

Legal Defences for NDAs - Myth vs. Reality

NDAs are not always explicitly labelled as such - they may be just one clause in a larger agreement, such as a no-contact agreement. For information on how to recognise an NDA, see [Can't Buy My Silence](#). Find the anti-NDA pledge on their website [here](#).

Legal Arguments/Defences	Reality
NDAs protect victims OR bring 'closure' to victims after a traumatising event	NDAs often re-traumatise victims by isolating them from potential avenues of support and preventing them from discussing what happened. Moreover, the lifelong threat of legal action for a breach means there is no closure.
NDAs are necessary to protect victims' confidential information	A one-sided confidentiality clause can protect victims without requiring them to agree to protect the other side. To suggest that confidentiality "must" be mutual/reciprocal is false. Many elements of settlement agreements are not mutual but represent a set of obligations on each side that create a sense of trade off and fairness.
Confidentiality agreements are an essential precondition to mediation. Banning NDAs impedes one of the most important and effective routes to redress for victims	This is a really common misunderstanding. Banning NDAs makes no difference to confidentiality undertakings in mediation (or investigation). In mediation, confidentiality is for the duration of the process only, not for ever (as in an NDA). This is important and reasonable as it helps people feel free to speak during this time and explore settlement.
NDAs are reasonable and not overly restrictive	NDAs are often extremely broad, and can prevent victims from speaking to friends, family, and even therapists about what happened. Although NDAs no longer tend to contain a clause forbidding the victim from going to the police, the negotiation takes place behind closed doors which leads to them creeping into many different areas of the victim's life.

NDA's are required to comply with data protection	Data protection of personal information has nothing to do with an agreement not to sue, an NDA. Moreover, disciplinary sanctions do not count as data protection. In addition, data protection legislation has many exceptions for public safety and public interest.
The college does not need to sign the pledge as it does not use NDAs	The pledge does not say "stop", it simply says "commit to not using". So signing the pledge does NOT insinuate that the college currently uses NDAs. Even if the college does not currently use NDAs, signing the pledge will give students the confidence to report sexual violence in the knowledge that they won't feel pressured to sign an NDA. Read the exact pledge from Can't Buy My Silence here.
NDA's restricting a victim's ability to speak to anyone about what happened for an unlimited time are "standard"	NDA's, like any other clause, are always negotiable. You can reject one entirely, extend the parameters of whom the victim can share their experience with, or limit how long the NDA applies.
It's important for colleges to be able to protect their reputations with NDAs	NDA's have been proven to have serious implications for the mental health of students. Colleges have a duty of care towards their students and should never use NDAs to protect their reputation if it puts someone at risk.

Information adapted from conversations with **Julie MacFarlane (May 2022)** and from **Can't Buy My Silence** ([website here](#) - 2022)

So far, 72 universities in England have signed [the pledge](#) not to use NDAs to silence people who come forward to report cases of sexual assault. The pledge was co-written by [Can't Buy My Silence](#) with the former Minister for Higher Education, Michele Donelan - if you have any questions or concerns about the pledge or its wording, you can contact Can't Buy My Silence [here](#).