



## **Bar Council response to the Legal Services Board's call for evidence on the misuse of non-disclosure agreements**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Legal Services Board's call for evidence on the misuse of non-disclosure agreements (NDAs).<sup>1</sup>
2. The Bar Council represents over 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society.
4. The Bar makes a vital contribution to the efficient operation of criminal and civil courts and tribunals. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

### **NDAs**

5. NDAs, or 'confidentiality agreements' as they are often known in England and Wales, are used in many different situations. In the context of employment disputes, parties entering into confidentiality agreements as part of a settlement will usually have had the benefit of legal advice from lawyers, from an ACAS adviser, or from some other representative (e.g. a trade union representative). Ordinarily, therefore, the parties should understand what agreement they are entering into and they will agree to enter into it freely. Confidentiality agreements may be requested by an employer or by an employee; sometimes both. A confidentiality agreement may be

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<sup>1</sup><https://legalservicesboard.org.uk/wp-content/uploads/2023/04/LSB-Call-for-Evidence-Misuse-of-NDAs.pdf>

tailored around other agreements, such as an agreement to provide an employment reference, or a mutual non-denigration clause. But a confidentiality agreement will always form part of the overall bargain in the settlement, and that bargain should be disturbed afterwards only for good reason.

6. There may be any number of reasons why confidentiality is sought and agreed. For example, there may be a dispute on the facts which neither party wishes to push to a determination. Or the parties may together wish to draw a line under a particular matter, to allow their relationship to move forward without risk that the past will later be dredged up. Sometimes it is the claimant who will want the details of any treatment complained of kept confidential (e.g. from future employers). There may be other reasons for confidentiality provisions, such as protection of intellectual property or sensitive business information. It would be quite erroneous to assume that all, or even most, NDAs or confidentiality agreements operate as some form of unfair gag or fetter on one party.

7. The Bar Council recognises that the use of NDAs in some particular circumstances can raise policy questions on which views will inevitably differ. There are clearly circumstances where the ability of both parties to sign an enforceable NDA is to their mutual benefit. But there will be other circumstances in which an NDA will benefit one party particularly. There may be yet other circumstances where an agreed suppression of information is contrary to the public interest. Determining the precise circumstances in which use of an NDA (or equivalent) should be lawful, and the precise circumstances in which use of NDAs should be unlawful, are very difficult questions indeed. They are for Parliament and the courts to resolve.

8. Regulators like the LSB can have no role in answering these questions, because legal service regulators have no role in making, or unmaking, substantive law. If parties are to be prevented from using NDAs or other confidentiality provisions in particular circumstances or situations, the relevant decisions to do so must be made openly and democratically in Parliament; not obliquely or opaquely, by regulators making rules of practice which restrict the extent to which lawyers can advise or assist their clients.

9. Parliament has already made specific provision for 'public interest disclosures' to be exempted from confidentiality agreements. But, as yet, it has not gone any further. Any changes in this area must be made legislatively e.g. by amendment to the Public Interest Disclosure Act 1998 (which inserted provisions relating to "Protected Disclosures" into the Employment Rights Act 1996).

10. Once it is recognised that the LSB has no role in determining the range of circumstances where use of an NDA is lawful, the separate question of whether the

LSB (or any other regulator) should be attempting to control or regulate lawyers involved in assisting their clients in the lawful use of NDAs, is easily answered.

11. The LSB can have no such role. The LSB should not be seeking to change professional rules to prevent the use of NDAs that are lawful. On the contrary, it is the duty of any lawyer to enable their clients to make full use of all lawful methods to protect their positions, and if those include using an NDA then a lawyer would be in breach of their fundamental duty if he or she were not to recommend use of an NDA when in the client's best interest. The LSB has no remit to prevent lawyers acting in the best interest of their clients. If the LSB considers that it does have such a remit, it is unclear to us under which provision(s) of the Legal Services Act 2007 it might consider itself to have that authority.

12. The role of lawyers, or at any rate of barristers, is to advise clients on the law, and to represent them (whilst complying with their conduct obligations). It is not the role of lawyers, or legal regulators, to interpose their own views of what is right and wrong, especially on difficult policy questions which Parliament has considered and where there is no unanimity of view. Rather lawyers should advise their clients as to their rights under the law as it stands.

13. The consultation paper says this (italics added):

*"However, there is evidence of misuse of NDAs 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 (all collectively referred to as "unlawful activity and other wrongdoing" throughout this document). In these cases, legal professionals can be called upon to draft, enforce or otherwise advise on what amount to illegitimate and/or unethical NDAs."*

14. With respect, this is very muddled thinking indeed. What is meant here by advising etc. on "*what amount to illegitimate NDAs*"? What is meant by "*unethical NDAs*"? The use of an NDA in any particular set of circumstances, will be either lawful or unlawful, but that is (self-evidently) a purely legal question. There is no safe basis upon which to attempt to define, and restrict the use of, a category of NDAs which are 'lawful but illegitimate/ unethical'. We are left totally uncertain what precisely is meant, in the context of this consultation, by "the misuse of NDAs".

15. We agree that there is an important debate to be had about the range of circumstances in which NDAs may be lawfully used, but that debate is not one for regulators of legal professions, because those regulators have no role in determining what behaviour is and is not lawful.

## Barristers

16. The issue of potential regulation of barristers in relation to the use of NDAs raises further specific issues.

### Barristers act on referral

17. The Bar is primarily a referral profession. Self-employed barristers generally act only when instructed by a solicitor. Any instructing solicitor should be aware of the Solicitors Regulation Authority's (SRA) Warning Notice of 2018 (updated in 2020) and the Law Society's Practice Note in January 2019. Consequently, any concerns at the solicitor level about potential misuse of NDAs should have been considered before a barrister is instructed to act.

18. Furthermore, the reality is that in the vast majority of cases, compromise and the terms of settlement are matters explained and advised upon by a solicitor, not a barrister.

19. That the potential misuse of NDAs is primarily an issue for solicitors and not barristers is reflected in the Parliamentary Women and Equalities Committee report on the use of NDAs in discrimination cases (October 2019) and the government response to that report, referred to in the LSB Review. The focus of the Committee Report is very much on the conduct of solicitors. There is no mention there of any issue pertaining to barristers in this area.

### Lack of evidence

20. The call for evidence does not detail any evidence of misuse of NDAs by barristers, in the sense of involvement by barristers in the use of NDAs in such a way that their conduct obligations have been or may have been breached. We ourselves are not aware of any such evidence, or of any criticism of barristers in this sensitive area.

21. If the call for evidence does bring to light specific concerns about barristers' professional conduct in connection with the use of NDAs, that is a matter that can be reviewed. In that event, we will provide a further response.

22. We would add that we are also not aware of any evidence of professional misconduct by solicitors in connection with the use of NDAs or the like. The Law Society and the SRA will however be closer to that issue and will doubtless supply their own evidence on the matter.

23. The Bar Council is wary of any agenda that seeks or tends to re-define the role of a barrister. The barrister's function is to advise his or her client on the law, and represent the client fearlessly, but always within the confines a professional code of ethics, strictly enforced. That role is fundamental to the operation of the legal system. Any proposals of regulatory reform that might restrict, curtail or limit the barrister's ability to advise and represent, within those confines, ought to be treated with the utmost caution.

### *Summary*

27. The Bar Council is concerned about the basis on which the call for evidence is made.

- (i) The call for evidence appears to be freighted with assumptions founded on anecdote and headlines, but which do not reflect the many good reasons why NDAs are utilised by parties on both sides of litigation.
- (ii) In employment matters, NDAs are a vital part of the dispute resolution process, both for claimants and respondents. They are often sought by employees, trying to resolve a dispute without the need for a public adjudication. Poorly considered limits in their use may deprive potential litigants of resolution options, and drive them either;
  - (a) towards expensive and acrimonious litigation that could otherwise be resolved by agreement, or,
  - (b) to avoid raising allegations that, once raised, could only be resolved expensively and acrimoniously.
- (iii) Restrictions on the operation of NDAs, and therefore on the fundamental right of parties to litigation to agree to limit the dissemination of information about matters in dispute, should not be imposed save where absolutely necessary.

28. It is of significant concern to the Bar Council that it appears to be being proposed that the complex and multi-factored issues about use of NDAs and confidentiality agreements in the resolution of disputes can and should be determined by any means other than legislation. Those issues require national debate, in-depth parliamentary scrutiny, and ultimately a political resolution.

24. For these reasons, and because many of the questions are more appropriately answered by other stakeholders, the Bar Council respectfully declines to respond to the call for evidence's more specific questions.

**The Bar Council**  
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