BIRMINGHAM LAW SOCIETY

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Response to the Consultation on Make Work Pay: regulations to prevent the misuse of NDAs in cases of workplace harassment or discrimination

July 2026

About this response

This response is submitted on behalf of the Employment Committee of Birmingham Law Society. Birmingham Law Society is one of the largest regional law societies in England and Wales, representing the interests of lawyers and law firms across Birmingham and the West Midlands.

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?

Q1 No

In our collective experience, it is incredibly rare for an employee to be asked to enter into terms pertaining to 'non-disclosure of relevant harassment/discrimination' in the absence of an accompanying settlement agreement. Typically, those agreements will be made pursuant to s203 Employment Rights Act which requires independent legal advice to be given regarding the terms and effect of the document, including provisions pertaining to confidentiality. Whilst there is no such requirement in Acas conciliated agreements, the conciliation process does facilitate an understanding of the terms through the involvement of a conciliation officer.

Whilst instances of non-disclosure agreements being included in agreements outside settlement agreement scenarios have undoubtedly occurred historically, notably in the context of hostesses at the "Presidents Club" dinner in 2018, we consider the use and content of NDAs in such scenarios to have been materially impacted by subsequent societal and regulatory developments – notably the SRA's Warning Notice which makes it clear that NDAs would be improperly used if used to impede/deter a person from reporting an offence to a law enforcement agency, making a protected disclosure or seeking legal advice.

Considering this, that confidentiality provisions are not typically complex and given the potential unintended consequences outlined in our response below we have reservations about whether there is any necessity or compelling reason to legislate in this area.

Question 2. Do you agree that the independent advice must be given in writing?

Q2 No

Whilst we consider that written advice may be a useful future reference guide for the individual in question, this is not currently a requirement for other areas where legal advice is required, notably when advising on a waiver of claims in a settlement agreement. We are not aware that this poses practical issues in practice. Insisting advice be set out in writing is likely to increase legal fees – and potentially cause some delay. As such, if advice does become a legal requirement, we do not consider that written advice should be compulsory.

Question 3. Do you agree that employers should not have to cover the cost of independent advice?

Q3 Yes

As with private settlement agreements where independent legal advice is a statutory necessity, we consider this best left to the parties. If the employer is getting something of worth from the provisions, it is highly likely that it will offer to contribute – as typically occurs with private settlement agreements. However, we do not believe this should be compulsory. We believe it is best dealt with as a matter for negotiation, considering the circumstances at hand. It could for example be that mutual confidentiality provisions have been suggested by a worker who is keen to preserve sensitivity. In that scenario it is difficult to see why the employer should meet the cost of legal advice.

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?

Q4 Yes

The concerns primarily relate to increased cost in circumstances where the existing regime does not in our experience tend to cause difficulties in practice. In our view the current regime provides adequate protection for individuals being asked to enter into relevant confidentiality obligations in an employment setting. A requirement to seek independent written advice on the terms and effect of the settlement is also likely to be a bar to concluding settlement in judicial mediation for an unrepresented party (unless Acas can act as “independent adviser” – which we do however have concerns about as set out below). This is a concern at a time when the tribunal system is under considerable strain.

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?

Q5 Yes

Whilst Acas conciliators will discuss settlement terms with the parties where appropriate, they do not currently give “advice” as such – reflecting their status as a neutral party in the conciliation exercise. We believe that requiring a person entering into a COT3 with relevant confidentiality provisions to also receive independent advice about those provisions will therefore duplicate time and incur potentially unnecessary cost taking into account that the terms are likely to have already been discussed with the conciliator.

Question 6. Should Acas conciliators should be included as relevant independent advisors?

Q6 No

We have concerns about the practical impact of a conciliator also becoming the employee's adviser. It may make the conciliator more partial and undermine neutrality, particularly if the conciliator is asked to negotiate or push back on the terms on the employee's behalf. We also query whether the conciliator (and Acas generally) would need to be insured. Professional indemnity insurance is likely to be a material cost for an Acas service already under considerable strain.

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.

Q7 No

We believe the proposed requirements are sufficient.

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?

Q8 No

We consider this unnecessarily formulaic. If the employee does not wish to enter into the agreement having been advised on its terms, they will decline the agreement. If they do wish to do enter into the agreement they will do so. We see little practical benefit in an employee needing to confirm that they wish to enter into the agreement before going on to do so.

Question 9. Do you agree that the regulations should not prescribe the form and style of the worker's preference?

Q9 Don't know

On the one hand we consider that a prescribed form of wording would provide clarity as to what is required. On the other we consider that this may create room for litigation if for example the parties are ignorant of the exact form of wording required and this gives rise to an allegation that the provisions entered into are not therefore valid.

Question 10. Should an employer be able to suggest confidentiality to their workers?

Q10 Yes

Confidentiality in respect of sensitive matters pertaining to discrimination and harassment will often be key to both parties. An employee may not take legal advice

and may not know that the suggestion of confidentiality needs to come from them in the first instance to achieve settlement. If an employer is unable to broach the issue of confidentiality themselves it is therefore likely that prompt settlements will be less likely to be secured, with the potential for disputes to instead escalate to the detriment of both parties. The requirement is therefore likely to prevent the prompt resolution of disputes.

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?

Q11 – Yes

Please see answer to questions 8 and 9 above.

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?

Q12 Yes

Please see answer to questions 8 and 9 above.

Question 13. Do you agree that an excepted agreement should be required to include a cooling off period?

Q13 No

We do not typically encounter issues with employees expressing regret about entering into confidentiality provisions; they tend to be an accepted part of a settlement agreement which gives both parties comfort that the underlying – often sensitive - circumstances will not be public knowledge. We therefore query the need for a cooling off period and consider that this would also lead to a number of practical difficulties.

Notably, as confidentiality will typically be a core incentive to settle it is highly unlikely an employer would be willing to proceed with settlement (and the payment of settlement monies) where confidentiality may not be maintained. It is therefore likely that the settlement terms would be conditional on the worker not seeking to resile from confidentiality in connection with any applicable cooling off period. That in turn creates uncertainty as to whether settlement has been achieved, the practical difficulties of which will be pronounced where settlement is purportedly reached shortly before a key deadline – for example to lodge a claim, present a response or before a Hearing. If a Hearing were vacated on the premise that settlement had been achieved, it is very possible that given the current delays in tribunal listings a relisted Hearing, should the settlement agreement be later voided, could be a year or more away.

We are also mindful that settlement agreements will not tend to be negotiated overnight – they will typically either be pitched as part of a protected conversation

whereby ten days is given to consider the terms or through an Acas conciliated process. We consider this sufficient time for the parties to reflect on the terms.

Question 14. Do you agree that 14-days is a sufficient length of time for a cooling off period?

Q14 Yes

We consider this to be too long, noting the reservations expressed above.

Question 15. If no, what length of cooling off period would you consider appropriate, and why?

Q15 7 days

Question 16. Should any required cooling off period only apply to the confidentiality clauses within an excepted agreement?

Q16 No

Confidentiality is an integral part of the settlement, and it is highly unlikely an employer would want to continue with settlement in the absence of confidentiality being maintained. As such, we consider that if the employee wishes to resile from confidentiality the entire agreement should fall away (unless the parties have agreed otherwise).

Question 17. Should workers be allowed flexibility to waive the cooling off period?

Q17 Yes

Yes, given the practical difficulties above. Further, if it does become compulsory for the individual to have received independent advice the decision about whether or not to enter into a relevant agreement will be an informed decision.

Question 18. Do you have any concerns about requiring a 'cooling-off' period for private settlement agreements?

Q18 Yes

Please see comments above.

Question 19. Do you have any concerns about requiring a 'cooling off' period in an Acas facilitated COT3 agreement?

Q19 Yes

Please see comments above.

Question 20. Do you agree that there should not be a mandatory statutory review period before an excepted agreement is entered into?

Q20 Yes

Typically – as set out above – settlement terms will be negotiated over a period of time such that periods of review are a natural part of the process. However in some circumstances there may be a pressing requirement for speed, for example where a party suggests settlement immediately before (or during) a Hearing. A mandatory review period would prevent parties from being able to settle promptly in such circumstances.

Question 21. Should both a review and cooling off period be conditions of an excepted agreement?

Q21 No

Please see our comments above.

Question 22. Do you agree that a written copy of the excepted agreement should be provided to all parties to the agreement?

22 Yes

We consider this to be standard practice and entirely reasonable.

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?

23 Don’t know

As a general principle we agree that an excepted agreement should be available in terms the employee can access but consider that there may be difficulties in trying to predefine all such circumstances – and that a generic reference to “any accessible format” makes the extent of the obligation unclear. For example, would braille be required or an alternate language? If such a requirement is included, we believe the required format should be clearly recorded in the document itself.

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

24 Yes

Question 25. Should regulations require an excepted agreement to be in plain language?

Q25 No

We consider that existing professional regulation in this area is sufficient. These provisions are not in our experience typically complicated. A statutory requirement that something be written in “plain language” creates the risk of litigation over technicalities.

Question 26. Should guidance, rather than regulations, set out that an excepted agreement should be written in plain language?

Q26 Don’t know

We consider this would be preferable to a statutory requirement but for the reasons above do not consider that this is necessary to cover in guidance.

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?

Q27 Yes

We consider this to be more appropriate than a limitless confidentiality obligation given that the employee will not know what may occur in the future.

Question 28. Should the confidentiality obligations relating to relevant harassment and discrimination in an excepted agreement be required to be time-limited?

Q28 No

Placing a time limit on the obligations may make an employer less likely to want to settle, prejudicing the effective resolution of disputes.

Question 29. If a time-limit is required, should government stipulate a maximum time limit?

Q29 No

We believe this is best left to the parties to agree.

Question 30. If yes, what should the maximum time-limit be? Please explain why.

Q30 N/A

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?

Q31 N/A

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 35 NOT GOVERNMENT POLICY – SUBJECT TO CONSULTATION
j) If no to any of the above, please explain why.

Q32

All of (a) to (h).

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?

Q33 No

Question 34. Should individuals with excepted agreements be able to disclose to prospective employers?

Q34 No

We see little reason why an employee would need to disclose as standard circumstances surrounding harassment/discrimination to a prospective employer and would be concerned that this freedom could make it less likely an employer would want to settle given the breadth of parties this could include including, for example, competitors. The employer may also be concerned about their inability to put their own version of events forward. If an individual did wish to have that ability this is a term that could be negotiated as required.

Question 35. Should individuals with excepted agreements be able to disclose to close family, as defined above?

Q35 Yes

Yes, as defined. We consider this appropriate given that people who have experienced discrimination/harassment are likely to have experienced distress and require support from their family network. They are also likely to need to explain the circumstances associated with, say, changes in employment to close family. This sort of carve out is already typically included in settlement agreements.

Question 36. Should individuals with excepted agreements be able to disclose to any other individuals for example wider family members, friends or anyone else?

Q36 No

We don't believe this should be standard given the breadth of people this could extend to but believe that it should be open to the parties to agree this in appropriate circumstances, for example where an individual does not have close family and cannot therefore avail themselves of the exception above. We believe this is best left to negotiation between the parties.

Question 37. If you answered yes to Question 36, how would you define the wider group of individuals?

Q37 See comments above.

Question 38. Should section 202A apply to individuals who work for someone other than their employer?

Q38 Yes

We see no reason why the protections should not extend to agency workers and those on secondment.

Question 39. If yes, what additional individuals should be covered?

Q39

We believe this should extend to (a) and (b).

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?

Q40 Yes

Question 41. If yes, what additional individuals should be covered? Please explain why.

Q41

We agree to the categories covered and consider that volunteers and interns should also be covered.

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?

Q42 Don’t know

Barristers.

Birmingham Law Society
Employment Committee
8 July 2026