LEGAL SERVICES BOARD

Meeting: Legal Services Board

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Item: Paper (23) 57

Title: Professional Ethics: NDA Call for Evidence

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Status: Official

Introduction Purpose of the paper/ Issue

1. This paper summarises emerging themes following our call for evidence about the misuse of non-disclosure agreements ("NDAs") earlier this year. It sets out our next steps, including further analysis, publication of a findings reports and the development of policy proposals for public consultation in early 2024.

Recommendation

2. The Board is invited to **discuss** the emerging themes and **consider and agree** that there is sufficient evidence to require our regulatory intervention.

3. The Board is invited to **consider and agree** our intention to scope policy options for an effective and consistent regulatory approach to address the issues.

Background

4. In January the Board approved the publication of a call for evidence on the misuse of NDAs[1], which are agreements that are often used to prevent individuals from disclosing confidential business information, including, for example intellectual property and developing commercial transactions. The call for evidence aimed to improve the LSB's understanding of the scale, extent and nature of NDA misuse where NDAs are used to conceal unlawful activity, such as discrimination, harassment or abuse, or other types of wrongdoing which are not illegal, such as bullying that does not amount to harassment. Our focus is to understand why some legal professionals may fail to adhere to their professional ethical obligations when engaged with misuse and explore the role regulation may be able to play in making sure NDAs are only ever used appropriately.[2] The call for evidence ran between May and July.

[1] https://legalservicesboard.org.uk/wp-content/uploads/2023/01/08.-Paper-23-05-Non-disclosure-Agreement-paper.pdf.

[2] https://legalservicesboard.org.uk/wp-content/uploads/2023/04/LSB-Call-for-Evidence-Misuse-of-NDAs.pdf.

5. The issue of the role of legal professionals in NDAs is not new. It has been raised with the LSB over a number of years and by a range of different parties. Our programme of work on Professional Ethics and the Rule of Law (PERL) has provided an opportunity to explore the concerns raised with us in more detail through the issue of a call for evidence, which aims to respond to three challenges in our Reshaping Legal Services strategy: (i) ensuring high-quality services and strong professional ethics, (ii) dismantling barriers to achieving a diverse and inclusive legal profession at all levels and (iii) achieving fairer outcomes for people who experience disadvantage.

6. This work is directly underpinned by a number of regulatory objectives in the Legal Services Act 2007 (the Act), including in particular, promoting and maintaining adherence to professional principles, protecting and promoting the public interest and encouraging an independent, strong, diverse and effective legal profession. In pursuing the issues, we are also mindful of the requirement in the Act to have regard to the better regulation principles, including the principle whereby action is targeted at cases of need.

7. We are focused on exploring the role of regulation to ensure the professional ethical conduct of legal professionals is upheld when drafting, enforcing or otherwise advising on NDAs. However, respondents frequently referred to matters that arguably go beyond conduct and may therefore be for other actors to address. We have nevertheless recorded those matters in this paper for the sake of completeness of analysis, and to illustrate the complexity of the issues.

8. For the avoidance of doubt, our work is not directed at NDAs as a legal instrument, but rather the role of legal professionals in their construction and use.

Analysis

9. We are grateful to all of those who offered their information in support of our work, and we received a wide scope of evidence from a diverse range of respondents. Overall, we had 103 responses to our call for evidence, including responses from:

   - 76 individuals who had direct knowledge or experience of potential NDA misuse within the jurisdiction of England and Wales.

   - the Bar Council (BC), the Employment Law Committee of Birmingham Law Society (BLS), the Bar Standards Board (BSB), the Council for Licensed Conveyancers (CLC), the Employment Lawyers' Association (ELA), Intellectual Property Regulation Board (IPReg), LawCare (LC), The Law Society (TLS), the Solicitors Regulation Authority (SRA) and two legal professionals.

   - Can't Buy My Silence (CBMS), End Toxic Aid (ETA), Independent Society of Musicians (ISM), Ivors Academy of Music Creators (IAMC), Maternity Action, Rt Hon Dame Maria Miller MP, Pregnant Then Screwed (PTS), Rights of Women (RoW), TUC Wales and Protect.

- six respondents with direct knowledge or experience of potential misuse of NDAs in jurisdictions outside of England and Wales.

10. In our analysis so far, we have identified the following emerging findings.

The misuse of NDAs

- **Respondents raised examples of legal (but unethical) and alleged illegal acts concealed by NDAs.** Examples of potentially legal but unethical acts concealed by NDAs included bullying, settlements over consumer products and construction and building disputes. Examples of alleged illegal activity reported by respondents as having been concealed by NDAs included unlawful harassment and discrimination (e.g., on the grounds of sex, race, disability and maternity), sexual assault and abuse, fraud and tax evasion. In defining misuse, some respondents questioned whether NDAs should ever be used to conceal misconduct, prevent a victim of wrongdoing from seeking support or reporting to regulatory or law enforcement bodies. The LSB notes that some such disclosures may be protected under existing laws[3], and responses therefore indicated that awareness of existing legal protections was not widespread.

- **The examples of potential misuse brought to our attention typically involved an imbalance of power between a party with more influence and resources and an individual made vulnerable by their circumstances.** The most frequently cited dynamic was that between an employer and employee, where an employee was dependent on their employer for financial compensation or a reference, after experiencing misconduct and voluntarily leaving an organisation or being dismissed. Where the NDA was in relation to an employment dispute, individuals ranged from junior roles right through to very senior leadership roles. While one respondent considered there is no evidence that victims of misconduct or other wrongdoing would be unable to receive a settlement without signing an NDA, another considered that employers have no incentive to enter into such agreements without an NDA.

- **Responses from individuals and organisations representing them demonstrated that the impact of being subjected to an NDA can be devastating.** Testimonies we received highlighted the detrimental impact of not being able to discuss experiences of misconduct or other wrongdoing. One respondent reported the results of a survey they carried out which found that 95% of those who signed an NDA said they have ongoing mental health problems. Respondents cited other impacts relating to wellbeing, finances and future career opportunities. There were suggestions that these impacts could be long-lasting despite any initial hope that signing an NDA would help an individual to put their experiences behind them. Some respondents also discussed the impact of NDAs on fair workplaces, with one respondent noting that NDAs can enable individual employers to engage in repeated acts of discrimination without public exposure.

[3] Public Interest Disclosures Act 1998

The role of legal professionals in NDAs

- **Our emerging findings indicated the potential for considerable access to justice issues for those in employment disputes, including when going through the process to reach a settlement agreement.** Some respondents questioned the motivations of professionals who were being paid for by employers while others highlighted a general lack of access to independent legal advice for some individuals. One respondent cited Employment Tribunal statistics (from 2020) for self-representation that showed 32% of claimants in 2019/20 had no legal representation recorded. Another asserted that it is a common experience for individuals in the aid sector to feel uninformed and unsupported in the settlement process.

- **We were particularly concerned by individuals' lack of understanding about their legal rights regarding NDAs, such as the contexts in which a non-disclosure clause in an agreement could be made void by existing legal obligations.** This included individuals' lack of understanding about the conditions that regulate the validity of settlement agreements under section 203(3) of the Employment Rights Act 1996[4] which includes, for example, the requirement for an employee to have received advice from a 'relevant independent adviser' as to the terms and effect of the proposed agreement and, in particular, its effect on their ability to pursue their rights before an employment tribunal.

- **Responses from individuals highlighted examples where legal professionals had presented NDAs in settlement agreements as standard and lacked sensitivity when advising an individual in a vulnerable situation.** Feeling like there was no other option was frequently cited as the respondents' reasons for signing an NDA, despite often later feeling regret or continued distress about this decision. Some stated that the terms and effects of an NDA are often not explained and that justification for signing an NDA can be vague and lack transparency. One respondent said that legal advice can amount to little more than 'rubber stamping' of the terms proposed by the employer, rather than being a genuine opportunity to challenge the terms.

- **Respondents highlighted existing requirements in codes of conduct that they considered relevant to preventing misuse.** This was either to explain why they considered current regulation is sufficient to address misuse, or to highlight particular misuses of NDAs that seemed at odds with existing professionals' ethical obligations, such as failure to obtain clients' consent and obtaining agreements under duress. Some individuals who had been asked to sign NDAs highlighted their lack of awareness about existing regulatory guidance and expressed concern

[4] https://www.legislation.gov.uk/ukpga/1996/18/section/203

that their legal professionals did not reference the guidance in their advice.

- **Some respondents considered existing regulatory guidance falls short of what is helpful and should support legal professionals to understand their ethical obligations.** In its published report into how law firms prepare NDAs[5], the SRA identified a low level of knowledge among solicitors about the content and issues raised in its warning notice on the use of NDAs, and the reporting obligations attached to it, and identified complacency as an issue among solicitors when handling a case with an NDA. Another respondent's view was that the SRA's warning notice provides insufficient clarity about improper professional conduct and does not assist professionals in handling queries about pushback on NDAs following growing public awareness and resistance. A further respondent considered that the warning notice is not sufficient and in-house guidance needs to be provided when agreements are discussed, and especially before they are signed.

The regulatory response to misuse

- **Suggestions from respondents for strengthened regulation included expanding guidance about misuse to apply to other legal services regulators and to enhance guidance to clarify more specifically how misuse contradicts existing ethical obligations.** One respondent highlighted the need to consider whether the misuse of NDAs could involve failing to ensure individuals understand their legal options and alternatives, advising clients to sign clauses which are questionably enforceable, obtaining agreement by duress or failing to take client instructions seriously. A few respondents raised concerns about increasing the role of regulation to address misuse, including the view that the distinction should only be between lawful and unlawful uses of NDAs. Another respondent urged regulators to maintain safeguards such as the SRA's warning notice, ensuring there are clear consequences if guidance is breached and to prevent abusive conduct without interfering with the freedom of parties to contract.

- **There were also suggestions about how regulation could clarify the options for whistleblowers to make protected disclosures – either as potential victims of misuse, or as members of the legal profession.** We will consider what we can learn from regulators in other sectors. For example, one respondent suggested that regulators adopt whistleblowing rule measures that are similar to those in the financial services sector, which require firms to include text in settlement agreements, clarifying that the individual is not precluded from making a protected disclosure.

- **Those who had reported potential misuse were largely dissatisfied with how their report was handled and the outcome of their case.** A

[5] https://www.sra.org.uk/sra/research-publications/thematic-review-nda/.

small number of respondents had reported potential misuse to the relevant regulator. Those who did report to regulators raised concerns about the length of the process and their disappointment with the outcome of their complaints – resulting in what they perceived to be either no action or a regulatory response that did not in their view appropriately reflect the seriousness of the misconduct experienced.

- **Suggestions from respondents for action from other parties included creating an independent body to review complaints about workplace misconduct and calls for legislation to better address the content and role of legal professionals in NDAs**. Some respondents suggested there needed to be more reporting about the impacts of NDAs, as well as requirements about the wording within, or use of NDAs. One respondent considered it would be useful to have a dual enforcement system where the two roles of compensating the individual and upholding the public interest are clear and separate. These are matters for government, but we include these in our summary in the context of continued public debate about action required to address continued misuse.

11. These findings highlight examples of legal professionals' conduct that give us cause for concern in the context of our wider programme of work on professional ethics and the rule of law – which also considers SLAPPs, economic crime, sanctions regimes and the role of in-house counsel. For example, there were accounts where individuals reported feeling pressured into signing agreements, where an imbalance of power led to a detrimental outcome for an individual and where individuals in vulnerable circumstances felt this was exploited to the benefit of the other party. We consider such conduct has the potential to undermine the rule of law and proper administration of justice and we will consider how regulation can best respond to address these concerns.

12. While we cannot draw any firm conclusions about the prevalence of misuse from our responses, we are conscious that there were initial enquiries from the public that did not result in responses due to concerns about what was permissible under the terms of an NDA – and when considering those initial enquiries, it is likely there was a further group of individuals who did not feel comfortable contacting us at all. We are also aware that it is less likely that those who were satisfied with the legal advice they received regarding signing an NDA would have contacted us as part of this call for evidence. This creates an obvious challenge for anyone, including the LSB, in establishing the actual level of prevalence of misuse and the number of organisations or individuals who continue to misuse NDAs despite existing legal and regulatory obligations.

13. In addition to the submissions we received, we are conscious of external developments since publishing our call for evidence, including the Higher Education (Freedom of Speech) Act, which became law in May 2023 and prevents universities from using NDAs to silence people who raise complaints about sexual misconduct, abuse, harassment, or bullying.

Next steps

14. After reflecting on the key themes in our emerging findings, we consider there is a strong rationale to take forward work in this area to scope policy options for a strengthened and harmonised regulatory approach to address these issues.

15. Given the highly sensitive nature of individuals' accounts of misuse, we will not publish their responses to our call for evidence, but we will include a report of relevant insights in our themes and summary of evidence document. We will publish responses from other stakeholders where these have not been submitted confidentially.

Risks and mitigations	
Financial:	N/A
Legal:	This is a contentious area and may therefore be at higher risk of challenge, however the legal team is engaged throughout this project in order to mitigate any risks of challenge, and to ensure alignment to the legislative framework and duty to promote the regulatory objectives.
Communications and engagement:	We engaged a range of stakeholders in our call for evidence and will continue to do so as part of this work.
Equality and diversity:	This work is consistent with one of the nine challenges set out in our sector-wide strategy, to dismantle barriers to a diverse and inclusive profession at all levels.
Resource:	N/A.
Environmental:	N/A.

Annexes

Annex A – Further analysis of emerging themes

Freedom of Information Act 2000 (FoI)		
Para ref	**FoI exemption and summary**	**Expires**
Annex A	Exemption s22 – This paper forms the basis for a themes and summary of evidence document to be published later this year.	Expected publication December 2023.