CCLISAR

realizing law's potential to respond to sexualized violence

CCLISAR POSITION STATEMENT
LEGISLATION PROHIBTING NON DISLOSURE AGREEMENTS (NDAs)

In the past few years, sexual assault survivors and their advocates in Canada, Ireland and the United Kingdom and the United States, have increasingly voiced concerns about the use of non-disclosure agreements ("NDAs") in financial settlements. They have exposed how NDAs silence survivors, protect perpetrators and institutions from accountability, and facilitate serial perpetration of sexualized violence. As a result, there have been calls on governments to regulate or even prohibit NDA terms in settlement agreements. In response, legislation has been passed in various states in the United States and in Ireland (the majority of which is restricted to the employment context).

On November 17, 2021, the province of Prince Edward Island (PEI) became the first jurisdiction in Canada to pass legislation, the Non-Disclosure Agreements Act (Bill No.118), to regulate the use of non-disclosure terms in settlement agreements in cases involving harassment and discrimination, including sexual harassment and sexual assault, in all contexts (and not limited to the employment). Under the PEI legislation, NDA terms in settlements for claims of sexualized violence are prohibited, unless the NDA is the express choice of the complainant and the case meets specific public interest criteria. The legislation came into force on May 22, 2022.

Since November 2021, legislation prohibiting NDAs has been tabled in Manitoba (limited to the employment context) and Nova Scotia (encompassing workplace and civil actions). On October 27, 2022, the government of Ontario tabled legislation *An Act to amend various Acts in respect of post-secondary education,* which is narrower in scope. If passed, it would prohibit post-secondary institutions ("PSIs") and private career colleges from agreeing to settlement terms with employees that would limit the institution's ability to disclose that the employee (or former employee) had been found to have engaged in sexual abuse as defined in the Act, against a student of the institution.

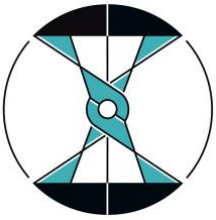
The PEI and similar legislation prohibit settlements that silence the survivor from speaking about the facts of their life experiences of sexualized violence, including the identity of the individual and/or institutional respondent/perpetrator, with limited exceptions. The Ontario legislation has a different focus: it prohibits post-secondary institutions as responsible institutions from agreeing to strict confidentiality about their knowledge of findings of sexual abuse committed against a student by an employee.

In late November 2021, CCLISAR held a workshop, attended by civil sexual assault practitioners and academics with expertise in sexualized violence, to discuss the call for legislation prohibiting or regulating NDAs in settlements relating to sexualized violence. The workshop focused on the central tension with NDA legislation, in terms of balancing concerns that survivors should not be silenced as the price for accountability and compensation, with the concern that prohibiting confidentiality terms outright, might have the unintended consequence of posing a barrier to access to justice, either by deterring claims at the outset or discouraging settlements. The workshop specifically considered the consequences and benefits of NDA legislation on those who face multiple intersecting oppressions, such as on the basis of race, Indigeneity, poverty, sexual orientation, gender identity and ability.

The scope of NDAs 'on the ground' may vary considerably. The broader the scope, the more problematic an NDA will be. The most restrictive NDAs prohibit the disclosure by the survivor of the who, what, when, and where of the sexualized violence, preventing survivors from speaking about their experiences.

CCLISAR acknowledges that the harms caused by NDAs include the harms to individual survivors of being silenced, and the systemic harms to the public interest, especially where confidentiality has facilitated serial predation and a profound lack of institutional accountability (such as by the quiet transfer of employees, religious leaders, coaches or professors to new jobs or institutions).

CCLISAR strongly supports the legislative move to prohibit institutions from insisting on confidentiality from survivors as a term of settlement in cases involving sexualized violence. CCLISAR also supports legislation that prohibits institutions from committing themselves to terms that prevent disclosure by them of the identities of persons against whom allegations or findings of sexual abuse have been made. Further, CCLISAR supports such legislation restricting NDAs in the settlement of sexualized violence claims in all contexts, and not limited to the employment context.



CCLISAR recognizes, however, that broad based legislation prohibiting NDAs with respect to the identity of individual perpetrators, may pose particular barriers to access to justice for survivors. This is especially true for those most vulnerable or marginalized who may lack the power and resources necessary to pursue legal processes, which often drag on for a period of years before a final determination is made. The reasons for survivors' relative powerlessness can be many, including related to financial position, mental and physical health, community pressures or consequences, and fear of reprisal. The experience of the practitioners with whom CCLISAR consulted is that confidentiality is sometimes the only leverage available to a survivor to access much needed compensation and to be able to move forward. As well, it is sometimes the genuine and well-founded desire of the survivor, that the particulars of the sexualized violence, including the identity of the perpetrator, remain as confidential as possible.

Accordingly, CCLISAR supports a nuanced approach to legislation prohibiting NDAs that will provide clear guidance to all parties as to the circumstances in which, at the request and direction of the survivor, and in the public interest, confidentiality as to the identity of the individual respondent may be a term of any agreement between a survivor and an individual or institutional respondent. It will be a rare circumstance where confidentiality terms to protect institutional respondents would ever be in the public interest.

CCLISAR's position above is not an endorsement of the specific language of any particular current or proposed legislation in Canada.