employment lawyers association

Call for Evidence: Misuse of Non-Disclosure Agreements

Response from the Employment Lawyers Association

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INTRODUCTION

1. The Employment Lawyers Association (**ELA**) is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 6,000 lawyers who practice in the field of employment law. We include those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and who advise both employees and employers. ELA's role is not to comment on the political merits or otherwise of proposed legislation or calls for evidence. We make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation and regulation or calls for evidence.

2. A Working Party, chaired by Louise Skinner was set up by the Legislative and Policy Committee of ELA to respond to the Call for Evidence of The Legal Services Board (**LSB**). In addition, for the purposes of this response, we have drawn on ELA's detailed response to The Women and Equalities Select Committee Inquiry into the use of Non-Disclosure Agreements in Discrimination Cases, published on 28 November 2018, a copy of which is enclosed with this Response (the **Inquiry Response**). The Members of the Working Party responding this Call for Evidence are listed at the end of this paper.

3. References in this paper to the views of ELA are intended to be inclusive of the views of the minority as well as the majority of ELA members. Whilst not exhaustive of every possible viewpoint of every ELA member on the matters dealt with in this paper, the members of the Working Party have striven to reflect in a proportionate manner the diverse views of the ELA membership.

4. As an unaffiliated and non-political organisation, we have not responded to all the questions posed in the Call for Evidence. ELA notes, in particular, that a number of questions invited views from individuals regarding their personal experiences. We have responded to those questions on which we feel best placed to comment. However, we would welcome the opportunity to discuss our responses below, or thoughts more generally on the other questions in the Call for Evidence, if helpful.

EXECUTIVE SUMMARY

5. As set out in the Inquiry Response, indiscriminate use of the US term 'NDA' can be confusing as the reader does not always fully understand what is being discussed.[1] Throughout ELA's response to the Call for Evidence, ELA refers to the use of NDAs in various contexts, the most pertinent and the most relevant being settlement agreements.

[1] Inquiry Response, part C, para. 11.

6. There are powerful reasons as to why NDAs still have a place in practice today, and these are relevant for employers and employees alike. Whilst ELA will not comment on the use of NDAs in individual circumstances, it asserts that NDAs, when used correctly, can have a positive impact on individuals, the settlement of employment claims, the reputation of employers and the progression of tribunal claims, to name but a few.

7. ELA also understands and supports the fact that sufficient safeguards must be in place to ensure that NDAs are not misused. ELA considers that there is ample guidance from regulators, The Law Society, the Equality and Human Rights Commission and the Advisory, Conciliation and Arbitration Service on the use of NDAs. ELA members understand that this guidance is widely publicised and there is a good level of awareness among ELA members of this.

8. ELA notes separately that its members have regulatory obligations under which they must operate, and this further guides their practice on their approach to NDAs. The challenge faced by ELA members that work with employees can be more so in relation to ethical practice and acting in the best interests of their client.

9. To maintain the effective use of NDAs and to ensure that they can play an important role in the regulation of confidential business information or intellectual property, ELA recognises the strong need for the continuation of safeguards, such as the SRA's warning notice[2], and for there to be clear consequences if the guidance is breached.

QUESTION 1a)

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?

10. For the purposes of responding to this question, ELA notes that the Call for Evidence describes as legitimate the use of NDAs for the purpose of preventing individuals disclosing 'confidential business information or intellectual property'[3].

11. As an apolitical organisation, we do not propose to comment on whether the usage of NDAs in particular circumstances is 'legitimate'. As noted in the Inquiry Response, however, we consider that the central purpose of an NDA is potentially broader than as defined by the LSB, extending to the contractual prevention of the disclosure of 'confidential information', as may be agreed between the parties for particular purposes. This might be commercial information. It might be personal information, which relates, for example, to fellow workers or patients in a clinical, care or therapeutic setting.

12. In an employment context, invariably the focus of NDAs between an employer and an employee will be the protection of the employer's confidential business information and/or intellectual property. Employment contracts typically contain fairly generic express confidentiality clauses that (broadly) reflect the employee's common law duty of confidentiality in relation to their employment. Those clauses will also usually set out, from the employer's perspective, and with a degree of specificity, the types of

[2] For details see footnote 6 below

[3] Page 5, Legal Services Board, Call for Evidence: Misuse of Non-Disclosure Agreements.

information that it considers confidential in the context of its business. That may include information relating to the business, products, affairs and finances for the time being confidential to the employer, or its group, and/or its business contacts, and trade secrets. The NDA in this context will usually limit the employee's use of such confidential information during their employment and after their employment has ended. The NDA will also commonly be subject to certain carve-outs. For example, the NDA will not apply to: (i) use or disclosure of information required by law; (ii) information that is in the public domain (other than through the employee's unauthorised disclosure); or (iii) any protected disclosures within the meaning of section 43A of the Employment Rights Act 1996 (i.e., the employee is not prevented from 'blowing the whistle').

13. As set out in detail in the Inquiry Response, NDAs also commonly feature in settlement agreements entered into between employer and employee. Under a settlement agreement, an employee will commonly waive any contractual and statutory claims that they may have against their employer. They may also agree to be bound by certain other restrictions including (importantly in this context) confidentiality obligations. In return, the employer will usually agree to pay or provide certain benefits, which might include (among others) a termination payment if the employee's employment is to terminate.

14. NDAs in a settlement agreement may go further than simply preventing the disclosure of information that might most naturally be understood as the confidential *business* information of the employer. They may also provide for additional restrictions, such as preventing the disclosure of the terms of the settlement agreement itself or of the wider circumstances leading up to the settlement agreement (including, for example, the dispute that has led to the settlement agreement and/or the circumstances of the termination of the employee's employment). Those additional restrictions may also include restrictions on the making of derogatory or disparaging remarks (i.e. to protect reputations). These additional restrictions can be mutually beneficial to the employer and the employee (see further below).

15. These additional restrictions are also invariably subject to important carve outs, reflective of the SRA's warning notice and other guidance (considered further below). Those carve outs now commonly confirm, in relation to such additional restrictions, that the employee is still not prevented or restricted from (among other matters):

    15.1. making disclosures of, or comments about, the relevant information to their immediate family or professional advisers (including medical professionals), provided they keep the information confidential;

    15.2. making a protected disclosure under section 43A of the Employment Rights Act 1996 (i.e., 'blowing the whistle');

    15.3. reporting a suspected criminal offence to the police or any law enforcement agency or co-operating with the police or any law enforcement agency regarding a criminal investigation or prosecution; or

    15.4. doing or saying anything required by, or co-operating with, or otherwise making disclosures to (about any misconduct or wrongdoing), HM Revenue & Customs, regulators, ombudsmen or supervisory authorities.

16. Importantly, as set out in the Inquiry Response, the focus of confidentiality terms in settlement agreements is often not so much to silence the employee but rather to reach agreement on (and regulate) what can, truthfully, be said to allow both parties to move on. Usually, all parties are concerned about confidentiality and reputation.[4]
17. A settlement may be reached before the issue which gave rise to the settlement has been fully investigated or concluded. For example, individuals involved in a discrimination claim may have refused to or been unable (through ill health) to co-operate with an investigation and grievance/disciplinary process. This puts employers in the unenviable position of being unable to reach a sensible conclusion on the issues before it, but having to take account of the rights and interests of all parties.

18. Further, there are a number of helpful safeguards in place to prevent the misuse of settlement agreements. As set out in the Inquiry Response[5], these include:

    18.1. Settlement agreement legislation requires that settlements must be in writing; that employees be advised by a qualified person (for example an independent solicitor, barrister or certified trade union or advice centre representative); that the adviser be clearly identified in the settlement agreement; and that the adviser carries insurance or other professional indemnity cover.

    18.2. In practice, employees are almost invariably required under the terms of the settlement agreement to provide a 'certificate' from the adviser confirming that the advice required to satisfy the legislation has been given. Provision of the certificate will normally be a condition of payment but is not required by legislation.

    18.3. Solicitors and barristers are regulated by their professional bodies (Solicitors Regulation Authority (**SRA**) and Bar Standards Board (**BSB**)) The SRA has issued a warning notice[6] to solicitors regarding the use of NDAs (first published in March 2018 and updated in November 2020).

19. However, there are also other additional safeguards or measures too (in the form of further guidance to the public and legal practitioners):

    19.1. On 7 January 2019, The Law Society published a practice note about the use of confidentiality provisions in the context of an agreement to end a workplace relationship.[7] While not legal advice, the practice note (which was updated on 12 December 2019) sets out The Law Society's view of good practice in this area.

    19.2. On 17 October 2019, the Equality and Human Rights Commission published a non-statutory guide on the use of confidentiality agreements in discrimination cases.[8]

    19.3. On 10 February 2020, the Advisory, Conciliation and Arbitration Service (**ACAS**) published guidance on the use of non-disclosure agreements, including the

[4] Inquiry Response, part D, para. 1.3.
[5] Inquiry Response, part D, para. 3.1(b), (c) and (d)
[6] https://www.sra.org.uk/solicitors/guidance/non-disclosure-agreements-ndas/
[7] https://www.lawsociety.org.uk/topics/employment/non-disclosure-agreements-and-confidentiality-clauses-in-an-employment-law-context
[8] https://www.equalityhumanrights.com/sites/default/files/guidance-confidentiality-agreements-in-discrimination-cases.pdf

circumstances in which they might reasonably be used. However, ELA members that work predominantly with employees note that, unlike settlement agreements, there is no requirement for legal advice for a COT3 to be enforceable. Where NDAs are included in COT3 agreements, there is the potential that an individual may not fully understand the effect or implications of the NDA provision given there is no requirement for such advice. An appropriate response in these circumstances may be for the ACAS conciliator involved in the case to highlight the existence of the NDA provision and point the individual to the available guidance and/or suggest that they may wish to seek legal advice.

20. More generally, the SRA Code of Conduct for Solicitors describes the standards of professionalism that the SRA and the public expect of those authorised by the SRA to provide legal services. The Code specifically requires that solicitors do not abuse their position by taking unfair advantage of others. A serious failure to meet the SRA's standards can result in regulatory action against a solicitor. This duty not to take unfair advantage in the context of NDAs is summarised in the SRA's warning notice on NDAs, and the SRA gives the following clear examples of unacceptable behaviour:

    20.1. *'taking advantage of an opposing party's lack of legal knowledge or where they have limited access to legal representation or advice, for example proposing or including a clause which you know to be unenforceable, or threatening to litigate upon such a clause;*

    20.2. *'applying undue pressure or using inappropriate aggressive or oppressive tactics in your dealings with the opposing party or their representative, for example, imposing oppressive and artificial time limits on a vulnerable opposing party to agree the terms of the NDA;*

    20.3. *'seeking to rely on your position as solicitor as a means of exerting power over the opposing party, for example, by discouraging them from taking legal advice;*

    20.4. *'preventing someone who has entered into an NDA from keeping or receiving a copy'.*

21. The SRA is also clear that a solicitor who fails to comply with the warning notice may be subject to disciplinary action.

22. As set out in the Inquiry Response, there are several important factors to bear in mind relating to the use of NDAs in settlement agreements[9]. Summarising:

    22.1. The reality is that if confidentiality terms were not permitted in settlement agreements, it is unlikely that agreement would be reached easily in the vast majority of harassment and discrimination cases (and other cases more generally) and/or the settlement sums on offer would inevitably take into account the risk that the matter would be publicised, potentially leading to claims from other employees, such as the "accused" in bullying and harassment allegations where the investigation was incomplete or inconclusive.

    22.2. There is currently no effective way for ordinary people with limited means to challenge defamation or repair damage to reputation. The effect of damage to

[9] Inquiry Response, part D, paras. 2.1 to 2.14.

reputation can be devastating in an employment context. An advantage of the settlement process is that resolution can be reached without the need for either party to admit liability, that they have done anything wrong, or to issue denials or demand statements withdrawing accusations. Settlement agreements essentially offer a dispute resolution process aimed at avoiding litigation.

22.3. In many cases employees who receive payments under the terms of a settlement agreement in respect of allegations of harassment or discrimination would not be successful if they were to pursue litigation. Even those with strong cases could choose not to pursue their case to a Tribunal because of the cost, potential risk to reputation and future job prospects, and because the outcome of litigation is not always predictable.

22.4. Tribunals and courts are overwhelmed and cost money to operate. Without NDAs in settlement agreements then settlement would not be reached as there is value in the NDA. That would force parties to litigate and create further delay and expense for the individual and for government.

23. Employees, complainants and accused individuals, may favour confidentiality because their concerns extend to protecting their families from unnecessary intrusion, their future career prospects, their reputation and social standing in the community, their concerns about being exposed on social media, and ongoing stigma. Many have no intention of wanting to speak out and would rather put the matter behind them. Including an NDA in a settlement agreement will likely be beneficial to all in these circumstances.

24. However, in the experience of the ELA members involved in this submission, it is relatively unknown for an employee to wish to challenge a confidentiality clause after the event. This may be because the clause has been tailored to their circumstances by agreement, and/or there is usually no clause permitting a variation of the clause by agreement should circumstances change (such a clause is more likely in an NDA and less likely in a settlement agreement). This may lead to the employee considering that variation is not permitted. This can in turn prevent an individual from feeling able to participate in discussions, such as public inquiries, on matters relevant to issues settled in the settlement agreement. Recent campaigns (such as Zelda Perkins' Can't Buy My Silence[10]) and claims involving high profile harassers and serial bullies have highlighted potential concerns in relation to the public interest and lawyer's ethical duties with respect to the use of NDAs.

25. In respect of ethical professional practice, there is presently no requirement to consider whether a confidentiality clause should be present in a settlement agreement at all. There is no requirement to consider the public interest unless an agreed whistleblowing disclosure has been made. The default presumption is one of confidentiality and how confidentiality terms can be tailored to the circumstances.

26. By way of example, where an employee's allegations are upheld or partially upheld in an internal investigation involving allegations of sexual or racial harassment, it is rare for an employee to be permitted to refer to the circumstances of the dispute, or any findings of fact, or the outcome of an investigation as part of a truthful public representation of facts, except in limited circumstances set out in the established guidance. In essence, the truth is distilled to publicly erase the disputed circumstances

[10] www.cantbuymysilence.com

in exchange for the financial and other benefits of the settlement. There has been a long-standing presumption that his is a fair bargain.

27. In such cases, in the experience of those individuals involved in this submission who tend to act for individuals, claimant lawyers are often informed that an employee experiences continuing trauma and violation by virtue of the interference with their freedom of expression and as a result of not being able to tell the truth by the requirement to maintain confidentiality of the process and findings. However, while agreeing to confidentially clauses may not be in the best interests of the individual complainant, nor in the public interest, from the complainant's perspective, foregoing the settlement is not an attractive prospect. Consequently, some claimant lawyers are questioning the necessity of confidentiality clauses in public interest cases, such as well-founded protected characteristics disputes arising in the public sector.

28. No published guidance or regulation supports a default approach of no confidentiality in these circumstances, and it is felt by some ELA members that further guidance for legal advisers and members of the public may be useful in this respect.

29. In summary, while often NDAs will protect commercial information (i.e., business data and intellectual property), there is a wider purpose for their use in the context of settlement agreements. Careful thought should be given by legal advisors as to whether NDAs are appropriate in each given case, and that where they are used, these are appropriately tailored to the circumstances and include relevant carve-outs.

30. The public interest in settling disputes and the parties' freedom of contract to settle disputes is in tension with the public interest in exposing blameworthy conduct. The current balance is drawn by regulators to prevent abusive conduct but not to interfere with the freedom of parties to contract. The question for a policy maker is whether to draw the line elsewhere and the consequences of doing so such as fewer settlements, more litigation, greater cost emotionally and financially for parties and greater financial cost and resource pressure on government run courts.

Question 2a)

AT WHAT POINT IS A LEGAL ADVISOR MADE AVAILABLE (IF AT ALL) TO AN INDIVIDUAL WHO IS BEING ASKED TO SIGN AN NDA?

31. For the purposes of responding to this question, we consider it appropriate to divide NDAs into: (i) NDAs contained in employment contracts or in the course of ordinary employment; and (ii) those contained in settlement agreements. We also draw the LSB's attention more generally to part D section 5 of the Inquiry Response.

32. While it is common for NDAs to be included in employment contracts, it is relatively uncommon for an employee to take legal advice on the terms of the NDA in their employment contract (which, as set out above, will tend to be fairly generic) or on the terms of their employment contract more generally. The more senior the role, however, the more likely that the employee will seek such advice and (potentially) negotiate the terms of their employment contract. However, even if the terms are negotiated, employees tend to be more concerned by their remuneration arrangements, or the terms on which their employment may be ended, rather than the terms of any NDA. As noted above, even if confidentiality provisions were not set out in employment

contracts, employees would (possibly unbeknownst to them) be covered by common law confidentiality obligations. At least where the obligations are set out in the contract, they are brought to the employee's attention and thereby reduce the risk of inadvertent breach.

33. Employees may be asked to sign other NDAs during the course of their employment. For example, NDAs regarding special events. As set out in the Inquiry Response[11], these events might include:

    33.1. an employee being asked to sign an additional confidentiality agreement, for the benefit of a client, before accessing the client's IT systems;

    33.2. an employee being asked to sign an additional confidentiality agreement in the context of an investigation being carried out by the employer to enable that employer to comply with its GDPR obligations and general obligations of confidentiality to employees under investigation;

    33.3. members of employee representative bodies such as trade union officials, national and European Works Council members – either generally or to enable the employer to confidentially enter into information and consultation processes on sensitive and, possibly, price sensitive proposals;

    33.4. a senior manager or company director being asked to sign a confidentiality agreement before being provided with information related to a potential business purchase. The information they have access to may well include sensitive information e.g. details of an on-going harassment complaint or dispute involving employees at the target entity; or

    33.5. an employee who is being promoted might be asked to sign up to new terms.

34. Again, it is uncommon for an employee to seek legal advice on the terms of such 'ordinary' NDAs arising in the context of ongoing employment, although members of employee representative bodies may have access to general advice on this topic.

35. The position is different for the more bespoke NDAs found in settlement agreements. As set out above, in order for a settlement agreement to be valid and binding, an employee must first take independent legal advice as to the terms and effect of that agreement before signing it. It is an essential pre-requisite. It is therefore extremely common for an employer to inform an employee at the time of presenting the employee with a settlement agreement (or raising the possibility of a settlement agreement) that the employee will need to seek such independent legal advice, and the terms of the settlement agreement will invariably include language regarding the taking of such independent legal advice.

36. As noted in the Inquiry Response, the issue with an employee seeking such advice on a settlement agreement is not the availability of an appropriate adviser, but rather the cost to the employee of doing so[12]. While practices do vary widely among employers, it is uncommon for an employer not to offer to make a capped contribution towards the

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[11] Inquiry Response, part E, para 7

[12] Inquiry Response, part D, para. 5.2.

employee's legal fees incurred in taking the necessary advice on the settlement agreement. Please see the Inquiry Response for further information in this regard[13].

Question 2c)

HOW EFFECTIVE ARE THE GUIDANCE AND/OR OTHER PUBLISHED DOCUMENTS THAT ARE DESIGNED TO WARN AGAINST THE MISUSE OF NDAS.

37. As set out above in response to Question 1a), in 2018 the SRA issued a warning notice to solicitors in relation to the use of NDAs regardless of the context in which the NDA arises. The warning notice was subsequently updated in 2020.[14]

38. The updated warning notice clearly states that the SRA expects solicitors to act in accordance with their professional obligations as set out in the SRA principles, standards and regulations. It reminds solicitors that any attempt to improperly use NDAs may constitute a breach of a solicitor's obligations, and offers examples of what might constitute such improper use (e.g. using NDAs to prevent a person from providing information to the SRA or other regulatory body, a law enforcement agency, or other supervisory, investigatory or prosecutorial body; to prevent cooperation with a criminal investigation or prosecution; to prevent proper disclosure about an agreement or circumstances surrounding an agreement to professional advisers who are bound by a duty of confidentiality; or including or proposing clauses in an NDA which are unenforceable). The warning notice also reminds solicitors that they have a professional duty not to take unfair advantage of an opposing party, whether represented or unrepresented by a lawyer. As set out above in our response to Q1a), unfair advantage might include applying undue pressure, using inappropriate, aggressive or oppressive tactics, or preventing someone who has entered into an NDA from keeping or receiving a copy.

39. The warning notice and its 2020 update have been widely publicised by law firms and legal publications and, as far as ELA is aware, there is a good level of awareness of the warning notice and its contents, particularly in the context of settlement agreements. From the experience of ELA's members, it is broadly considered that the profession has striven to adopt the principles and themes set out in the warning notice and to incorporate them into everyday practice. Common precedents prepared by third party providers (e.g. Practical Law Company ('PLC') and LexisNexis), and on which members of the legal profession commonly rely, have also been updated to reflect the latest guidance. However, while it is ELA's experience that levels of awareness is high amongst employment lawyers as they deal with such issues on a day to day basis, it is perhaps less well understood by some other members of the profession.

40. In the experience of ELA's members, lawyers are generally mindful of the issues surrounding NDAs and seek to advise clients in the most responsible way.

41. However, the regulators do not interfere with the right of a party's right to contract. They seek only to restrict unfair, unethical or abusive actions.

42. Further, as set out in the Call for Evidence and as referenced in response to Question 1a) above, additional guidance in relation to good practice around the use of NDAs has

[13] Inquiry Response, part D, section 5.
[14] https://www.sra.org.uk/solicitors/guidance/non-disclosure-agreements-ndas/

been released by The Law Society, EHRC, and ACAS (together, the "**Additional Guidance**").

43. As far as ELA is aware, the Additional Guidance is also broadly noted and followed by legal professionals. In the opinion of ELA, it is vital that the Additional Guidance continues to be publicised and updated so that it is as accessible as possible to all who continue to rely on it.

44. ELA considers that, together with the SRA warning notice, the Additional Guidance has offered useful instruction and guidance on the use of NDAs in a variety of contexts.

45. Furthermore, in-house legal and HR professionals are also generally aware of, and have taken (or are taking) steps to incorporate the tenets of the warning notice and Additional Guidance. This includes updating in-house precent employment contracts and settlement agreements to reflect the guidance to ensure that they are compliant with the warning Notice, Additional Guidance, and best practice more generally.

46. As we understand it, for legal educators such as those running vocational courses for aspiring lawyers, the focus of discussions around NDAs is generally in relation to settlement agreements and not NDAs in general. The LSB may want to consider asking vocational course providers to include general training on NDAs to students as part of their professional ethics courses.

Question 4a)

IS THERE IS ANYTHING ELSE YOU WOULD LIKE TO TELL US ABOUT THE MISUSE OF NDAS?

47. As set out in the Inquiry Response, there is no public repository or easily accessible data relating to concluded settlements. It is therefore difficult to estimate or advise in relation to the scope of the potential misuse of NDAs in the context of settlement agreement. It is possible, however, that the high-profile instances of misuse of NDAs (particularly that came to light during the #MeToo movement) has contributed to a generalised perception as to the use of NDAs that might be inaccurate or misleading.

48. ELA members who work predominately with employees note that these high-profile cases have raised issues in relation to the public interest and a lawyer's ethical duties and negotiation prowess. Some members consider that there may be an impact on an employee personally given that they are not able to disclose confidential information. In such circumstances their legal counsel may be faced with an ethical challenge to consider if this is a fair bargain.

49. As set out above in response to Question 2c), employment solicitors are generally aware of the SRA's warning notice and significant other guidance regarding the use of NDAs. Solicitors are also generally aware of their professional responsibilities, including their professional obligation not to take unfair advantage of others. In the experience of ELA members, employment contracts and settlement agreements have also evolved promptly and accurately in response to the warning notice and guidance, and there is good general awareness of the legal and ethical considerations involved.

50. NDAs continue to play an important role beyond the regulation of confidential business information or intellectual property. In the context of a settlement agreement, they can help employers and employees resolve significant and complex disagreements. In the absence of such NDAs, it is less likely that agreement would be reached easily in many cases. Prospects of settlement would be reduced, leading to: (i) higher numbers of employees failing to secure settlements with their employer; and/or (ii) higher numbers of employees being forced to litigate their dispute to reach a resolution.

51. ELA strongly recognises, however, the need for continuing safeguards in relation to the use of NDAs (and settlement agreements more generally). The SRA's warning notice has been helpful. If other regulatory bodies would like to follow suit, we recommend consistency in messaging.

52. The decision for the policy maker in regulating NDAs is that any such regulation restricts the freedom of the parties to contract as they would choose. Restrictions on unfair and unethical use of NDAs are agreed as being necessary by all. The question for the policy maker is whether restricting further the use of NDAs would have more harmful consequences than the current approach. Whilst a further restriction could be expected to result in greater exposure of blameworthy conduct that would likely, in our experience, entail placing greater costs both financial and otherwise on both employers and workers and also on government, perhaps creating yet further delay in the resolution of disputes through fewer settlements being achieved.

Members of ELA Working Party

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