



LEGAL SERVICES  
**BOARD**

**CALL FOR EVIDENCE:**  
MISUSE OF  
NON-DISCLOSURE  
AGREEMENTS

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## INTRODUCTION

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The Legal Services Board (LSB) is the oversight regulator for legal services in England and Wales. We are independent of both government and the legal profession. We oversee the regulation of nine approved regulators such as the Solicitors Regulation Authority (SRA), the Bar Standards Board (BSB) and CILEx Regulation (CRL), who in turn regulate authorised persons such as solicitors, barristers, and Chartered Legal Executives respectively, to carry out reserved legal activities.

The LSB operates within a statutory framework enacted by Parliament through the Legal Services Act 2007 (the Act), which describes our functions (which also include a range of powers and duties).

Our [Reshaping Legal Services strategy](#), which is underpinned by the regulatory objectives we share with the regulators we oversee, identifies nine challenges that need to be tackled to deliver fairer outcomes, stronger confidence and better services for consumers. The strategy considers the role for regulation in responding to the challenges and invites others in the sector to play a role as well, such as through leadership in the profession.

Three of the challenges in the strategy are (i) ensuring high-quality services and strong professional ethics, (ii) dismantling barriers to achieving a diverse and inclusive profession at all levels and (iii) achieving fairer outcomes for people experiencing disadvantage. They are directly underpinned by a number of the Act's regulatory objectives, in particular, promoting and maintaining adherence to the professional principles, protecting and promoting the public interest and encouraging an independent, strong, diverse and effective legal profession.

To help meet these particular challenges, we are seeking, through this call for evidence, to gather information to inform whether a strengthened and harmonised regulatory approach is needed to address the misuse of non-disclosure agreements (NDAs).

A (lawful) NDA is a legally enforceable agreement under which it is agreed that information will be kept confidential. They are frequently used in employment and commercial contexts and are often used legitimately as a means for companies to ensure the confidentiality of sensitive business information, for example, in advance of the sale or purchase of a company.

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. Vulnerable individuals who are the targets of discrimination, harassment or abuse may be asked or coerced through an imbalance of power to sign them. We consider that there is an active question to be addressed about the professional ethical conduct of legal professionals who assist, enable or facilitate such misuse of NDAs, and whether existing regulatory arrangements are sufficient to address this.

In terms of the regulatory objectives within the Act, the misuse of NDAs by legal professionals raises concerns about the independence and integrity of the profession. There is clearly a public interest in preventing this type of misuse and preparing unenforceable NDAs also potentially undermines the regulatory objective to support the constitutional principle of the rule of law. Further, when used to silence legal professionals who have experienced unlawful activity or wrongdoing themselves, the misuse of NDAs may act against efforts to ensure a strong and diverse profession.



We are therefore focused on the conduct of legal professionals to better understand why, in cases of misuse, they may fail to properly balance their professional obligations in the way described. We will explore how frontline regulation could be strengthened to (i) set clearer expectations for the conduct of legal professionals who are involved in the preparation of NDAs, (ii) support legal professionals in meeting their professional ethical obligations and (iii) ultimately supervise and enforce adherence to those obligations where needed. The LSB will focus on how best to achieve a harmonised approach across regulators by, for example, providing assistance in accordance with its duty under section 4 of the Act, issuing a statement of policy under section 49(2) or guidance under section 162.

Through our call for evidence, we wish to explore the scale, extent, and nature of the misuse of NDAs; the impact of misuse; and the steps that should be taken to prevent future misuse. We will be guided by the evidence as to what our next steps should be. Examples of regulatory levers we may recommend include changes to regulators' professional codes of conduct, improved education and training, setting reporting requirements and for regulators to utilise monitoring and supervision to support this.

The purpose of this paper is to:



## WHY ARE WE DOING THIS WORK?

While NDAs can be used legitimately by companies to ensure the confidentiality of sensitive business information, the #MeToo movement has [raised public awareness](#) of the misuse of NDAs to silence victims of misconduct in the workplace.<sup>1</sup> Media coverage has also highlighted patterns of misuse in particular sectors of the economy such as the [arts](#), [further education](#), [policing](#) and [advertising](#).<sup>2</sup> This raises questions about the protections in place to prevent, identify and address the misuse of NDAs.

In the UK there are existing legal protections that limit the extent that NDAs can legitimately be used. For example, they cannot be used to remove a worker's right to "whistleblow" where this amounts to a 'protected disclosure' under the Public Interest Disclosure Act (1998). However, despite these legal protections, NDAs are still being misused to conceal unlawful activity and other wrongdoing. In June 2019, the House of Commons Women and Equalities Committee reported on the widespread use of NDAs to settle discrimination cases and made a number of recommendations to Government and regulators.<sup>3</sup>

In 2019 the Government proposed new legislation to prohibit NDAs from including clauses that prevent individuals from disclosing information to the police, doctors, lawyers or social workers. It has also signalled an intention to legislate so that the limitations of confidentiality clauses are clear to those signing them and to improve legal advice available to individuals before signing an agreement. We understand that the Government is currently identifying the appropriate legislative opportunity to deliver these commitments.

The SRA issued a warning notice in 2018 (updated in 2020) to those they regulate due to concerns about the use of NDAs which prevent reporting to regulators and law enforcement agencies, and prevent disclosures that are protected by law, or take unfair advantage of the opposing party who is subject to the NDA.<sup>4</sup>

However, despite the recognition given by the Government to the reality of the problem, it will be some time before new, primary legislation is made. The SRA is also the only legal services regulator to have so far taken steps to address the misuse of NDAs. While we see evidence that the improper use of NDAs continues, we consider there may be benefits in pursuing a sector-wide approach.<sup>5</sup>

## OUR APPROACH

We have already gathered some information in preparing this call for evidence. This includes:

- evidence contained in the [House of Commons Women and Equalities Committee Report 2019](#)
- published [guidance](#) and [practice notes](#) from the SRA and the Law Society respectively
- [complaints data](#) from the SRA
- feedback from stakeholders including those who attended the LSB's 'Reshaping Legal Services' conference in October 2022 and roundtable on Professional Ethics and the Rule of Law in March 2023
- information from groups and organisations about misuse in particular contexts and sectors,<sup>6</sup> and
- [articles highlighting experiences of misuse, particularly to conceal sexual misconduct and harassment](#).

The call for evidence is an important opportunity to ensure that we capture up-to-date and relevant information to inform any next steps.

## HOW CAN YOU BE INVOLVED?

We hope to hear from a range of stakeholders who have information about:

- the legitimate use of NDAs
- the illegitimate and unethical use of NDAs to conceal unlawful activity and other wrongdoing, and the impact of this on the individuals concerned as well as any wider impacts
- the conduct of legal professionals in drafting, enforcing and otherwise advising on NDAs
- the existing regulatory response, such as what happens when misuse is reported
- what you think the solution(s) might be to address the role of legal professionals involved in the misuse of NDAs.

This may include knowledge and insights from: legal professionals; organisations who offer support to those who have been affected by NDA misuse; those who have been asked to sign or have signed such NDAs; legal regulatory bodies; legal representative bodies; legal professionals; consumer groups and representatives; other regulated professional sector bodies; academia; and any other interested groups. This is by no means an exhaustive list and the call for evidence is open to anyone with an interest in this work.

Evidence might include relevant published reports, datasets, or research. It could also be reflections or examples based on your experience or role, as well as the experiences/roles of others.



**The call for evidence will close on 14 July 2023.**

You can respond by emailing us at [ndas@legalservicesboard.org.uk](mailto:ndas@legalservicesboard.org.uk). We might follow up with you to clarify or get more information if necessary. Alternatively, we can arrange for you to provide your response orally. More information about what we will do with the information shared with us is included on page 14.

# 1. THE USE OF NDAs

## Summary

NDAs are intended to be used to protect sensitive commercial information.

There are legal limitations on the use of NDAs, but these limits may not be sufficiently clear to give individuals the confidence to disclose illegitimate use.

We are concerned with the conduct of legal professionals involved in the misuse of NDAs to cover up unlawful activity or other wrongdoing, or to seek to prevent a signatory from exercising their legal rights.

NDAs may exacerbate an imbalance of power between the relevant parties, as a party may have a lack of legal knowledge about the professional obligations of a legal professional, or whether a clause is unenforceable.

Data on the extent of the misuse of NDAs is difficult to gather given their confidential nature.

## What is an NDA?

NDAs are legal agreements or clauses designed to prevent individuals from disclosing confidential information – and might be referred to as ‘confidentiality agreements’. The agreements or clauses can be one way or by mutual agreement, and are often time limited. An NDA is not enforceable if the relevant information captured in the agreement is not actually confidential – by already being in the public domain.

This section considers some of the contexts in which an NDA may be used, summarising what existing legislation defines as legitimate (where no clauses are likely to be void under law) and illegitimate uses, and what we know about the complex grey area of unethical but potentially lawful use.



## What are NDAs legitimately used for?

These agreements were designed to prevent individuals from disclosing confidential business information or intellectual property. For example, if a business meeting with an investor or an advisor is likely to include information that needs to be kept confidential, such as a business idea, attendees might be asked to sign an NDA before the meeting. NDAs can also form part of an employment contract to ensure that an employee cannot share confidential business information at any point while they are under contract – or an employee might be asked to sign an NDA when they leave a job.

The Intellectual Property Office (IPO) advises that a good NDA should ‘restrict the use of the ideas and information to a specific permitted purpose’ and take account of when someone might need to share information with others.<sup>7</sup> It should also not unfairly restrict the activities that someone can do in future.



## What might an NDA look like?

The IPO provides sample NDAs which include phrases such as:

- ‘The Recipient undertakes not to use the Confidential Information for any purpose except the Purpose, without first obtaining the written agreement of the Discloser’
- ‘The Recipient will, on request from the Discloser, return all copies and records of the Confidential Information to the Discloser and will not retain any copies or records of the Confidential Information’
- ‘Neither this Agreement nor the supply of any information grants the Recipient any licence, interest or right in respect of any intellectual property rights of the Discloser except the right to copy the Confidential Information solely for the Purpose’

## What are the legal limitations of using NDAs?

There are limitations on how NDAs can be used legally. They cannot be used to:

- remove someone’s [statutory employment rights](#) (Employment Rights Act 1996)<sup>8</sup>
- override [anti-discrimination law](#) (Equality Act 2010)<sup>9</sup>
- remove a worker’s right to “whistleblow” where this satisfies the [legal criteria of a qualifying disclosure](#).<sup>10</sup> For example, if the worker holds a reasonable belief that they are acting in the public interest and that the disclosure they are making tends to show past, present or likely future wrongdoings (Employment Rights Act as amended by the Public Interest Disclosure Act 1998)
- prevent an individual from taking a matter to an [employment tribunal](#) – though legitimate settlement agreements can).<sup>11</sup>

The Public Interest Disclosure Act 1998 sets out that a qualifying disclosure includes one that shows that a criminal offence has been committed, is being committed or is likely to be committed. This would suggest that where individuals have evidence of criminal activity, such as fraud, they can have confidence that being asked to sign an NDA to prevent their disclosure is unlawful.

## When might NDAs be unethical but potentially lawful?

Taking account of the above legal limitations, we have identified a number of situations where use of an NDA is not clearly prohibited by law but might be considered to be unethical. For example:

- a victim of wrongdoing that is not always protected by law (such as bullying) who has been asked to sign an NDA and is unsure if whistleblowing their experience would be acting in the public interest
- a vulnerable individual is asked to sign an NDA and does not understand their full rights or responsibilities but signs to end a grievance process
- an individual signs an NDA but at the time is not aware of the full impact of not being able to discuss their experiences now and in future, such as effects to their wellbeing or opportunities
- NDAs that perpetuate systemic imbalances of power, particularly in scenarios where the individual who is being asked to sign is made to feel that they do not have an alternative
- NDAs that indirectly encourage or at least facilitate further criminal or inappropriate acts by protecting an individual who goes on to commit them

We consider these examples indicate potential misuse of NDAs because they demonstrate that the imbalance of power that exists between parties has meant that they lack equal access to information, which would ensure that they can make an informed decision on whether or not to sign an NDA and the impact of doing so.



## What might an NDA used in this context look like?

Campaign group [Can't Buy My Silence](#) notes that NDAs are usually 'part of a much longer agreement that you make to either settle (resolve and end) a formal complaint or a legal claim, or an agreement you sign to begin a negotiation/ mediation/ investigation about your situation'.<sup>12</sup> NDAs can consist of complicated language and Can't Buy My Silence gives examples of clauses that indicate the agreement contains an NDA, such as those that mention not speaking about an experience to anyone (including on social media) and 'non-disparagement' clauses that prevent individuals from making negative comments:

- 'The parties confirm that they agree to keep the existence and terms of this Agreement and the circumstances concerning the termination of your employment confidential...'
- 'Employee acknowledges that this paragraph prohibits Employee from e-mailing about or posting any information about Employee's allegations on any social media networking site including...'
- 'The Employee shall not make any adverse or derogatory comment about the Employer or their officers, employees or workers and the Employee shall not do anything which shall, or may, bring the Employer or their officers, employees or workers into disrepute'

## To what extent may NDAs be used to conceal unlawful activity or other wrongdoing?

Given the confidential nature of NDAs, we do not know the full extent of their misuse - examples of poor conduct tend to be identified through individuals speaking out about their experiences, which may resonate with others in similar positions. Not-for-profit organisation Speak Out Revolution, which aims to accelerate organisational diversity and stop the culture of silence around workplace bullying and harassment, has developed a [dashboard](#) to collect data on experiences.<sup>13</sup> It claims that, of the 799 experiences of workplace bullying and harassment submitted to the dashboard in the UK, 80% were experienced by women, 25% of people have been silenced from talking about their experiences through NDAs and 34% of people who anticipate they will be asked to sign an NDA will not pursue formal reporting.

There is some evidence that those from marginalised groups are more likely to have signed an NDA. For example, the Speak Out dashboard shows that respondents from Black ethnic backgrounds are 6% more likely to have signed an NDA than white respondents.

Campaign group Pregnant Then Screwed conducted a [survey](#) of 260 women who had experienced pregnancy or maternity discrimination and subsequently signed NDAs.<sup>14</sup> 91% of respondents felt that signing an NDA was their only option and 70% experienced a negative impact on their mental health after signing.

Previous reports suggest cultures of misuse in particular sectors. A 2020 BBC report indicated that nearly one-third of universities used NDAs to resolve student complaints about sexual harassment (prior to a pledge from a group of universities to end this practice). Parliament has recently voted for a new law that will prohibit universities from entering into NDAs about complaints of sexual misconduct, abuse, bullying, harassment or discrimination.<sup>15</sup> The [Make NDAs Fair](#)<sup>16</sup> campaign has called for the advertising industry to stop the misuse of NDAs in workplace abuse and sexual harassment cases.

Campaign groups such as Can't Buy My Silence and Make NDAs Fair emphasise that NDAs are not required to reach a settlement agreement with a party following misconduct but have become 'standard' practice.

Settlement agreements are used in civil cases where an individual signs a release clause, agreeing to relinquish their right to take legal action about a dispute, both now and in the future. The agreement may result in the individual receiving a financial sum and/or the other party agreeing to rectify the source of a dispute. Settlement agreements do not have to, by default, include an NDA or confidentiality clause. When used in an employment context, the individual signing the agreement must have received independent legal advice for it to be valid – but those signing are not always aware of this.

We recognise that victims of wrongdoing or misconduct are entitled to pursue, for example, a financial settlement as recourse for their experience. We also recognise that victims of wrongdoing may want a confidentiality clause in an agreement that prevents a party from disclosing their identity following a dispute.





## The government response to concerns about misuse

In March 2019 the government launched a consultation on [confidentiality clauses - measures to prevent misuse in situations of workplace harassment or discrimination](#) setting out its intentions to enhance protections for vulnerable individuals.<sup>17</sup> It received evidence from trade unions, legal organisations, charities, campaign organisations, employers and employer representative organisations. Overall, there was support for the proposals.

The government considered the evidence from the House of Commons Women and Equalities Committee Report 2019 and its own consultation and published the [outcome](#) to its consultation in July 2019.<sup>18</sup> Its final proposals were to:

- legislate against confidentiality clauses that prevent disclosures to the police (to ensure to victims are clear that they are able to report a suspected crime), regulated health and care professionals and legal professionals
- legislate so that limitations in confidentiality clauses are clearly set out in employment contracts and settlement agreements
- produce guidance for solicitors and legal professionals responsible for drafting settlement agreements
- legislate to enhance independent legal advice received by individuals signing confidentiality clauses, and
- introduce enforcement measures for confidentiality clauses that do not comply with legal requirements.

At the time of publishing this call for evidence, the government says it is carefully considering the next steps. While government identifies the appropriate legislative opportunity to meet these commitments, we consider that strengthening the regulatory framework can assist in addressing the misuse of NDAs.

### Call for evidence

It can be complex for individuals to understand when an NDA may be illegitimate and there remain unethical uses of NDAs which conceal unlawful activity or other wrongdoing – some of which will be addressed by new legislation that will, for example, ban NDAs that prevent disclosures to health and care professionals and enhance access to independent legal advice. As part of the evidence we receive, we would like to know:

- a) Are there other legitimate purposes for using NDAs that we have not considered? If so, what is the rationale for the use of these NDAs?

The impact of the #MeToo movement has seen a focus on misuse in the context of sexual harassment – although it is likely we are far from understanding the full extent of misuse even in this context. There is very limited data on misuse regarding wrongdoing or other scenarios for misuse, such as to cover up fraud or criminal activity. We would like to gather qualitative evidence to understand experiences of NDA misuse including:

- b) Can you provide examples or case studies about individuals' entering into NDAs? If you can, please include the following in your response:
  - The context in which the NDA was signed
  - The factors that influenced the decision to sign an NDA
  - Whether the individual had access to legal advice or other support
  - If signing an NDA had any impact on the individual (e.g., wellbeing, health, future opportunities)
- c) Can you provide any quantitative evidence on the nature and extent of NDA misuse?





## 2. THE ROLE OF LEGAL PROFESSIONALS IN NDAs

### Summary

Legal professionals can play a key role in drafting, enforcing or otherwise advising on a settlement agreement, including NDAs or confidentiality clauses.

Currently, the SRA is the only legal services regulator to provide specific guidance for legal professionals on the use of NDAs.

The imbalance of power that exists between an individual or company seeking an NDA and a less powerful individual or worker can be exacerbated if they have limited access to independent legal advice.

### What role do legal professionals play?

Legal professionals can have an end-to-end involvement in advising on or handling misconduct or wrongdoing. In the workplace this can include advising on policies and training, advising workers and employers in a disciplinary or grievance process and advising on settling claims. They also assist with litigation.

NDAs typically take the form of a clause within a settlement agreement or other type of contract between an employer and a worker or employee. NDAs can be introduced following a dispute or in other contexts, such as redundancy, or even as part of a contract for employment. Legal professionals can therefore be involved in advising both companies and individuals on their rights and obligations regarding NDAs.

The Employment Lawyers Association (ELA) has identified that it is common to include exceptions to NDAs in the following scenarios: to discuss a case with a partner or close family member; when information is already in the public domain; and, when ordered by a Court or Tribunal.<sup>19</sup> ELA also cited that a significant proportion of agreements include a clause requiring an employee or worker to repay money received under an agreement should they breach it or any specific terms (a 'claw back' clause).

The **SRA's** Standard and Regulations<sup>20</sup> which came into effect on 25 November 2019, includes Principles<sup>21</sup> that set out the fundamental tenets of ethical behaviour that the SRA expects of those it regulates. These principles include, a requirement that solicitors act:

- in a way that upholds the constitutional principle of the rule of law, and the proper administration of justice
- That upholds public trust and confidence in the [solicitors'](#) profession and in legal services provided by [authorised persons](#)
- with independence
- with honesty
- with integrity
- in a way that encourages, equality, diversity and inclusion and
- in the best interests of each [client](#).

The SRA makes clear that should the Principles come into conflict, those which safeguard the wider public interest (such as the rule of law, and public confidence in a trustworthy solicitors' profession) take precedence over an individual client's interests.



The SRA issued a [warning notice on the use of NDAs](#) in March 2018, and updated it in November 2020 to make clear its concerns to ensure that NDAs are not used to prevent reporting to regulators and law enforcement agencies, or prevent making disclosures protected by law. The notice makes clear that improperly using NDAs, may constitute a breach of one or more of the SRA Principles. The notice states that the SRA would consider an NDA to be used improperly, if it was to prevent anyone from providing information to the SRA, or other regulatory, supervisory, investigatory or prosecutorial body acting in the public interest, to prevent co-operation with a criminal investigation or prosecution or prevent proper disclosure about the agreement or circumstances surrounding the agreement to professional advisers, such as legal or tax advisors and/or medical professionals and counsellors (who are bound by a duty of confidentiality) or include or propose clauses which are unenforceable, amongst other matters.

The notice also refers to a duty not to take unfair advantage of an opposing party (whether or not represented) and includes applying undue pressure or inappropriate aggressive or oppressive tactics or preventing someone who has entered into an NDA from keeping or receiving a copy. The SRA's notice gives several examples of improper use of NDAs, such as those which prevent or seek to impede or deter someone from co-operating with a criminal investigation.

In January 2019, the Law Society published a practice note on [NDAs and confidentiality clauses in an employment law context](#) which focuses on NDAs between an individual and their employer, and highlights the regulatory duties set out by the SRA and the SRA's warning notice on NDAs. The Law Society updated this in December 2019.

The **BSB** and **CRL** also set out in their respective codes of conduct, duties to act with honesty, integrity, independence and to not behave in a way which is likely to diminish the trust and confidence which the public places in the profession. However, other than the SRA, none of the regulators has provided specific guidance on the use of NDAs.

The **Equality and Human Rights Commission (EHRC)** published [guidance on the use of confidentiality agreements in discrimination cases](#) in October 2019.<sup>22</sup> The guidance applies to NDAs between employers, and anyone protected by the work provisions of the Equality Act 2010. It states that an NDA would not be enforceable if:

- it is in a worker's contract and seeks to stop a worker from pursuing a claim based on an act of discrimination that happens in the future, i.e., after the contract is signed;
- a worker is under duress to sign it, including being placed under unjustified pressure to sign;
- the settlement agreement does not meet the definition of a 'qualifying settlement agreement' as set out in the Equality Act 2010, which includes the requirement that the worker must have received independent advice about the terms and effect of the agreement before signing (including about any confidentiality clauses).

The guidance sets out good practice principles, such as considering whether a confidentiality agreement is needed. The EHRC sets out some examples where it would not be necessary or appropriate for an employer to use NDAs to stop a worker discussing discrimination. It also considers possible appropriate exceptions to this, such as:

- a worker requesting an NDA because they would like a matter relating to discrimination to be kept confidential and,
- where following a thorough and fair investigation of a complaint, the evidence shows that a worker has been falsely accused of discriminating against another worker and the employer uses an NDA to protect the reputation of the falsely accused individual.

The **Advisory Conciliation and Arbitration Service (ACAS)** released [guidance on NDAs](#) in February 2020 which states that confidentiality clauses should not be used to prevent the reporting of sexual harassment and discrimination.<sup>23</sup> The guidance suggests good practice principles including providing a worker with a minimum of ten calendar days to consider an NDA.

However, notwithstanding the usefulness of the standards and guidance summarised above, the evidence of continuing misuse of NDAs suggests that clearer and more effective expectations for the professional conduct of legal professionals may be required.

## Call for evidence

Legal professionals are made aware of their professional obligations regarding the use of NDAs through standards and guidance. The publication of a number of standards and guidance documents about misuse in the past few years reflects continuing concerns about the role of legal professionals and employers in these agreements, and the need to promote a better understanding of how existing legislation and regulation limits the use of NDAs. In view of these concerns, we would like to know:

- a) At what point is a legal advisor made available (if at all) to an individual who is being asked to sign an NDA?
- b) What are individuals' experiences of having access to legal advice? Please consider in your response
  - the extent to which an individual felt well informed, supported and that their interests were being protected during the process. For example, were the terms and effect of the NDA fully explained?
  - the justification provided for keeping the information that was subject to the NDA confidential
  - whether an individual experienced any behaviours or conduct by legal professionals (either acting on an individual's behalf or an opponent's behalf) that were considered to be unethical or fall short of their professional obligations. If so, please provide an explanation.

Where relevant, we would also like to hear from parties who have used guidance and/or other published documents that are designed to warn against the misuse of NDAs. We would like to know:

- c) How effective are the guidance and/or other published documents that are designed to warn against the misuse of NDAs. Please consider if they:
  - provide clarity on when NDAs should not be used, the rationale behind this (e.g., where use is unlawful, a breach of code of conduct or unethical) and the consequences for legal professionals or employers of doing so
  - reflect your knowledge of the use of NDAs in practice
  - sufficiently explain what individuals who are asked to sign NDAs should do and where to go for support

## 3. THE REGULATORY RESPONSE TO MISUSE

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### Summary

Legal services regulators invite reports on the potential misuse of NDAs with reference to the existing professional standards for legal professionals.

There are other avenues to report to employers or make reports about employers where they have potentially misused an NDA.

The extent and nature of reports about potential misuse may be unclear to the profession and the public given the lack of information available.

We have considered existing standards and guidance relating to the misuse of NDAs. It is important to also consider what options are available to individuals who want to report potential misuse.



## How is potential misuse reported to regulators?

The **SRA** requires solicitors to report any breaches of regulatory arrangements by any regulated person. Anyone else can report a solicitor or firm to the SRA which will consider if there was a failure to comply with its Principles and Standards and Regulations – any regulatory action resulting from a report will depend on the risk posed to the public and consumers. The SRA has set out its approach to [whistleblowing](#) by the public, legal professionals or others regarding serious misconduct or risk to the public.<sup>24</sup> The SRA publishes an annual report of its regulatory activities and in 2020/21 the SRA received [eight reports relating to NDAs and closed 10 cases](#) – one was referred to the Solicitors Disciplinary Tribunal and one was closed with a rebuke to the legal professional involved.<sup>25</sup>

The **BSB** handbook requires barristers or BSB entities to report their own [serious misconduct](#) or the misconduct of others.<sup>26</sup> The BSB invites reports about: the conduct of barristers ; a business or organisation regulated by the BSB; or any other aspect of regulation. The BSB publishes an annual [Regulatory Decision-making](#) report setting out information on complaints, investigations and outcomes,<sup>27</sup> however no detail is given as to whether any of these cases involve an NDA.

Regulators may uncover information about the misuse of NDAs through the supervision and monitoring of their regulated community and thematic reviews.

For concerns about the service provided by a legal professional to a consumer, reports are made to the **Legal Ombudsman** (LeO) if they cannot be resolved with the legal professional in the first instance. While LeO can only deal with service complaints, it can refer concerns about the conduct of legal professionals to the regulators.

## How is potential misuse reported to other bodies?

**ACAS** set out in its [Guidance: Non-disclosure agreements](#) that an individual can complain to their employer if someone in an organisation has misused or attempted to misuse a confidentiality clause. If this complaint is not resolved, they can make a claim to an employment tribunal. Workers who are concerned that their employer is breaching equality and human rights law can report concerns to **EHRC** and where the information meets certain criteria, those workers may be protected under the Public Interest Disclosure Act 1998.

### Call for evidence

As we have summarised in Sections 1 and 2, there are existing limitations on the use of NDAs, and guidance for legal professionals and employers on best practice. For those who have reported potential misuse, we want to know:

- a) Where you have reported the misuse of NDAs to any relevant body, what is your experience of this?  
In your response, please reflect on:
  - the processes for reporting
  - the outcomes of reporting
  - if you would report misuse again in future
- b) Have regulators responded to the misuse of NDAs in any other ways beyond the activity summarised above?
- c) How can regulators best address the role of legal professionals in the misuse of NDAs?
- d) Is there anything else you would like to tell us or suggest about regulators' role and the misuse of NDAs?



## SUMMARY OF QUESTIONS

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In this call for evidence we have asked respondents to consider the following questions as part of their response, however we welcome all information that is considered relevant for our understanding of the misuse of NDAs:

### 1. The use of NDAs

- a) Are there other legitimate purposes for using NDAs that we have not considered? If so, what is the rationale for the use of these NDAs?
- b) Can you provide examples or case studies for entering into NDAs? If you can, please include the following in your response:
  - The context in which the NDA was signed
  - The factors that influenced the individuals' decision to sign an NDA
  - Whether the individual had access to legal advice or other support
  - If signing an NDA had any impact on them (e.g., wellbeing, health, future opportunities)
- c) Can you provide any quantitative evidence on the nature and extent of NDA misuse?

### 2. The role of legal professionals in NDAs

- a) At what point is a legal advisor made available (if at all) to an individual who is being asked to sign an NDA?
- b) What are individuals' experiences of having access to a legal advisor? Please consider in your response
  - the extent to which an individual felt well informed, supported and that their interests were being protected during the process. For example, were the terms and effect of the NDA fully explained?
  - the justification provided for keeping the information that was subject to the NDA confidential
  - whether an individual experienced any behaviours or conduct by legal professionals (either acting on an individual's behalf or an opponent's behalf) that were considered to be unethical or fall short of their professional obligations. If so, please provide an explanation.
- c) How effective are the guidance and/or other published documents that are designed to warn against the misuse of NDAs. Please consider if they:
  - provide clarity on when NDAs should not be used, the rationale behind this (e.g. where use is unlawful, a breach of code of conduct or unethical) and the consequences for legal professionals or employers of doing so
  - reflect your knowledge of the use of NDAs in practice
  - sufficiently explain what individuals who are asked to sign NDAs should do and where to go for support

### 3. The regulatory response to misuse

- a) Have regulators responded to the misuse of NDAs in any other ways beyond the activity summarised in Section 3?
- b) Where you have reported the misuse of NDAs to any relevant body, what is your experience of this? In your response, please reflect on:
  - the processes for reporting
  - the outcomes of reporting
  - if you would report misuse again in future
- c) Is there anything else you would like to tell us or suggest about regulators' role and the misuse of NDAs?



#### 4. In addition to this, we invite you to consider the following:

- a) Is there anything else you would like to tell us about the misuse of NDAs?
- b) Has reviewing our call for evidence prompted you to consider any other examples of potentially unethical conduct relating to legal professionals that you would like to raise?
- c) How can regulators best address the role of legal professionals in the misuse of NDAs?
- d) Please send us any further information that you consider relevant, which is not otherwise accounted for in the above questions.

## NEXT STEPS

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We are grateful for your response and engagement with our work. Any evidence we receive will be used to inform and guide our thinking on the need for any policy responses. We will publish conclusions from our analysis of the evidence later this year and any proposals for further action based on what the evidence tells us.

At any time during this process you are welcome to contact us.

Please email us at [ndas@legalservicesboard.org.uk](mailto:ndas@legalservicesboard.org.uk).

Below we explain what we will do with the information you share with us – if you have any questions, please contact us using the email address above and we will be happy to speak with you:

### Important information about our handling of your responses:

We are committed to handling any information you share with us appropriately and with the upmost care. The information you send us will be passed to colleagues within the LSB. We will publish the information we receive without personal information where possible, or we may choose not to publish responses from individuals where there is an increased risk that individuals may be identified. We may also summarise or refer to your information thematically in our published response document.

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with access to information legislation including the Freedom of Information Act 2000 (FoIA) and the Environmental Information Regulations 2004. By providing personal information for the purpose of this call for evidence, it is therefore understood that you have read this information, and our Privacy Notice linked below, and you accept that your information is disclosable under such laws.

If you would like the information that you provide to be treated as confidential, it would be helpful if you could explain to us why you regard the information you have provided as confidential. To assist the LSB, we request that all confidential and/or personal information be provided as annexes that may be separated from your main response document. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that we can maintain confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the LSB.

As above, we are happy to discuss any of this with you if you have questions or concerns.

If you are concerned that your response may breach the terms of an NDA, we strongly recommend that you seek independent legal advice before submitting your response.

Further information about how we will handle the information you provide to us can be found in our [Privacy Notice](#) concerning 'Consultations', which are located within sections covering 'Regulatory work' and 'Stakeholder Engagement'.



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