IPReg

Legal Services Board Call for Evidence: Non-Disclosure Agreements – IPReg Response

Legitimate use of Non-Disclosure Agreements (NDAs)

The Call for Evidence document references the legitimate use of NDAs; however, it is important to emphasise these legitimate uses in order to provide balance to this discussion. It is also important to view the use of NDAs in their entirety, so that, as regulators, we can understand the scale of the problems highlighted.

NDAs in the intellectual property (IP) sector are frequently used to protect confidential information, enabling inventors to discuss their ideas whilst retaining the ability to protect their IP at the earliest stages and allowing business to easily and cheaply protect information that is valuable or sensitive. For example, it is commonplace for inventors to utilise NDAs when seeking investment.

In order to file a patent application, no "public disclosures" can be made before the application is submitted. Any "public disclosure" made before applying would invalidate that application. NDAs are a useful tool to ensure that disclosures made are clearly confidential, and so would not risk an inventor's ability to protect their IP at a later date. In these circumstances, NDAs create contractual rights and provide certainty by setting out the rights and obligations of all parties. NDAs and the protection they afford individuals are, therefore, an essential tool in protecting the public interest by ensuring the legal rights and privileges of individuals and businesses are maintained as they conduct their business.

In cases where the misuse of NDAs has been highlighted, such as those linked to the #MeToo movement, have, rightly, been widely covered by the media. It is important to be aware of how NDAs have been covered in the media and be equally mindful of how we react and respond to that media attention.

Other reports that have looked at the misuse of NDAs, such as the report produced by the Centre for Ethics and Law (CEL) '*Ethics and NDAs*', and the Solicitors Regulation Authority's Warning Notice, look at this issue from what CEL refers to as an 'employment NDA' perspective. The examples set out in the Call for Evidence focus primarily on misuse of NDAs in a similar way, with an 'employment NDA' context to the issue. Whilst this is certainly the area in which the majority examples of misusing NDAs stem, this narrow view does give an unbalanced outlook on NDAs as a whole.

There needs to be a clear distinction between the legitimate uses of NDAs and the types of NDAs highlighted in the Call for Evidence. There does appear to be an 'employment' theme that links the NDAs that are being misused, however, NDAs used for employment settings should not be

considered problematic in themselves. Employment NDAs are often the easiest and cheapest way to protect trade secrets, proprietary processes, client information and other valuable or sensitive information.

One concern is that, given the media focus and without presenting a balanced view of the legitimate use of NDAs, we run the risk of demonising the use of NDAs, which could in turn put individuals and businesses off utilising them as a tool. This could mean that individuals and businesses forego the protections afforded by NDAs due to the negatives perceptions and connotations associated with them.

Regulatory Response

The question of whether existing regulatory arrangements are sufficient to address the issues raised can only be answered, as the Call for Evidence mentions, once there is a better understanding of the actual scale of the problem. Alterations to regulatory arrangements, or further guidance on the use of NDAs should be borne out of firm evidence that there is a widespread issue in the way legal professionals are advising clients on the use of NDAs, rather than stemming from a desire to respond to the increased media coverage of particular instances of misuse. As regulators, we must be careful when applying regulatory levers, and be sure that any action is evidence based, targeted and proportionate.

IPReg, since its inception has had no complaints about members of our regulated community misusing NDAs, nor has there been any suggestion or indication, through our engagement with firms and attorneys, that there are any concerns with other legal professions misusing NDAs. In the absence of both complaints or indications of any misuse, we should look at what our response would be if there were to be any complaints, or any indication that a firm or individual was misusing NDAs.

Any misuse of NDAs would, as set out in the Call for Evidence, raise serious concerns about the professional conduct of the regulated firm or individual. In such cases, IPReg would look to enforce our new regulatory arrangements, the Core Regulatory Framework[1]. Chapter 1 – Overarching Principles sets out that all regulated persons must:

Chapter 1 - Overarching Principles

1. *act in a way that upholds the constitutional principle of the rule of law and the proper administration of justice.*
2. *act in a way that upholds public confidence in the regulated profession.*
3. *act with independence.*
4. *be honest.*
5. *act with integrity.*
6. *act in a way that encourages equality, diversity and inclusion in and by the profession.*
7. *act in the best interests of each client.*
8. *maintain proper standards of work.*

[1] Any conduct that took place under our old rules could also be investigate.

Similarly, where guidance already exists from other regulators of legal services, it consistently reminds legal professionals to act in accordance with existing principles, namely:

- Act in a way that upholds the Rule of Law;
- Act in a way that upholds public trust and confidence in the legal profession;
- Act with independence; and
- Act with integrity

The principles, that form the foundation of a regulator's regulatory arrangements, such as the requirement to act with integrity, are deliberately broad to allow regulators to tackle issues as they arise, rather than requiring specific arrangements for each issue. Regulators, therefore, already have sufficient regulatory arrangements in place to deal with a legal professional that is involved in misusing NDAs.

Given that regulators have existing powers that can be used to challenge or reprimand legal service providers who are involved in the misuse of NDAs, the question becomes more about enforcement of those regulatory arrangements rather than if the arrangements are sufficient. The enforcement of the regulatory arrangements is the responsibility of the front-line regulator, which includes proactive work, not simply based on complaints received. Each regulator will be best placed to determine how it enforces the regulatory arrangements, in particular, deciding to what extent an issue impacts its regulated community.

It should also be noted that the various uses of NDAs and the differing roles of legal professionals in drafting, implementing and enforcing NDAs, means that generic, cross-sector guidance is not likely to be particularly useful. Rather, it would be more appropriate for frontline regulators to determine the extent to which further guidance would be useful to their regulated communities. The SRA, as mentioned earlier, has already issued such guidance on the responsibilities and obligations that solicitors should be mindful of when working with NDAs.

As the Call for Evidence highlighted, the government is looking at whether it should implement further legislation to address the issues raised in the Call for Evidence. In doing so, the government will also consult and gather evidence on this issue. Given the Government's plans to look further into this issue, it would seem premature to introduce further regulatory arrangements before the Government has acted. Doing so could run the risk that they may require further amendment and could further exacerbate the negative perceptions of NDAs by issuing guidance that may not be completely accurate or relevant following the Government's work.

Perception of NDAs

As mentioned above, the media coverage of the misuse of NDAs has solely focused on the 'employment' aspect of NDAs. Following the LSB's announcement and publication of its Call for Evidence, the press coverage was almost entirely focused on a singular use of NDAs (the

'employment' theme), and the generally tone of the coverage gave a negative impression of NDAs. These articles questioned whether NDAs should be banned entirely or solely focused on the use of NDAs being used to bully, harass and silence victims.

The LSB, naturally, cannot control the narrative of the media coverage of NDAs, but as regulators, we must be extremely careful in how our words and actions might be covered. The danger of the public's perception of NDAs as a tool used to silence or bully, is one that is extremely concerning. This is particularly the case if the majority of the evidence on the misuse of NDAs is anecdotal, as it risks demonising a legitimate tool without concrete evidence of the scale of the problem.

The negative, and often unbalanced coverage of NDAs can be counterproductive to upholding the public interest if it creates an environment in which NDAs are solely seen as an 'oppressive tool' used by legal services providers to silence vulnerable individuals. This characterisation ignores the legitimate use of NDAs as a vital tool in protecting rights and preserving confidentiality for individuals and businesses. As regulators, we have a responsibility clearly and accurately to inform the public debate. By adding to a growing mischaracterisation of NDAs by implementing further regulatory arrangements or generic guidance, without a clear distinction of the types of NDAs that have the potential of being misused and clear evidence on the scale of the problem, only serves to weaken access to justice and undermines the integrity of the majority of the legal profession who use NDAs for legitimate purposes.