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## A CASE FOR THE INCLUSION OF DISABILITY IN THE NON-DISCLOSURE AGREEMENTS BILL

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Non-disclosure Agreements (NDAs) used by employers to stop employees or former employees from sharing information are currently in the spotlight following the exposure of the scale of sexual harassment by the #MeToo movement and the use of NDAs in keeping this hidden. The *Women and Equalities Committee* report into the use of NDAs in discrimination cases highlights a cover-up culture that silences victims of discrimination and harassment, and calls for a set of specific regulatory changes.<sup>1</sup> The government's consultation on the misuse of NDAs in workplace harassment and discrimination cases responded to some of these calls.<sup>2</sup> Further building on this, the Rt. Hon. Maria Miller MP's *Non-Disclosure Agreements Bill* calls for the use of NDAs to be outlawed, thereby preventing them from being used to cover up instances of harassment and ill-treatment.<sup>3</sup> The Bill passed the first reading as a Private Members' Bill (Presentation Bill) on 21<sup>st</sup> June 2021, with a second reading scheduled for 3<sup>rd</sup> December 2021.

It is generally acknowledged that NDAs are appropriate in certain circumstances such as for the protection of commercial information, or when victims of discrimination wish to protect confidential information or preserve their anonymity. However, the use of "settlement" NDAs has become commonplace in employment disputes to restrict employees from speaking out about the discrimination they encountered.<sup>4</sup> This is despite ACAS guidelines stating NDAs should not be used: "to stop someone reporting discrimination, harassment or sexual harassment"; "to cover up inappropriate behaviour or misconduct, particularly not if there's a risk of it happening again"; and "to avoid addressing disputes or problems in the workplace".<sup>5</sup> By restricting employees from speaking out about discrimination, NDAs encourage employers to continue "business-as-usual", rather than addressing the underlying causes of discrimination and dealing with its perpetrators or seeking to improve organisational practices and culture.

Although the *Non-Disclosure Agreements Bill's* origins are in seeking to address NDAs with regard to sexual harassment, ACAS guidance also states that NDAs "should not be used to

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<sup>1</sup> <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1720/1720.pdf>

<sup>2</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/783011/confidentiality-clauses-consultation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/783011/confidentiality-clauses-consultation.pdf)

<sup>3</sup> [https://hansard.parliament.uk/Commons/2021-09-14/debates/AB31746A-F1FB-4EB4-8A55-EE6C90007DB2/Non-DisclosureAgreements\(No2\)?highlight=disclosure#contribution-0A90824A-1E72-43A0-B8B5-25A51841772B](https://hansard.parliament.uk/Commons/2021-09-14/debates/AB31746A-F1FB-4EB4-8A55-EE6C90007DB2/Non-DisclosureAgreements(No2)?highlight=disclosure#contribution-0A90824A-1E72-43A0-B8B5-25A51841772B)

<sup>4</sup> <https://www.equalityhumanrights.com/sites/default/files/guidance-confidentiality-agreements-in-discrimination-cases.pdf>

<sup>5</sup> <https://www.acas.org.uk/non-disclosure-agreements>;  
<https://www.acas.org.uk/sites/default/files/2021-03/non-disclosure-agreements.pdf>

prevent the reporting of discrimination” more broadly, reminding employers that “Workers are protected from discrimination, harassment or victimisation on the nine ‘protected characteristics’ of Age, Disability, Gender Reassignment, Marriage and Civil Partnership, Pregnancy and Maternity, Race, Religion or Belief, Sex and Sexual Orientation”.

This suggests it is appropriate for the *Non-Disclosure Agreements Bill*, or any alternative or supplemental legislation, to cover (or be amended to cover) discrimination on the grounds of all protected characteristics. This is consistent with the legislative paths taken in other countries. For example, California’s initial *STAND (Stand Together Against Non-Disclosures) Act* that banned the use of NDAs with regard to sexual harassment has been followed by the “*Silenced No More Act*” (Senate Bill 331) that extends this ban to cover all proscribed acts of workplace harassment, discrimination and retaliation.<sup>6</sup> This includes workplace harassment or discrimination on the grounds of, for example, race, disability, religion, and sexual orientation.

Turning to the issue of disability, there are several arguments why disability should be specifically included in the *Non-Disclosure Agreements Bill*, including: the extent of labour market disadvantage affecting disabled people; the likely high proportion of NDAs concerning disability discrimination relative to other protected characteristics; employer reluctance to improve organisational disability practices; and the consequences of signing an NDA for disabled people. The below explores these issues in turn.

### **i) The extent of labour market disadvantage affecting disabled people**

The UK’s disability employment gap (the difference in disabled and non-disabled people’s employment rate) is 29 percentage points, and adjusting for increasing rates of disability prevalence, it has not narrowed significantly since 2010.<sup>7</sup> Disabled employees also report a less positive experience of work regarding job control, work-life balance, job-related mental health, and job satisfaction.<sup>8</sup> When employers take actions to generate a culture of fairness, many of these outcomes improve significantly. However, settlement NDAs that seek to cover-up instances of discrimination reduce the pressure on employers to develop such cultures and tackle the underlying causes of disabled people’s disadvantage within their organisations.

### **ii) The likely proportion of NDAs relating to disability discrimination cases**

The extent to which settlement NDAs are used for each protected characteristic is unknown, given their secretive nature. However, the figures on the proportion of Employment Tribunal cases that relate to each protected characteristic reported in the Table below help illuminate this matter. Although only a small fraction of individuals who experience discrimination and harassment pursue Employment Tribunal cases, the Table shows the number of judgements relating to disability discrimination is proportionately very high compared to other protected

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<sup>6</sup> [https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=202120220SB331](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB331)

<sup>7</sup> House of Commons (2021). Disabled people in employment. Briefing Paper Number 7540, 1 April. Wass, V., & Jones, M. (2020). *Measuring disability and interpreting trends in disability related disadvantage*. disabilityatwork.co.uk. <https://www.disabilityatwork.co.uk/wp-content/uploads/2020/08/Briefing-Note-disability-measurement-.pdf>

<sup>8</sup> Bruyère, S. M. (2020). (Ed) *Employment and disability: Issues, innovations, and opportunities*. Labor and Employment Research Association: Cornell University Press. Hoque, K., Wass, V., Bacon, N., & Jones, M. (2017). Are high performance work practices enabling or disabling? Exploring the relationship between selected HPWPs and work-related disability. *Human Resource Management*, 57(2), 499-513. Jones, M. (2016). Disability and labor market outcomes. *IZA World of Labor*: 253 doi: 10.15185/izawol.253. Jones, M. (2016). Disability and perceptions of work and management. *British Journal of Industrial Relations*, 54(1), 83-113. Schur, L., Han, K., Kim, A., Ameri, M., Adya, M., Blanck, P., & Kruse, D. (2017). Disability at work: A look back and forward. *Journal of Occupational Rehabilitation*, 27(4), 482-497. Schur, L., Kruse, D., & Blanck, P. (2013). *People with disabilities: Sidelined or mainstreamed?* Cambridge: Cambridge University Press.

characteristics. As such, it is reasonable to assume that disabled people are proportionately more likely than many people with other protected characteristics to be subjected to settlement NDAs. Therefore, ensuring the *Non-Disclosure Agreements Bill* specifically bans NDAs relating to disability discrimination appears both important and justified.

### **Employment Tribunal Cases by Protected Characteristics**

	<b>Employment Tribunal cases<sup>a</sup> in England, Wales and Scotland (February 2017 onwards).</b>
Disability discrimination	13,571
Sex discrimination	7,092
Equal Pay Act	4,503
Race discrimination	6,449
Age discrimination	3,265
Maternity and pregnancy rights	2,686
Parental and maternity leave	167
Religion or belief discrimination	1,426
Sexual orientation discrimination/Transexualism	789

<sup>a</sup> Cases with judgements.

Source: Employment Tribunal cases online accessed 29<sup>th</sup> September 2021, <https://www.gov.uk/employment-tribunal-decisions>.

#### **iii) *Employer reluctance to improve disability equality practices***

NDA settlements may have had a deleterious effect in contributing towards employer reluctance to improve disability equality practices by enabling employers to cover up instances of disability discrimination, and thereby side-step the development and introduction of better practice. The adoption of formal disability practices across workplaces in Britain is extremely limited, with private sector employers surveyed in the government’s Workplace Employment Relations Study adopting less than one of the seven practices asked about (e.g., monitoring recruitment and selection procedures by disability; conducting formal assessments of the extent to which the workplace is accessible to employees or job applicants with disabilities).<sup>9</sup> Settlement NDAs in disability cases help employers conceal instances of disability discrimination from public view, and thereby avoid having to address the underlying causes of discrimination and improve organisational practices and culture.

#### **iv) *The consequences of signing a settlement NDA for disabled people***

Settlement NDAs used by employers to avoid the threat of an employment tribunal typically result in the termination of employment. However, employees that have signed settlement NDAs often face difficulties finding reemployment.<sup>10</sup> The consequences of this are particularly severe for disabled people, when added to the disadvantage they already face within hiring processes (as the persistently high disability employment gap suggests). NDAs have also been shown to have detrimental effects on the physical and psychological welfare of the employees affected.<sup>11</sup> This is especially concerning for people whose physical or psychological welfare might be already negatively affected by their disability. Therefore, the implications of NDAs

<sup>9</sup> Bacon, N., & Hoque, K. (2021). The treatment of disabled individuals in small, medium-sized, and large firms. *Human Resource Management*, early view <https://doi.org/10.1002/hrm.22084>

<sup>10</sup> <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1720/1720.pdf>

<sup>11</sup> <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1720/1720.pdf>

for disabled people's reemployment opportunities and for their welfare appear to be particularly severe.

Overall, the Rt. Hon. Maria Miller MP's *Non-Disclosure Agreements Bill* is very much welcome. It has the potential to increase significant levels of transparency regarding the extent of harassment and discrimination in workplaces in the UK and thus help compel employers to address the causes of harassment and discrimination. The Bill might be strengthened further, however, by explicitly including disability. Were it to do so, it would have the potential to become a powerful mechanism by which to address disability disadvantage in UK workplaces.