ULCC | CHLC

UNIFORM LAW CONFERENCE OF CANADA

NON-DISCLOSURE AGREEMENTS (NDAs)
THIRD POLICY REPORT

Presented by

the Working Group

Readers are cautioned that the ideas or conclusions set forth in this paper, including any proposed statutory language and any comments or recommendations, may not have been adopted by the Uniform Law Conference of Canada. They may not necessarily reflect the views of the ULCC and its delegates.

Halifax, Nova Scotia
August 2025

Contents

Non-Disclosure Agreements (NDAs) – Third Policy Report of the Working Group

A. Working group membership and meeting report

[1] The working group on Non-Disclosure Agreements (NDAs) (the Working Group) commenced meeting in April 2023 to examine the need for uniform legislation to address concerns related to the use of NDAs. Members of the Working Group this year are:

Katie Armitage, Government of British Columbia (until February 9, 2024, from September 13, 2024)
Natalie Barnes, Government of BC (from February 9, 2024)
Chelsea Evans-Rymes, Government of Alberta
Jennifer Khor, working group chair, Community Legal Assistance Society, BC (chair from September 2024)
Nicolas Le Grand Alary, Barreau du Québec
Tyler Nyvall, Government of BC
Clea Parfitt, private lawyer, BC

[2] Government of Canada representatives have been attending as observers:
Olivier Gadoua, Government of Canada (until September 13, 2024)
Caroline Soulé, Government of Canada (from September 13, 2024, until January 30, 2025)
Andréanne Breton, Government of Canada (from January 30, 2025)

[3] Greg Blue, Uniform Law Conference of Canada (ULCC) (from September 13, 2024) and Christina Croteau, ULCC have been attending to provide support to the Working Group.

[4] Peter Lown, K.C., Uniform Law Conference of Canada (ULCC) was working group chair until his retirement in September 2024. We thank Peter for his leadership.

[5] Mina Connelly, Government of Yukon, commenced attending working group meetings from October 11, 2024, and will be the drafter of the uniform act.

[6] Since the 2024 Annual Meeting, the Working Group met 14 times to consider policy issues and develop the recommendations in this report for model legislation on NDAs.

B. Background

[7] The Working Group has been meeting since April 2023 to consider the need for uniform legislation arising from concerns related to the use of non-disclosure agreements (NDAs). This project arose in the context of increased public attention to the use of NDAs, draft legislation being introduced in several jurisdictions[1] and the adoption of legislation in PEI regulating NDAs (the PEI Act).[2]

[1] To date in Canada, NDA specific bills that have been introduced have been private member's bills.
[2] *Non-disclosure Agreements Act, RSPEI 1988, c N-3.02*. online <https://canlii.ca/t/55f2s>.

[8] The use of NDAs[3] in situations of sexual harassment and sexual assault was brought into the spotlight with the #MeToo Movement[4] in 2017. Women broke their NDAs to speak out about how being forced to be silent affected them and how the use of NDAs facilitates serial predatory perpetrators. People who are subject to an NDA may be unable to disclose the harm they suffered to family members, therapists or other trusted advisors. They may be unable to explain a gap or change in their employment, or behaviour that may be triggered due to past trauma. They often live with a fear of accidentally breaching it. The perpetrator effectively exerts a level of control over the complainant forever, exacerbating feelings of powerlessness and helplessness. All this can prevent closure and healing and negatively impact the lives and livelihoods of those subject to an NDA. It is also recognized that NDAs can also cause harm to innocent third parties, who may interact with a wrongdoer they would have otherwise avoided, had the history of the person's conduct been known to them. The use of NDAs for "improper purposes undermines the fundamental foundations of our democratic society including freedom of expression by limiting people's ability to discuss important matters of public policy."[5] The improper use of NDAs contributes to a lack of confidence in the administration of justice by facilitating those who may have been responsible for wrongdoing to avoid accountability. As a result of increased awareness that NDAs are used to silence people who experience or report harassment and assault, and that this causes harm on both an individual and societal level, many jurisdictions internationally have enacted or introduced legislation banning or restricting their use.

[9] The Working Group has produced two reports on this issue. The first policy report,[6] delivered to the ULCC Annual Meeting in August 2023, set out the values and principles underpinning policy discussions, considered the scope of conduct that should be subject to the legislation, discussed legislative options, and raised issues for discussion and direction by the Civil Section. The Civil Section accepted the report and provided direction for the Working Group to continue its work. The second policy report[7] was delivered to the ULCC Annual Meeting in August 2024 in Ottawa. In the second report the Working Group made 15 recommendations regarding development of uniform legislation regulating NDAs. The Civil Section accepted most of the recommendations, provided comments and raised questions for the Working Group to further consider.

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[3] In this paper the term NDAs is used to refer to non-disclosure agreements used in settlement agreements, pre-emptive non-disclosure agreements often included in employment contracts, non-disparagement clauses, and generally confidentiality agreements used to prevent someone from talking about their experience. It does not extend to confidentiality agreements that prevent disclosure of a settlement amount.

[4] "me too. Movement", online: <https://metoomvmt.org/>.

[5] *Non-Disclosure Agreements (NDAs) Second Policy Report of the Working Group* (Ottawa: Uniform Law Conference of Canada, August 2024) at p. 6. online: <https://www.ulcc-chlc.ca/ULCC/media/EN-Annual-Meeting-2024/Non-Disclosure-Agreements-(NDA)-working-group-2nd-progress-report-with-Appendix.pdf>.

[6] *Non-Disclosure Agreements (NDAs) Progress Report of the Working Group* (Charlottetown, Prince Edward Island: Uniform Law Conference of Canada, August 2023) online: <https://www.ulcc-chlc.ca/ULCC/media/EN-Annual-Meeting-2023/Progress-Report-of-the-Working-Group.pdf>.

[7] *Supra* note 5.

[10] In Canada, no new NDA legislation has been enacted since the second policy report. Legislation that regulates NDAs are the PEI Act,[8] amendments to Acts relating to post-secondary education in Ontario which restricts the use of NDAs in sexual misconduct cases in the post-secondary education context[9], and the amended Ontario real estate regulations[10] specifying that contractual agreements cannot prevent reporting to the registrar for real estate agents remain the legislation.

[11] Internationally, more jurisdictions have enacted legislation regulating NDAs. Ireland enacted legislation[11] in October 2024. By the end of 2024, 29 states in the U.S.A. had legislation limiting the use of NDAs, with more states still considering draft bills. Other jurisdictions continue to make progress towards or study the issue. In Australia, the Victorian Government invited submissions on possible legislative amendments to restrict the use of NDAs in relation to workplace sexual harassment.[12] In the UK, the government confirmed its intention to implement the provisions of the *Higher Education (Freedom of Speech) Act 2023*[13] that prohibits the use of NDAs in allegations of sexual misconduct, bullying or harassment.[14] An amendment to the employment rights bill to restrict the use of NDAs has also been proposed in the UK.[15] This comes shortly after more than 400 complainants or witnesses have come forward with allegations of sexual misconduct against former Harrods owner Mohamed Al Fayed, some of whom say they signed NDAs.[16] Also in the UK, the Legal Services Board published its summary report of evidence on the misuse of NDAs in February 2024.[17] The report highlights potential overuse and misuse of NDAs where the intention is to cover up misconduct, intimidate or silence people and will be used to consider whether further regulatory intervention is needed to ensure the legal professionals standards of professional ethical conduct.

[12] Several research papers have been published this year that examine the impact of legislation restricting NDAs. They consider whether the enactment of legislation restricting NDAs has had an impact on number of cases being filed, settlement rates of cases, or time to resolving these cases. Engstrom analyzes more than a quarter million case filings for Los Angeles County Superior Court finding that there

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[8] *Non-disclosure Agreements Act*, *supra* note 2.
[9] *Strengthening Post-secondary Institutions and Students Act, S.O. 2022, c. 22*. online <https://canlii.ca/t/5608b>.
[10] *Code of Ethics,* O.Reg. 365/22, 2022. online <https://www.ontario.ca/laws/regulation/r22365>
[11] *Maternity Protection, Employment Equality and Preservation of Certain Records Act (Ireland)*, 2024.Online <https://www.irishstatutebook.ie/eli/2024/act/37/enacted/en/html>
[12] "Restricting NDAs in workplace sexual harassment cases" (8 September 2024), online: *Engage Vic* <https://engage.vic.gov.au/restricting-non-disclosure-agreements>.
[13] *Higher Education (Freedom of Speech) Act (U.K.), 2023 c.16*. online <https://www.legislation.gov.uk/ukpga/2023/16/contents>
[14] "Government reaffirms commitment to Free Speech in universities", online: *GOVUK* <https://www.gov.uk/government/news/government-reaffirms-commitment-to-free-speech-in-universities>.
[15] Aletha Adu, "Ban bosses from 'improper' use of NDAs for low-paid workers, says ex-minister", *The Guardian* (2 April 2025), online: <https://www.theguardian.com/law/2025/apr/02/ban-bosses-from-improper-use-of-ndas-for-low-paid-workers-says-ex-minister-louise-haigh>.
[16] Graham Satchell & Jessica Rawnsley, "More than 400 come forward over Mohamed Al Fayed sexual abuse allegations" (31 October 2024), online: <https://www.bbc.com/news/articles/cy7dgrkp2vzo>.
[17] *Misuse of non-disclosure agreements (NDAs) summary of evidence report* (Legal Services Board, England and Wales, February 2024) online: <https://legalservicesboard.org.uk/research/misuse-of-non-disclosure-agreements-ndas-summary-of-evidence-report>.

was neither a sharp increase or decrease in case filings, nor a prolongation of cases or increase in intensity, cases still settled without secrecy.[18] Bullock analyzed cases in US federal court, and arbitration, and compared data from New Mexico, which enacted NDA legislation, to neighbouring states which did not have legislation.[19] She found that settlement NDA bans increased filing of allegations of employment discrimination in US federal court, but there was a small decrease in settlement at the court and in arbitration. Bullock concludes that there may be an increase in deterrence resulting from the legislation but the decrease in settlement may weaken the deterrence value. Macfarlane, founder of *Can't Buy My Silence*, shared a yet unpublished article which includes data analysis conducted on PEI Human Rights Commission cases before and after the PEI Act came into effect. The data indicates that there has been little change in settlement rates.[20] Dr. Macfarlane previously shared an analysis of the data from the EEOC concluding that there had been a marginal increase in settlement rates since the introduction of NDA legislation in a number of jurisdictions.[21] This research attempts to address the concerns raised regarding possible chilling effect on settlements by NDA legislation. While limited to specific jurisdictions and acknowledging there may also have been impacts on case filings due to the covid pandemic restrictions, the research suggests that restricting NDAs does not inhibit settlement of cases and therefore also does not appear to create a significant additional burden on the courts.

[13] At the Annual Meeting in 2024 the Civil Section passed the following resolution:[22]

> BE IT RESOLVED:
>
> THAT the second policy report of the Working Group on Non-Disclosure Agreements (NDAs) be accepted;
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> THAT the working group continue its work in accordance with the directions of the ULCC; and

[18] David Engstrom et al, "Shedding Light on Secret Settlements: An Empirical Study of California's STAND Act" (2025) 92:1 Univ Chic Law Rev, online: <https://chicagounbound.uchicago.edu/uclrev/vol92/iss1/2>. Engstrom also did not find evidence that settlement amounts were decreased. He did conclude that California's "Stand" Act had a "liberation effect" improving the lives of many who experienced assault and harassment at p. 189.

[19] Blair Bullock & Joni Hersch, "The Impact of Banning Confidential Settlements on Discrimination Dispute Resolution" (2024) 77:1 Vanderbilt Law Rev 51. Online <https://scholarship.law.vanderbilt.edu/vlr/vol77/iss1/2/>

[20] Julie Macfarlane (unpublished) "The Dangerous Growth of Non-Disclosure Agreements: their reach, impact and the myths that sustain them" includes a review of data from the PEI Human Rights Commission that shows that levels of adjudication and settlement have remained fairly similar before and after the PEI Act. In 2017/18, the Commission reported 39% of complaints settled (23 of 59 cases closed) and a further 25 (42%) cases withdrawn, some of which would also be settled and some abandoned. These are not broken down, so the settlement numbers would be affected by this. In 2023/24, following the enactment of the PEI Act, the annual report shows 33% complaints settled (18 of 54 cases closed) and a further 33% withdrawn, some settled. The numbers being adjudicated are very small - two in 2017/18, and one each in 2022/23 and 2023/24. With such a small sample, she finds the changes in settlement numbers are marginal.

[21] *Supra,* note 5 at paras 14–15.

[22] *Uniform Law Conference of Canada, Resolutions of the Civil Section* (2024), online: <https://www.ulcc-chlc.ca/ULCC/media/EN-Annual-Meeting-2024/Civil-Section-Resolutions-2024.pdf> at 1.

THAT the working group report back to the ULCC at the 2025 meeting.

C. Application

[14] This project proposes uniform legislation to regulate NDAs, for consideration by all jurisdictions in Canada, both common law and civil law (Quebec), for a harmonized approach.

D. Consultation

[15] The Working Group consulted with lawyers and interested persons to hear different perspectives on NDAs. More than one lawyer noted that the use of NDAs has arisen in the context of the lack of viable avenues for redress through current legal processes. Many consulted commented on the reality of unequal bargaining power during negotiations. One interested party asserted that NDAs are not good for democracy, freedom of speech, and freedom of the press. Another urged consideration of commitments to reconciliation. It was also noted that not legislating to regulate NDAs was in itself making a decision. It was widely recognized that legislation would help level the bargaining power from a policy perspective.

[16] All of those consulted acknowledged and recognized the harm that can be caused by the improper use of NDAs, and acknowledged the harm that can be caused by shielding misconduct which may facilitate serial perpetrators. There was also consensus on the importance for people who had been harmed to be able to speak to medical practitioners, counsellors, spiritual advisors, others for healing and it was acknowledged that one does not always know what will assist someone at that time an agreement is being made. All also noted how important it was that the person who has experienced harm gets to choose what happens and the decision about whether to enter an NDA or not should be theirs to make.

[17] Differing views on permitting parties from being released from NDAs were shared, with acknowledgment that while it may be wrong to restrict people forever there were also reputational concerns for institutions if allegations were raised in the future. Some individuals spoke about the importance of ensuring there is finality when arriving at a settlement. One lawyer shared the view that related to sexual abuse claims in a family situation it would not have been possible to make a settlement if binding NDAs were not available and emphasized the difference between these cases and workplace harassment, or even sexual abuse involving institutional parties. Others noted that individuals who have experienced harassment, discrimination or abuse may not be able to make the best decision for themselves in the moment. Some people may regret their decision to sign an NDA sometime later.

[18] Several of the individuals consulted also discussed the current challenges from an institutional perspective on the inability to make disclosures that potentially would prevent serial harm from occurring or provide transparency for others to make informed decisions. It was noted that it should not be the responsibility of the person who was harmed to prevent serial harm,; and concern was raised by one lawyer regarding whether restricting NDAs would make it more difficult for individuals to seek redress in sexual abuse situations.

[19] The Working Group recognizes and thanks the individuals[23] who shared their time and experiences with us to further inform our considerations of these complex issues.

E. Issues identification and analysis

[20] As discussed in the second policy paper, NDAs are being used to silence people and protect wrongdoers from being held accountable. This contributes to a lack of confidence in the legal systems, access to justice, and the ability to hold people to account in society. The use of NDAs for these improper purposes undermines the fundamental foundations of our democratic society, including freedom of expression, and as a tool used to undermine the right to equal protection and benefit of the law in situations where there is power imbalance. The improper use of NDAs has become "normalized" and creates a culture of silence. Addressing the improper use of NDAs which cause harm and attempting to correct power imbalances are justifiable reasons to restrict the use of NDAs. Goals include leveling the playing field between the potential parties to an NDA when an agreement is being negotiated, and ensuring that certain disclosures are always permissible regardless of the existence of an NDA. While NDAs are used in ways that cause harm, it is important that they not be restricted entirely as some individuals who have experienced sexual or other harassment and discrimination may choose to enter into an NDA and any uniform legislation should not take away this option. Individuals who experience harm should be empowered to choose whether or not to enter into an NDA.

F. Options for Consideration

[21] At the Annual Meeting in 2024, the Civil Section accepted many of the recommendations made by the Working Group in the second policy paper. The Civil Section also provided comments and raised questions for the Working Group to further consider. This section is organized are follows:

- **Part I** the Working Group's policy recommendations that have previously been endorsed by the ULCC Civil Section;
- **Part II** the Working Group's revised and new policy recommendations;
- **Part III** policy issues on which the Working Group has not yet reached consensus and is seeking the ULCC's direction; and
- **Part IV** commentary on consideration of the broader context for consideration identified by the Working Group.

I. Recommendations Previously Endorsed

[22] The Civil Section endorsed a number of policy recommendations made by the Working Group. These recommendations are summarized below.

[23] A list of individuals the Working Group heard from during consultation is included in Appendix A.

(a) Approach

[23] *Recommendation 1*: The legislation strictly regulate and limit the use of NDAs.[24] The Act would not ban NDAs outright, but would create requirements around their use, aimed at deterring inappropriate use, leveling the playing field between the potential parties to an NDA, and ensuring that specific disclosures are always permitted notwithstanding the existence of an NDA.

(b) Application

[24] *Recommendation 2*: The Act would apply to NDAs that address the circumstances regarding human rights discrimination, inappropriate sexual conduct and sexual assault, harassment and bullying (or violence), and reprisals. A single instance or alleged instance is sufficient to be captured by the legislation. It is not limited to a specific context. Discrimination would be defined in a way that is consistent with human rights legislation, and harassment and abuse would be defined broadly to include sexual and other forms of harassment, violence and bullying similar to definitions found in health and safety legislation. [25]

[25] NDA would be defined to include any kind of non-disclosure provisions in any type of agreement (including non-disparagement clauses, settlement agreements, etc.) that prevent a party from disclosing alleged or substantiated discrimination, harassment and/or abuse.[26]

[26] The Act would enable parties to maintain the confidentiality of settlement amounts.[27]

(c) Scope

[27] *Recommendation 3*: The Act would apply to NDAs used in situations of conduct described above under Application and not limited to a specific context. Meaning the legislation applies to the employment context and beyond (e.g. sports organizations, volunteers, consumer disputes, health providers such as massage therapists, family situations, etc.)[28]

(d) Pre-emptive NDAs

[28] *Recommendation 4*: The Act would provide that pre-emptive NDAs that are not limited to the legitimate purposes of protecting trade secrets, intellectual property, and other similar confidential business information are void and unenforceable. [29]

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[24] *Supra*, note 5 at para 33, Recommendation 2.
[25] *Ibid* at para 27, Recommendation 1.
[26] *Ibid* at para 45, Recommendation 5.
[27] *Ibid*, at para 44, Recommendation 5.
[28] *Ibid* at para 27, Recommendation 1.
[29] *Ibid* at para 45, Recommendation 5.

(e) Non-compliant NDAs are void

[29] *Recommendation 5*: The legislation would provide that an NDA (i.e., the non-disclosure provision within an agreement) is void if it does not comply with the Act, thus ensuring severability of offending provisions.[30]

(f) Appending provisions

[30] *Recommendation 6*: The Act should provide that the provisions of the legislation be appended to the agreement with the NDA.[31]

(g) Preamble and commentary

[31] In the second policy report, the Working Group recommended that the uniform legislation have both a purpose clause and commentary.[32] The Civil Section noted that the accepted drafting guide of the ULCC for uniform legislation indicates that purpose clauses are not generally[33] necessary, and commentary would sufficient. The Working Group accepted this direction.

[32] *Recommendation 7*: The Act would not have a purpose clause.

II. New and Revised Recommendations

[33] Set out below is a summary of the Working Group's revised and new policy recommendations. Recommendations have been refined following consideration of the Civil Section's feedback or the Working Group's own considerations.

(a) Requirements for Validity

[34] Since the 2024 Annual Meeting, the Working Group has spent a considerable amount of time discussing and reviewing the validity requirements and considered number of possible preconditions that could be required for an NDA to be enforceable. In arriving at these revised recommendations, the Working Group seeks to achieve a balance between preventing the unilateral imposition of NDAs, assisting in addressing the imbalance of bargaining power without duplicating conditions, and the concern raised by some members of the Working Group that too many preconditions may make it almost impossible to negotiate an NDA in the first place.

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[30] *Ibid* at para 39, Recommendation 4.
[31] *Ibid* at para 102, Recommendation 13.
[32] *Ibid* at para 35, Recommendation 3.
[33] *Uniform Law Conference of Canada, Drafting Conventions* (22 August 2023), online: <https://www.ulcc-chlc.ca/ULCC/media/Civil-Section-documents/Drafting-Conventions-approved-approuvees-Conventions-only-final.pdf>, ss 13, 17.

i) No undue influence

[35] The Working Group believes that one of the most important policy objectives of the uniform legislation is to address the power imbalances that can make some people feel as though they have no option but to sign an NDA. One way to achieve this objective is for the legislation to state expressly that there should not be any undue attempts to influence the person who experienced the unwanted conduct (relevant person) to agree to an NDA. Although some commentators (see e.g. the Manitoba Law Commission[34]) have cautioned that such a provision is unnecessary given common law concepts such as undue influence, unconscionability, etc., the Working Group is concerned that in practice many relevant people feel forced into NDAs. The Working Group thus recommends that the legislation include provisions that specify there must be no undue influence or pressure on a relevant person to enter into an NDA. These could be modeled after, for example, provisions in BC's *Business Practices and Consumer Protection Act*,[35] which are designed to address similar power imbalances between contracting parties and address unconscionable acts or practices. The Working Group further discussed that this may be interpreted as limiting the common law scope of undue influence. However, it was noted that including a description, or examples of what may be undue influence, in the uniform Act would assist parties in understanding. For example, a person must not use their power or position to unduly pressure a relevant party to sign.

[36] In the second policy report, there was a suggestion to adopt a reverse burden of proof where undue influence is alleged.[36] In further discussion, the Working Group noted that while reverse onus is also used in BC's *Business Practices and Consumer Protection Act,*[37] acknowledged that its use is rare. The Working Group conceded that the other protections proposed may be sufficient.

[37] *Recommendation 8*: The Act would provide that a person must not unduly influence another person to enter into an NDA. It could include examples of conduct that would constitute undue influence. The Act would also clarify that nothing in the Act derogates from any other remedies that a court may award, including those available in equity and common law.

ii) *Relevant person's preference*

[38] In the second policy report, the Working Group recommended that the legislation should include a section making it clear that an NDA cannot prevent disclosure of underlying facts by a complainant unless it is the complainant's preference[38] and that this also be a condition of validity.[39] Upon further discussion, the Working Group concluded that such a provision may lack clarity and therefore agreed that it should not be included. The policy intent behind such a provision is to "level the playing field" between parties and avoid NDAs being imposed upon a relevant person against their will. However, questions

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[34] *The Use of Non-Disclosure Agreements in the Settlement of Misconduct Claims* (Manitoba Law Reform Commission, June 2023) online: <http://www.manitobalawreform.ca/pubs/pdf/145-full_report.pdf>.
[35] *Business Practices and Consumer Protection Act, S.B.C. 2004, c.2*, s 8. Online <https://canlii.ca/t/56gwl>
[36] *Supra,* note 5 at para 66.
[37] *Business Practices and Consumer Protection Act, S.B.C. 2004, c.2*, *supra* note 34.
[38] Supra, note 5 at para 48, Recommendation 6.
[39] *Ibid* at para 74, Recommendation 9.

arose as to how such a requirement could be confirmed and documented[40] contributing to the Working Group's doubts about its usefulness.

[39] The Working Group also discussed that the legislation should be clear that NDAs cannot be imposed unilaterally. In California, the language "voluntary, deliberate, and informed"[41] is used to emphasize that an agreement must be negotiated.

[40] The majority of Working Group is of the view that prohibiting undue influence supported by an opportunity for independent legal advice discussed below, will provide the necessary protection. Some members of the Working Group continue to have concerns regarding ensuring whether the choice to enter an NDA is truly the decision of the person harmed and are not convinced that the measures outlined are sufficient to balance out unequal bargaining power, but are in agreement on this recommendation.

[41] *Recommendation 9*: the Act would not include a requirement that an NDA is only valid if it is the complainant's preference but would make it clear that an NDA cannot be imposed unilaterally.

iii) *Opportunity to obtain independent legal advice*

[42] There was broad consensus among the Working Group that the relevant person must be given a reasonable opportunity to receive independent legal advice.[42] While there was discussion of ensuring that the legal advice was available, reliable, and competent, the Working Group recognizes it is the responsibility of law societies/legal regulators to regulate the legal profession regarding ethics and competency, and mandating a legal advice scheme through the legislation was not feasible in view of the scope of the uniform legislation. The Working Group encourages jurisdictions to engage with their relevant regulator and other legal profession organizations to support educational professional development for legal professionals on the legislation.

[43] As discussed in the second policy report, in considering the opportunity to obtain legal advice the Working Group discussed what "reasonable opportunity" may mean. The Working Group recognizes that this ambiguity may contribute to pressure on a relevant person to sign in shorter time frames that may be problematic. Many jurisdictions specify time for considering an NDA and/or for a cooling off period.[43] Therefore, the Working Group maintains the recommendation that the legislation specify a relevant person have at minimum 30 days to obtain independent legal advice and consider the proposed NDA.

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[40] In some jurisdictions such as New York an additional acknowledgement form by the relevant person stating that this is their express wish of preference is signed. However, this arguably may be subject to the same concerns of undue influence as the NDA itself.

[41] *Cal. GOV Code § 12964.5 - 12964.5. (d)(2)*, 2024."As used in this section, "negotiated" means that the agreement is voluntary, deliberate, and informed, the agreement provides consideration of value to the employee, and that the employee is given notice and an opportunity to retain an attorney or is represented by an attorney." Online <https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=GOV&sectionNum=12964.5>

[42] *Non-disclosure Agreements Act*, *supra* note 2, s. 4(3)(a).

[43] CA GOV Code §12964.5 (b)(4), *supra* note 40; *820 ILCS 96 /1-35 (Illinois)*, s (a)(2) online <https://www.ilga.gov/legislation/ilcs/ilcs5.asp?ActID=4008>

[44] *Recommendation 10*: The Act would require that a person must be given at least 30 days to obtain independent legal advice before entering into an NDA.

iv) *Third party health and safety and public interest*

[45] The PEI Act states that NDAs are only enforceable where they "do not adversely affect (i) the health or safety of a third party, or (ii) the public interest."[44] The Working Group considered the Civil Section's concern regarding the ambiguity of "public interest" and no longer recommend including such a clause. Following further discussions, the Working Group is also recommending against a "health and safety" clause as a pre-condition for enforceability. Although the Working Group is concerned about the harm that can be caused to third parties by NDAs, such a clause raises significant concerns of vagueness and uncertainty. That said, as a matter of public interest, an NDA cannot override disclosures (both protected and required) under health and safety legislation; this issue is discussed under non-applicability and exceptions. Consideration of disclosures to third parties is also discussed further in Part III.

[46] *Recommendation 11*: the Act should not include a requirement that an NDA is only valid if it does not adversely impact the health and safety of a third party, or the public interest.

v) Waiver of Confidentiality

[47] As discussed in the second progress report, the Working Group recognizes that trauma and the need to process the trauma may only become apparent to a person some time, possibly years, after an NDA is finalized. Some jurisdictions have addressed this concern by providing that a person can unilaterally waive confidentiality in the future, and in the second report, the Working Group made this recommendation.[45] However, upon further discussion, the Working Group is no longer recommending this be included. Some members of the Working Group were of the opinion that the list of permitted disclosures discussed below helps to achieve the policy objective of ensuring a person may process the trauma and find closure. The Working Group recognized parties have an expectation of finality when agreeing to a negotiated settlement. In balancing interests, the Working Group reconsidered the recommendation. This change has been agreed to by some members of the Working Group on the basis that the other protections recommended in this report, such as requiring set time and duration, are included in the uniform Act.

[48] *Recommendation 12*: the Act would not include a requirement enabling a person to unilaterally waive confidentiality in the future.

vi) Set Time and Duration

[49] It may be unconscionable to bind a person to a contract in perpetuity. However, the term length of an NDA may be a useful bargaining chip in the negotiation of the agreement. After lengthy discussions on this point, the Working Group agreed that the legislation should require NDAs to have a specified term

[44] *Non-disclosure Agreements Act*, *supra* note 2, s. 4(3)(c).
[45] *Supra*, note 5 at para 74, Recommendation 9.

length, but it should not set a maximum statutory duration. Some members were of the view that the concern about potential life-long agreements is mitigated by the enumerated list of mandatory exceptions, and preventing agreements beyond, for example 10 years, may amount to an invisible barrier that makes a negotiated NDA impossible to achieve. While other members noted that the exceptions did not mitigate against the psychological harm that a relevant person may experience by being limited by the NDA and that the NDA permits the perpetrator to continue to have a level of control over the relevant person.

[50] *Recommendation 13*: The Act should provide that an NDA must have a specified term length.

vii) No Liquidated Damages

[51] As noted in the second progress report, the Working Group is aware of clauses requiring payment of liquidated damages or return the consideration paid for settlement of the claim for harassment or discrimination are being included in some NDAs. The objective of further intimidating the relevant person is clear. The Working Group continues to recommend that an agreement requiring payment of liquidated damages, forfeiting all or part of the consideration be unenforceable.[46] As with any breach of contract, proven damages when a breach has occurred continues to be a remedy available to parties.

[52] *Recommendation 14*: The Act should provide that that any clause in an NDA purporting to require the complainant to pay liquidated damages for an alleged breach of an NDA is unenforceable.

viii) *Mutuality*

[53] As discussed in the second policy report, it is often misunderstood by the person who experienced harm that to have privacy and maintain confidentiality of their identity they must agree to an NDA. Complainants are also led to believe that if they agree to an NDA then the party offering the settlement will also be bound by the NDA. While there are some protections under privacy law to ensure the confidentiality of the relevant person's identity depending on the parties involved, the legislation should make clear that the identity of the relevant person is to be kept confidential, and the other parties cannot also discuss the underlying facts. Examples of such clauses may be found in the Maine and Nevada legislation:

Maine:

> The provision applies to all parties to the agreement to the extent otherwise permitted by law.[47]

[46] *Ibid* at para 72.
[47] *26 MRSA §599-C: Nondisclosure agreements (Maine)*, s 4B. Online: <https://legislature.maine.gov/statutes/26/title26sec599-C.html

Nevada:

> 4. Except as otherwise provided in subsection 5, upon the request of the claimant, the settlement agreement must contain a provision that prohibits the disclosure of:
>
> (a) The identity of the claimant; and
>
> (b) Any facts relating to the action that could lead to the disclosure of the identity of the claimant.[48]

[54] *Recommendation 15*: The Act provide for NDAs to be mutual and bind all parties, not only the relevant person, unless the relevant person elects otherwise.[49]

(b) Non-Applicability and Exceptions

[55] The Civil Section accepted that, as a matter of public policy, there are situations where an NDA cannot prevent certain disclosures and endorsed the Working Group's recommendation to provide for the non-application disclosures as set out in ss. 4(6) and (7) of the PEI Act and the additional disclosures recommended in the second policy paper[50] although there was expressed concern regarding the ambiguity of "otherwise in the public interest". Over the last year the Working Group discussed this concern and considered further refining the list disclosures that should always be permissible, regardless of an NDA.

[56] The Working Group discussed different investigation processes internal and external to an organization, as well as other processes, such as mediation. It was recognized that confidentiality in these situations is helpful to permit open discussions and disclosures; however, the increased use of blanket NDAs is problematic. For instance, blanket NDAs in these processes may be used to conceal retaliatory behaviour during a mediation or investigation process. They may also prevent disclosures for health and safety reasons. Appropriately crafted confidentiality clauses can address the concerns parties may have to allow for full investigations and settlement discussions.

[57] On further discussion the Working Group also considered that disclosure for research purposes should be included in the list of exceptions in the legislation. This would allow sharing of information about the situation giving rise to the NDA and the use of the NDA itself for research where confidentiality is maintained. The disclosure would be permitted where the identities of the other parties are not disclosed and the information shared will be kept confidential by the researchers. This could be analogous

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[48] *NRS 10.195 – Prohibition of provisions in settlement agreement prohibiting or restricting disclosure of certain information (Nevada)*, 2022, ss 4, 5. Note Section 5 provides that where a governmental agency or public officer is a party to the settlement, the agreement must not contain a provision pursuant to section 4. Online <https://law.justia.com/codes/nevada/2022/chapter-10/statute-10-195/>

[49] Note that this does not prohibit disclosure has may be permitted under non-applicability and exceptions if required.

[50] *Supra*, note 5 at paras 53, 74, Recommendations 7 and 9.

to the approach taken in the *Personal Information Protection and Electronic Document Act* (*PIPEDA)*, s. 7(2)(c):

> … an organization may, without the knowledge or consent of the individual, use personal information only if… it is used for statistical, or scholarly study or research, purposes that cannot be achieved without using the information, the information is used in a manner that will ensure its confidentiality, it is impracticable to obtain consent and the organization informs the Commissioner of the use before the information is used;[51]

[58] This may allow for governments, universities, research institutions, non-profit organizations to conduct relevant research on the use of NDAs which may, for example, assist in assessing the effectiveness of the legislation.

[59] To summarize, although the group has not achieved consensus on a "health and safety" exception to a third party (discussed in Part III below), the Working Group agrees that the following broad categories of disclosures should be expressly permitted:

- required or protected by law
- in the course of an investigation (including a workplace investigation)
- to a person qualified to provide health (including mental health), spiritual or other similar services or support, including counseling services and support groups
- to a person authorized to practise law in Canada
- to a law enforcement agency (including regulatory bodies)
- to a spouse, parent, sibling, child and any other specific individual named in the agreement, as specified in the NDA
- to perspective and current employers
- for research purposes, provided any published results are anonymized
- for artistic expression by the relevant person that does not identify the party responsible or person who committee or is alleged to have committed the harassment or discrimination or the terms of the NDA
- to a person or entity identified by regulation.

[60] Although Working Group members are in agreement with the above exemptions being included in the uniform Act, some members did express concern about the exception for artistic expression, citing potential concerns about uncertainty due to such expression's subjectivity.

[61] The Working Group accepts that an exemption that allows disclosure "or otherwise in the public interest" may be too ambiguous. The Working Group is concerned that while much consideration has gone into drafting a provision that is comprehensive, we cannot anticipate all scenarios which may arise in the future. It is recommended that the public interest be referenced as guidance for additions to non-applicability and exception disclosures which may be addressed through regulatory-making powers.

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[51] *Personal Information Protection and Electronic Documents Act* S.C. 2000, c.5, s.7(2)(c) online <https://laws-lois.justice.gc.ca/eng/acts/p-8.6/page-1.html#h-416969>

[62] *Recommendation 16*: The Act should include the above list of exceptions for which disclosure is always permitted. The Act further allows for additions to the non-applicability and exception list through regulatory-making powers which reference public interest as a guiding principle.

(c) Retrospectivity

[63] The Working Group further considered retrospectivity and that to achieve the objectives of the legislation past NDAs should be unenforceable if they restrict disclosures permitted under the legislation (non-applicability and exceptions). This is similar to s. 5 of the PEI Act.[52] Recognizing that agreements may address other issues and not be standalone NDAs, the remaining clauses of the agreements would remain valid while severing the NDA.

[64] The Working Group also considered retroactivity related to pre-emptive NDA and non-disparagement clauses which may be found in employment contracts and attempt to limit disclosures regarding the conduct within scope of the legislation (human rights discrimination, sexual conduct, harassment and bullying (or violence) and reprisals). These should also become unenforceable.

[65] *Recommendation 17*: The Act provides that an NDA entered into before the Act comes into force is unenforceable to the extent that they attempt to restrict disclosures permitted under the Act (non-applicability and exceptions disclosures). The Act also provides that pre-emptive NDAs and non-disparagement clauses existing before the Act comes into force are unenforceable as they relate to the conduct within the scope of the legislation.

(d) Provision of NDA

[66] The Working Group is aware of some instances in which a person who signs an NDA is not given a copy of the agreement and is only allowed to view it when signing. This is not acceptable to the Working Group.

[67] *Recommendation 18*: The legislation should provide that anyone who enters into an NDA must be provided with a copy of the executed NDA.

(e) Plain language

[68] The Working Group discussed the questions raised by the Civil Section regarding the recommendation that the legislation specify that NDAs be written in plain language. While the Working Group recognizes that this may be difficult to enforce and would become a matter of interpretation for the courts if the NDA was challenged, including such a requirement may encourage improved drafting of NDAs. There are examples of legislation that include plain language requirements and assistance for persons to understand their rights, often related to government responsibilities such as in access to information and protection of data.

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[52] *Non-disclosure Agreements Act*, *supra* note 2, s 5.

[69] *Recommendation 19*: The Act should provide that the NDA be written in plain language.

(f) Other measures to support awareness of the law

[70] The Working Group further considered measures to support the awareness and understanding of the law. The viability of measures considered were assessed. While we do not recommend that these be included in the legislation, jurisdictions are encouraged to consider the suggested supports.

[71] The Working Group noted the need for public awareness campaigns once legislation is adopted for people to understand how the legislation may affect an individual's NDA. People who live under an NDA often live with continual fear of possibly breaching their NDA. Jurisdictional issues which may arise were also discussed in terms of the need for public awareness, fact sheets and legal advice.

[72] As noted previously, the opportunity to obtain legal advice is required for a valid NDA. The Working Group considered whether there were other mechanisms to support the person contemplating signing an NDA to obtain legal advice such as funding mechanisms or competency of the advice. It was recognized that ensuring the competency of the legal profession is the responsibility of the law societies/legal regulators. Provisions to facilitate funding for legal advice are improbable considering the scope of the legislation and the wider context of access to justice needs.

[73] Jurisdictions are encouraged to engage with the relevant law society, bar associations and continuing professional development providers when legislation is introduced in support of professional development training.

[74] *Recommendation 20*: Jurisdictions should consider what educational and awareness strategies and tools are required to ensure awareness of the law.

(e) Use of public funds

[75] In the second policy report, the Working Group recommended that the legislation include a restriction that public monies cannot be used as consideration for an NDA related to harassment and discrimination, or to litigate enforcement of an NDA.[53] The prohibition would extend to grants of public funds. Corresponding amendments to relevant *Finance Administration Acts* or legislation governing the provision of grants should also be made.

[76] Following further discussions, the Working Group was generally in agreement that public funds should be restricted from use as consideration for NDAs or enforcing NDAs but concluded that this may be outside the scope of the uniform legislation on NDAs. The use of public funds may be more appropriately addressed by amending other legislation, including legislation addressing the use of public funds, and through non-legislative mechanisms. Non-legislative mechanisms may include policies,

[53] *Supra*, note 5 at para 98, Recommendation 12.

directives, and contract wording. Jurisdictions are encouraged to consider how best to address this in their context.

[77] *Recommendation 21*: The Act should not include a provision regarding the use of public funds as consideration for an NDA.

(f) Reporting

[78] The Working Group considered whether to include required reporting requirements in the legislation with the objective of monitoring and assessing the effectiveness of the legislation. There is complexity in establishing a registry and questions regarding enforcing compliance. The benefits of a reporting mechanism would facilitate monitoring to track the prevalence of NDAs, if legislation was meeting the objectives of reducing the use of NDA, and compliance of NDAs with requirements of the legislation. Reporting would also inform education efforts and identify possible systemic issues related to the use of NDAs. After considering the complexities of implementing a registry, the Working Group determined not to include a reporting provision in the legislation. Jurisdictions might be more able to implement feasible reporting and monitoring if scope of the legislation was narrower, such as applying only in employment or labour situations.

[79] *Recommendation 22*: The Act should not include required reporting requirements.

III. Direction Requested from ULCC

[80] As evidenced above, the Working Group has achieved broad consensus on virtually all of the contents of a proposed uniform Act. However, there remain three specific issues on which agreement was not reached and on which direction and advice from the ULCC is requested. These issues are set out below.

(a) Health and safety exception (permitted disclosure)

[81] As noted above, the Working Group is not recommending that it be a precondition of validity that an NDA not adversely impact the health and safety of a third party. The Working Group agreed that reporting and disclosures made under health and safety legislation are permitted disclosures. However, the Working Group has been unable to achieve consensus on whether the list of permitted exceptions should include a disclosure to a person where the person's health and safety may be at risk. This would allow, for example, a person who entered into an NDA due to sexual harassment at a workplace, to warn another person or persons in the workplace that they should avoid the wrongdoer.

[82] The Working Group recognizes that there may be legitimate situations when a relevant person may have concerns regarding the health and safety of other people. The Working Group discussed that the policy objective of the legislation was to prevent harms resulting from the use of NDAs including serial predation. We also discussed that there may be situations where reporting through health and safety processes may not be available (non-workplace) or responsive. It was also discussed that allowing this

type of disclosure may give rise to concerns regarding the certainty of the agreement and expectations of the parties. The below table summarizes the pros and cons of allowing for such a disclosure in the Act.

Pros	Cons
Helps prevent harm from serial perpetrators Relevant party may not experience feelings of guilt if did not report/warn Provides for situations where there is no health and safety body (e.g. family sexual assault) Addresses situation where employer, organization, health and safety body, etc. has not addressed or not yet addressed concerns.	Agreement with such an exception gives parties less certainty, and certainty is a major benefit of entering into an NDA in the first place. The recipient of such a disclosure is not under any obligation to keep the information confidential. Places onus on relevant party to address harm to third parties – obligation should rest with the organization (when there is one). Requires relevant person to determine whether health and safety concerns are legitimate.

[83] If included, the wording of the exception may clarify and limit the situations where disclosure directly to a third party is permitted. For example, where there are "reasonable grounds to believe that compelling circumstances exist that affect the health or safety of any individual",[54] "is likely to be" harmed[55], or the risk is "imminent risk".[56] It is noted that if a disclosure was made that did not qualify as an properly permissible disclosure, the other party to the NDA is able to pursue remedy for breach of contract, and the person about whom the disclosure is made, may also have a defamation claim.

[84] *Direction sought 1*: As the Working Group is divided on whether to include as an exception that an NDA cannot prevent a party from making a disclosure for the purpose of protecting the health and safety of a third party, the Working Group seeks the ULCC's direction on how to proceed in this respect.

(b) Restricting NDAs with alleged wrongdoers

[85] From consultation with employers' counsel the Working Group was made aware of the complexities of addressing wrongful behaviour, including in situations where investigations may not definitively determine whether the allegations can be substantiated. It was also noted that in some cases it is the person who committed or has alleged to have committed the wrongful behaviour who demands that the organization bind the relevant person with an NDA or also threatens the employer with a

[54] As in the *Personal Information Protection Act, S.B.C. 2003, c. 63*, ss. 18(1)(k), online < https://canlii.ca/t/566gk>; *Freedom of Information and Protection of Privacy Act, RSO 1990, c F.31*, s 21(1)(b). online <https://canlii.ca/t/56fvc>

[55] As in child protection legislation, such as the *Child, Family and Community Service Act* RSBC 1996, c. 46, s. 14. Online <https://canlii.ca/t/56bvs>

[56] As in Codes of Conduct for lawyers: *Canadian Federation of law Societies, Model Code of Professional Conduct*, online: <https://flsc.ca/what-we-do/model-code-of-professional-conduct/interactive-model-code-of-professional-conduct/> , s 3.3-3.

wrongful dismissal suit if the employer and the relevant person do not agree to an NDA. Employers' counsel noted that legislation regulating NDAs could provide guidance to employers in these situations and the ability for employers to disclose wrongful behaviour or allegations of wrongful behaviour when contacted for references. This would assist to address the risks of serial predation, and health and safety concerns where others may be further harmed.

[86] The Working Group recognized that the non-application or exceptions of the NDA may also allow disclosures by other parties, not only the relevant party. For example, employers and institutions may have to disclose as required or permitted by law, as they have responsibilities under legislation such as health and safety, employment standards, privacy, and may also need to seek advice from legal counsel or other advisors.

[87] Section 4(4) of the PEI Act prohibits NDAs that prevent investigation of a complaint:[57]

> A party responsible shall not enter into a separate non-disclosure agreement with the person who committed or is alleged to have committed the harassment or discrimination for the purpose of preventing a lawful investigation into a complaint of harassment or discrimination.

[88] The Working Group also considered Ontario's *Strengthening Post-Secondary Institutions and Student Act* (2022)[58]:

> 16.1 (5) Subject to subsection (6), an agreement between a private career college and any person, including a collective agreement or an agreement settling existing or contemplated litigation, that is entered into on or after the day section 1 of Schedule 2 to the *Strengthening Post-secondary Institutions and Students Act, 2022* comes into force, shall not contain any term that, directly or indirectly, prohibits the private career college or any person related to the private career college from disclosing that an allegation or complaint has been made that an employee of the private career college committed an act of sexual misconduct toward a student of the private career college, and any such term that is included in an agreement is void.

[89] The Working Group also acknowledges that lawyers engaged in civil litigation on sexual assault have considered the differences between institutional and individual perpetrators and the use of NDAs. Watershed Legal Projects, formerly the Canada Centre for Legal Innovation in Sexual Assault Response (CCLISAR), strongly supports legislation to prohibit institutions from insisting on confidentiality from the relevant person and prohibiting institutions from committing to terms that prevent disclosure by them of the identities of persons against whom allegations or findings of sexual assault have been made.[59] We

[57] *Non-disclosure Agreements Act*, *supra* note 2, s 4(4).
[58] *Strengthening Post-secondary Institutions and Students Act*, *supra* note 9; The U.K. also has a similar clause in its Expert Participation, *Higher Education (Freedom of Speech) Act 2023*, s A1(11), supra, note 13.
[59] *CCLISAR Position Statement Legislation Prohibiting Non-Disclosure Agreements (NDAs)*, online: <https://www.watershedlegalprojects.ca/_files/ugd/4b52bd_c138560207e8460caabbf1c68dc2a005.pdf>.

have also heard from a lawyer who specializes in civil sexual assault cases who strongly expressed that settlements with NDAs with perpetrators were the only way to get some redress for clients who had been abused, particularly in the family context.

[90] In discussion the Working Group recognized there may be situations where there are allegations made between two employees. In some situations, allegations may be made as retaliation against a relevant person who reports harassment or discrimination. In these situations, the employer may disclose information related to each employee, for example if a reference was requested. The Working Group also recognized that there may be situations where investigations may not find that the allegations have been substantiated, and this would be relevant information to be provided.

[91] The Working Group was in agreement that a private agreement with an NDA cannot absolve an institution of its responsibilities which exist in law. Additionally, the Working Group agreed that an institution should not be prevented from disclosing if there were substantiated complaints. The area where the Working Group could not come to consensus was with respect to allegations of wrongdoing that fall within the scope of the proposed Act.

[92] The pros and cons for having the legislation prevent institutions from entering NDAs with alleged perpetrators are summarized below:

Pros	Cons
Helps prevent harm from serial perpetrators. Recognize that many investigations do not substantiate allegations (may not have expertise to find facts, gender stereotypes). Mitigating: Organizations likely will not comment on individuals if they do not want to citing privacy rights	Arguably contrary to some fundamental tenets of our legal system including presumption of innocence, right to be heard Freedom to contract. Equally applies to both parties as alleged harassers may make retaliatory complaints against the relevant party. This would prevent the relevant party from being able to seek an NDA (although may not prevent a confidentiality clause).

[93] The majority of Working Group members were of the view that the Act should prevent institutions from entering into NDAs with alleged perpetrators, thereby permitting disclosure of allegations, not only substantiated findings, as this furthers the policy purpose of preventing harm from serial predation. When an institution would be disclosing allegations, they must also disclose whether an investigation was carried out and the conclusion of any investigation. However, other members of the Working Group are concerned about the potential impact of sharing unsubstantiated allegations.

[94] *Direction sought* 2: the Working Group seeks the ULCC's direction on how to proceed on this issue.

(c) Offence or penalty provisions

[95] In the second policy report, the Working Group recommended that the legislation include offence provisions for the respondents entering into an NDA or who enforces, or attempts to enforce, an NDA contrary to the legislation.[60] There are several examples of NDA legislation with offence provisions.[61] Questions were raised by the Civil Section at the 2024 Annual Meeting regarding who investigates and prosecutes, whether the corporate veil could be pierced where the controlling minds "knowingly" proceeded with NDAs contrary to the legislation, and the viability of punitive damages or client costs. The Working Group has further considered whether the Act should include offence provisions that would make it an offence to enter into an NDA that is contrary to the validity requirements of the Act. Would that mean it would be an offence if the relevant party was not given 30 days for independent legal advice, or if there was an effort to unduly influence someone to enter into an NDA? The Working Group also discussed whether the uniform Act should instead include administrative monetary penalties. Finally, the Working Group considered whether the Act should be silent with respect to offence provisions or administrative penalties, but the final report accompanying the uniform Act should encourage jurisdictions to implement some form of deterrence in a way that works for their jurisdiction. For example, jurisdictions may designate an administrative body to administer a system of administrative penalties, or assign responsibilities related to the context giving rise to the situation, such as to the labour board for workplace issues, or the human rights commission for discrimination matters.

[96] The below table sets out the pros and cons of the options considered.

Pros	Cons
May be a deterrent (both options)	Specifying in the Act does not provide jurisdictions with flexibility to choose the sanctions that make sense in their context.
If an offence: prosecution would be responsible and processes clear	If an offence: prosecution may not have resources to prosecute (no teeth)
If an administrative penalty: May be more likely to be applied	If an admin penalty: Need to designate an administrative body to administer (no one clear body with scope of Act) or assign responsibilities/context (may miss areas) May be significant start-up and operating costs for administrative body if existing body not identified

[60] *Supra*, note 5 at para 92, Reommendation 11.

[61] For example, *Non-disclosure Agreements Act*, *supra* note 2, s 6; *820 ILCS 96 /1-35 (Illinois)*, *supra* note 42; *26 MRSA §599-C: Nondisclosure agreements (Maine)*, *supra* note 46, s 5; *RCW 49.44.211: Prohibited nondisclosure and nondisparagement provisions (Washington)*, s 7. Online <https://app.leg.wa.gov/rcw/default.aspx?cite=49.44.211>

[97] *Direction sought 3*: the Working Group seeks the ULCC's direction on how to proceed on this issue.

IV. Addressing systemic issues

[98] The uniform Act is an important step to prevent harms resulting from misuse of NDAs. However, the Working Group recognizes that ULCC is limited in how we are able to respond and what may be appropriately addressed by legislation. This Act arose primarily in the context of misuse of NDAs in settling sexual misconduct and harassment situations. The Working Group acknowledges that settling a complaint is often the only real viable option as cost, time and access to pursuing justice through our legal systems are prohibitive and challenging. We have heard that the use of NDAs arose as the criminal justice system did not provide an effective way to seek redress for sexual assault. Less than 6 % of sexual assaults are reported to police.[62]

[99] Legal systems are unable to meet the current demands and the needs of all people.[63] Sexual harassment, sexual misconduct and discrimination are systemic societal issues. This legislation is only one tool to ameliorate a limited aspect of harm. We need to find solutions to address the systemic societal issues and broader access to justice issues. A broad spectrum of strategies and supports are needed. Political commitment and leadership are needed. Funding for programs that provide education, social supports and legal assistance are required to support relevant parties. Education and awareness-raising is needed not only of this legislation, but to address these systemic issues. Training for organizations on the laws and addressing complaints about wrongful conduct is required. Addressing the backlogs and delays in the legal processes, providing legal aid, taking steps to make processes more trauma-informed, supporting relevant parties to be able to chose to come forward if they want to, and systems that function in a timely way to hold perpetrators and responsible institutions to account are needed to restore public confidence and truly address the problem of violence, discrimination and harassment in society.

G. Next Steps

[100] Following the ULCC's endorsement of the recommendations set out in Part II above, and its direction on the issues set out in Part III, the Working Group will work with the drafter to develop the uniform legislation and final report.

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[62] Adam Cotter, *Criminal justice outcomes of sexual assault in Canada, 2015 to 2019* (6 November 2024), online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2024001/article/00007-eng.htm>.

[63] There are long timelines and delays, high costs of lawyers and experts, lack of supports and the adversarial nature of our systems are not trauma-informed. There are fundamental issues of access to justice that legislation cannot address. Additionally, there is a lack of public supports for people who are harmed. Relevant persons face considerable barriers in pursuing remedies for the harms they have experienced. The barriers include reductions to victim compensation programs, inaccessible counselling and support services, long wait times for services that are available, and limited, if any, financial support if they are unable to work.

H. Draft Resolution

[101] The Working Group proposes the following resolution for consideration by the Section:

BE IT RESOLVED:

THAT the third policy report of the Working Group on Non-Disclosure Agreements (NDAs) be accepted;

THAT the Working Group continue its work in accordance with the directions of the ULCC;

THAT draft uniform legislation on NDAs be prepared based on the recommendations of the third policy report and further directions provided by the ULCC; and

THAT the Working Group report back to the ULCC at the 2026 meeting.

Appendix A: Individuals heard from during consultations

Jillian Frank, partner, KPMG, Vancouver, BC

Jeffrey Metcalfe, Canon Theologian of the Anglican Diocese of Québec and parish priest, Québec City, PQ

Stephen Torscher, partner, Carbert Waite LLP, Calgary, AB

Marcel Williamson, an Indigenous IT cybersecurity consultant, Winnipeg, Manitoba

Jan Wong, journalist, professor, author; Toronto, Ontario

A lawyer practicing in the area of civil sexual assault