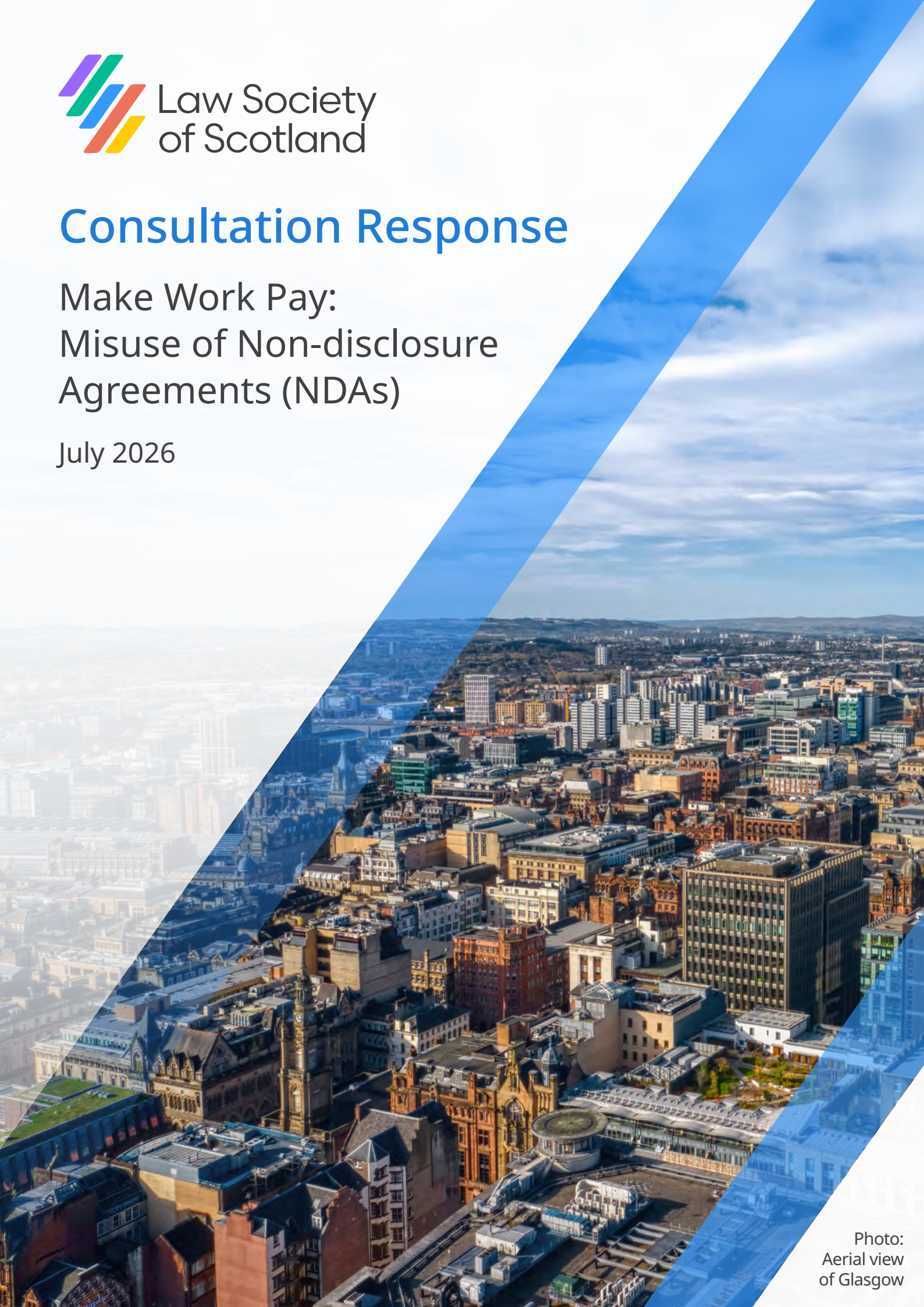


Consultation Response

Make Work Pay: Misuse of Non-disclosure Agreements (NDAs)

July 2026



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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors. We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Employment Law sub-committee welcomes the opportunity to consider and respond to the UK Government's Make Work Pay: misuse of non-disclosure agreements (NDAs)¹. The sub-committee has the following comments to put forward to consideration.

General Comments

The consultation does not appear to address confidentiality in internal processes. Employers may, for example, require confidentiality during grievance or disciplinary procedures to protect the integrity of an investigation, including by reducing the risk of witness collusion or destruction of evidence. We assume this would not be treated as an NDA, either because it is an employer requirement rather than an agreement or clause. Further guidance would be helpful on how employers should respond where workers wish to disclose allegations during such processes. Where disciplinary or grievance proceedings continue after a related NDA has been concluded, our view is that this should be included as a ground for wider disclosure, in addition to the categories listed in section 3.

¹ [Make Work Pay: misuse of non-disclosure agreements \(NDAs\) - GOV.UK](#)

Consultation Questions

Chapter 2: Conditions for an expected agreement

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.

We agree that 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. Presently, there is no requirement that a worker receives independent advice on the terms and effect (or legal limitations) of any non-disclosure/confidentiality provisions, unless they are contained within a settlement agreement. A condition that the worker has received independent advice would strengthen the protection afforded to workers and help to mitigate against the application of any undue pressure to enter into excepted agreements.

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.

A requirement that independent advice be given in writing would assist in highlighting to the worker the advice given on the terms, effect and legal limitations of any excepted agreement. It would also serve as a permanent record which could be revisited by the worker in the future and used as evidence by either party in the event of a dispute arising. However, a requirement that the advice be given in writing could lead to unintended consequences. It is not standard to advise on any other terms of a settlement agreement or COT 3 agreement in writing. Requiring advice on an excepted agreement to be in writing might cause a delay in the advice being given or encourage (for efficiency reasons) the use of standardised advice (e.g. by way of issue of a pro-forma

guidance note for all excepted agreements). Requiring advice on an excepted agreement to be in writing may also lead to higher costs for independent advice, given the additional time and work involved. Any requirement that expects an adviser to reiterate the “terms” in writing, in addition to the “effect” of the excepted agreement is likely to be disproportionate.

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.

At present, there is no requirement that employers cover the costs of independent advice to workers in respect of settlement agreements. Notwithstanding this, from our experience, it is generally market practice for employers to contribute towards the cost of the advice. We consider this works well in practice, and the same approach should be adopted in respect of advice given on excepted agreements. To support this approach, we suggest that the Government publish guidance which recommends that employers contribute towards the cost of independent advice, *and gives an indication of a reasonable cost and/or time contribution*. In addition, we suggest that there should be a stipulation in regulations that any contribution towards advice associated with an excepted agreement must not be conditional upon the worker's signature / agreement. Without such a stipulation, there is a risk that contributions towards advice fees will be made conditional on the worker entering into a binding excepted agreement, and this may put undue pressure on the worker to sign the agreement to avoid having to meet the cost of the independent advice themselves.

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.

As noted above in our answer to question 2, we have concerns about the requirement for the advice to be in writing.

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.

As noted above in our answer to question 2, we have concerns about the requirement for the advice to be in writing.

In addition, in those circumstances where a COT 3 agreement is being negotiated between parties without the involvement of legal professionals, the condition that independent advice is to be given on the terms, effect and limitations of the excepted agreement within the COT3 would require the employee to incur the additional cost of engaging an independent adviser. For the reasons stated below, we do not consider it appropriate for the ACAS conciliator to provide the required independent 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.

The ACAS conciliator appointed to assist parties mediate a COT3 agreement should not be considered an independent adviser for the purpose of providing advice to an employee on the terms, effect and legal limitations of an excepted agreement. The ACAS conciliator appointed to assist parties mediate a COT3 agreement, whilst in theory 'neutral', is expected to assist both parties. We do not believe, therefore, that the same conciliator can truly be considered 'independent'

for the purpose of giving advice on the excepted agreement. In our view, it would only be workable for the ACAS conciliator appointed to mediate in a COT3 agreement to also provide the 'independent' advice required on the excepted agreement if provisions in excepted agreements were standardised such that any "advice" would be considered neutral or unchallengeable.

A further concern of deeming the ACAS conciliator as 'independent' and capable of providing the required advice is that if the worker were to challenge the advice given on the provisions which form the excepted agreement, this would undermine the whole COT3 agreement, leading to uncertainty for the employer.

One option might be to appoint a second ACAS conciliator who could be designated 'independent' for the purpose of advising on the excepted agreement. However, given the existing workload of ACAS conciliators, we accept this would be impractical and/or would clog up the system, causing delays.

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

We consider it is sufficient that independent advice on the terms, effect and legal limitations of the excepted agreement is provided to the worker.

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.

We agree the worker should be required to express their preference in writing to enter into the excepted agreement following receipt of the independent advice. However, we consider that it should be permissible for the written expression of preference to be contained within the excepted agreement itself, rather than in a separate email, letter or similar. We consider any requirement that the written expression of preference is separate to the excepted agreement itself would be problematic from a record retention perspective. Allegations surrounding the misuse of an excepted agreement could surface several years after the agreement is signed, and it is unclear whether any separate record of the worker's consent to enter the excepted agreement will have been retained by the employer. We consider that a more proportionate option would be to include a clause in the excepted agreement itself acknowledging that it is the worker's preference to enter the excepted agreement. It could be a requirement that this clause is in a prominent position in the agreement, potentially requiring a separate signature to draw attention to it.

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.

See above at question 8.

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.

We recognise that permitting an employer to suggest confidentiality to their workers, and tie it to a financial settlement, would adversely impact the effect of s202A ERA 2025 on tackling coercion by employers to silence their workers. However, we also acknowledge that in circumstances where there are, for example, malicious/unfounded allegations, or disputed facts, employers may

legitimately require confidentiality and/or commitments from their workers not to make derogatory/disparaging statements in order to manage disruption in the workplace and/or protect other workers from ongoing stress/the risk of being defamed.

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.

Whilst we do not have concerns about requiring a worker to express their preference in writing to enter into an excepted agreement, we believe that it should be permitted for this expression of preference to be contained within the excepted agreement itself.

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.

As above.

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.

We recognise that cooling off periods exist in other contractual situations, but we consider it unusual to have one where a worker will have had the benefit of 'up front' safeguards like those being proposed (independent advice on the terms and impact of an excepted agreement and a requirement that the advice be in writing). There is also the possibility of supplementary guidance for advisers involved in an excepted agreement to not put any undue timing pressure on a worker and that could be further supported by guidance issued by the Law Society of Scotland and the Solicitors Regulation Authority.

Should there be a cooling off period, then any retraction by the worker of the provisions which comprise the excepted agreement should void the whole agreement, otherwise it would be unworkable in practice. Employers will have likely considered that the provisions which comprise the excepted agreement are required for commercial certainty and may not have agreed to the wider agreement without them. As a result, they are likely to want protections in place, such as making a payment (or part of) conditional until after the cooling off period has expired. Payment periods vary depending on the circumstances and operational resources of an employer, but it is reasonable to assume that a cooling off period would impact that period, including any future termination date that might not have otherwise been agreed. These considerations are in addition to the uncertainty that would arise from the use of cooling off periods in litigation and ACAS early consideration.

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

If there is to be a cooling off period, 14 days seems excessive. A significant proportion of agreements are made in the days/hours before tribunal hearings and it will be important that any cooling off period does not, so far as possible lead to the unintended consequence of obstructing settlement of live cases.

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.

We suggest that market analysis is conducted to assess the least disruptive period to tribunal processes whilst still achieving any identified objective of reducing undue pressure on a worker to enter into an excepted agreement.

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

See above at question 13.

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.

See above at question 13.

Should a cooling off period be deemed essential then it would seem contradictory to that principle to allow a worker to waive it. This would make more sense if independent advice was not required, and a worker could choose to waive a cooling off period with the benefit of independent advice. However, as this is not the proposal, then it would not make sense to allow for someone to waive the cooling off period.

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.

See above at question 13.

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.

See above at question 13.

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.

See above at question 13.

By comparison to a cooling off period, a statutory review period would encourage parties to consider provisions which comprise an excepted agreement in good time to avoid or reduce the likelihood of an agreement negatively impacting tribunal time limits or tribunal proceedings.

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

See above at question 13.

We do not consider it proportionate to have both a mandatory statutory review period and a cooling off period.

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.

It is unclear what "any accessible format" means. Whilst we agree that an excepted agreement must be provided in a way that enables a worker to obtain independent advice on its terms so that the terms and impact are properly and clearly understood, further clarity is required in terms of the extent of this.

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

a) Yes

b) No

c) Don't know

d) Please explain why.

It is suggested that this be in guidance only. See answers to question 23 and 25.

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.

It would be very difficult for a court to determine whether an agreement was in 'standard plain language, and this is likely to lead to satellite litigation, as well as uncertainty for both parties. We suggest that this be a recommendation in guidance as opposed to a requirement in the regulations. We consider this is why it is important that there is a requirement for clear independent advice to be given so that the terms and impact of an excepted agreement are understood and agreed by the worker.

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.

See above at question 25.

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.

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.

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 years

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]

2-3 years would provide sufficient time to achieve the short to medium term rationale for an excepted agreement, whilst preventing any systemic issue from being hidden from wider scrutiny should that be a concern. Employers are likely to have document retention policies in place to ensure that they keep worker records no longer than required and will likely suffer from loss of corporate knowledge over time. In circumstances where there have been disputed facts which have given rise to the excepted agreement then it will be important that employers have an ability to respond to any disputed disclosure arising from an excepted agreement expiring.

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.

No.

Chapter 3: Permitted disclosures

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.

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.

A worker should be permitted to make a disclosure to advice agencies such as Citizens Advice who might be advising on employment issues or on how to respond to discrimination or harassment. In cases where workers are not members of a trade union these agencies might be crucial sources of advice including on whether to seek an excepted agreement or on the terms of such an agreement.

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.

There are pros and cons with allowing this. It might well be useful for a worker seeking new employment to be able to explain the circumstances of the excepted agreement especially in relation to explaining why they are seeking to leave their current employment or have recently left an employer and thus to disclose some details of the NDA and the circumstances that led to it. However, we recognise that prospective employers would not be legally bound to keep the information imparted in the disclosure confidential. In addition, there could be many such 'prospective' employers if someone was making multiple job applications or having multiple interviews. If it was decided to extend disclosure to prospective employers it would be necessary to consider whether this should extend this to recruitment consultants who may be helping workers with their searching for jobs.

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].

We support the suggestion that the regulation should stipulate that the employee is entitled to make a disclosure to a named person of their choice with the agreement of their employer and that employer agreement should not be unreasonably withheld. This should address the concerns around defining a ‘friend’. We note that it is currently common practice for an agreement to caveat that “provided such person agrees to keep the information confidential” albeit recognising that the person isn’t party to the agreement and therefore there is not an obvious way of enforcing this stipulation.

Chapter 4: Application to other individuals

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

We are broadly supportive of widening out the protection of section 202 of the Employment Rights Act 2025 to include classes of individuals who might need such a provision whilst not being workers but are in quasi employment situations where workplace harassment or discrimination could occur. Such people could otherwise fall between the cracks. We would agree with the list in the consultation of those who could potentially be covered such as nurses and midwives in training and NHS practitioners. We would also support the extension of section 202 to cover those, often students, on placement.

There is a wider point here. There is a mismatch between section 202 of the Employment Rights Act 2025 which currently only applies to workers and employees as defined in the Employment Rights Act 1996 whereas under Part 5 of the Equality Act 2010 the category of individuals entitled to protection against discrimination and harassment is wider to any individual who falls within the more expansive definition of ‘employee’ under s83 of the Act. We suggest that all those individuals who might have a legal right not to be discriminated against or harassed pursuant to Pt 5 of the Equality Act 2010 should be covered by the s202A provisions.

There may also be others who would not fall under the current scope of section 202 of the Employment Rights Act 2025 and might also not be covered by Part 5 of the Equality Act who might be in need of protection against the use of non-disclosure agreements. Volunteers, and self-employed individuals may variously also find themselves in an unequal bargaining position and could potentially be coerced to sign a non-disclosure agreement to protect the reputation of the employing organisation to which they provide their services. We suggest that the government consider ways to include them.

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.

e) Please explain why.

See above at question 40.

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.

See above at question 40. Specific examples might include, but are not limited to, self-employed personal trainers, swimming instructors or yoga instructors, working within large leisure providers.



For further information, please contact:

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