them, in settlement or elsewhere, is objectionable
- Investigations: complainants constrained from saying what they learned through investigation, but not what happened to them and what they knew before investigation
- Must not constrain complainants from talking about the misconduct, and respondent's poor response to complaint
- Must not be required not to disparage the respondent

Why Constraints are Harmful

- **Interfere with life-long processing**
- **Interfere with being able to manage when triggered by a new event**
- **Repeat the loss of control and subjugation of the complainant's needs that was at the core of the discriminatory event**
- **Continue to worry about the respondents –the exact opposite of closure for many complainants**

Additional risk from damages clauses

- **Significant penalties for any breach of the agreement – including breach of confidentiality, non-disclosure or non-disparagement terms**
- **Large fixed amount – no matter how minor**
- **Penalty terms make the risk for complainants very high, and increase ongoing anxiety caused by the non-disclosure/non-disparagement language**

Say no to Constraints

- **Say no to non-disclosure/non-disparagement clauses**
- **Respondents may be bluffing**
- **Protects the complainant from**
 - **ongoing (hard to anticipate) harm of clauses**
 - **feeling coerced and pressured to agree**
- **Wait to settle, or proceed with complaint without settling?**
- **Risk of settlement discussions failing, at least in the short term**

Modify language

- If no is not an option - attempt to reduce harm of NDA clause**
- **Limit public forms of disclosure rather than all disclosure**
 - **Limit what is disclosed by excluding identifying information**
 - **Limit disclosure to those that already have an obligation of confidentiality, including employers**
 - **Create a comprehensive list of exceptions**

Describe Exceptions

Image 11

Disclosure

- **To immediate family members**
- **Legal, financial and tax purposes**
- **In relation to on-going investigations/ charges regarding the same or similar allegations**
- **If there are future public allegations**
- **Healthcare providers**
- **In the course of a recovery or healing program**
- **To prospective employers or recruiters, or to actual employers**

Is confidentiality possible?

- **As part of modifying the language, consider if confidentiality is still possible and practical**
- **Complainants should not accept a demand for ongoing confidentiality where there has already been disclosure of underlying facts beyond a narrow group of people**

Ms. C v. City and Councillor and Union

**BCHRT on ATD –
2023 BCHRT 203**

Image 5

- **Part of complaint - employer discriminated by having an overly broad confidentiality requirement in its investigation procedures**
- **Tribunal accepted that an overly broad confidentiality requirement could have an adverse impact and therefore be discriminatory**
- **Confidentiality provision caused Complainant distress and exposed her to a negative work environment when it opened her to discipline for warning her coworkers about a danger in the workplace**

Implications of Ms C case

- **Carefully consider breadth of confidentiality provisions needs- if is broader than necessary may be discriminatory**
- **Complainants cannot contract out of their human rights under the Code - if a confidentiality provision re future conduct breaches the Code because it is discriminatory - it will be unenforceable**
- **For counsel - it may be a breach of the Code to negotiate a discriminatory confidentiality provision - respondents do not get a pass because they are acting for someone else or on their instructions**

Defamation

A woman with glasses and a teal shirt is pointing at a screen in a meeting. The background is dark and slightly blurred, showing other people in the room.

- **Caution complainants that any public statements about what happened outside pleadings in a complaint to the Tribunal may still put them at risk of a defamation claim**
- **In defamation, the speaker (complainant) bears the onus of proving that their comments were true**
- **Defending against a defamation claim can be very expensive, even if it is unfounded**

Questions or Comments?

<https://clasbc.net/FightMisuseofNDAs>

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