

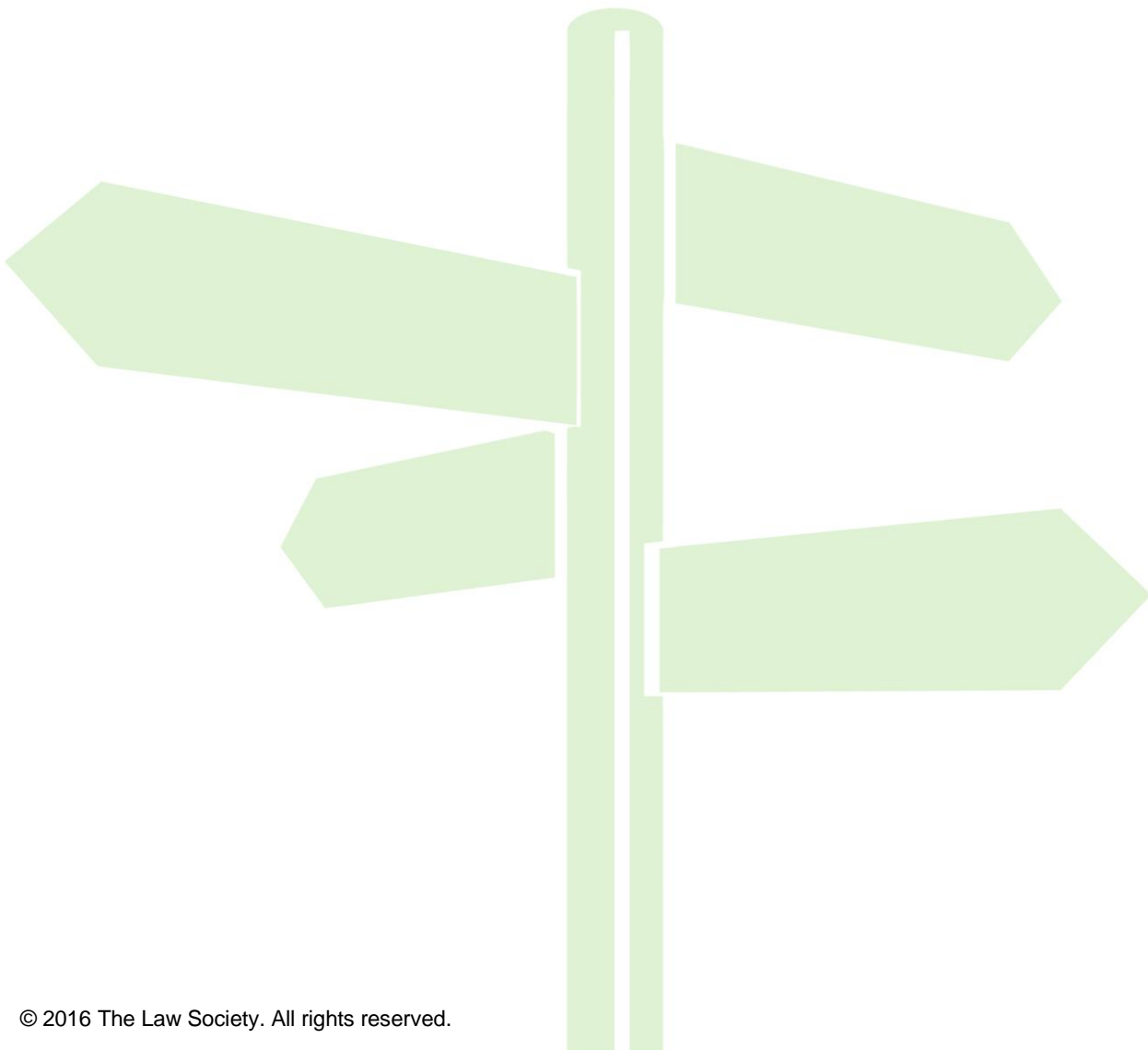


The Law Society

## **Non-compete clauses: Call for evidence**

Junior Lawyers Division response to consultation

July 2016



# Non-compete clauses: call for evidence

## Consultation – Department for business innovation and skills

### Response of the Junior Lawyers Division

This consultation ran from 25 May 2016 to 19 July 2016

The department for business innovation and skills was seeking views on whether non-compete clauses prevent people from starting up their own business after leaving a job.

#### 1. Examples of ‘non-compete clauses’

*There is no commonly accepted definition of a non-compete clause, and it is not a term used in UK statute. However, the term is being increasingly used in academic literature. For the purposes of this call for evidence, by “non-compete clauses” we are referring to any clause in an employment contract that seeks to restrict a worker’s ability to compete against their former employer after they leave. They are often also referred to as restrictive covenants. Examples, of which we are aware, include:*

- a. *Restrictions to an ex-worker’s ability to work for a competing business.*
- b. *Restrictions which prevent an ex-worker from having dealings with the employer’s customers or clients.*
- c. *Restrictions preventing an ex-worker from hiring workers of the former employer.*
- d. *Restricting a worker from setting up a business in a geographical location that would disadvantage their ex-employer.*

##### Question 1a

**Are any of the examples above incorrectly being framed as a non-compete clause? If so, why?**

Yes  No

##### Question 1b

**Are you aware of other examples of clauses in an employment contract which restrict a worker’s ability to compete against a former employer? If so, please can you provide examples of these.**

Non-solicitation, non-dealing and non-poaching clauses.

#### 2. The Prevalence of non-compete clauses in the UK

*The UK employment framework allows employers and workers to agree and negotiate worker contracts. As a result government does not hold any*

*information on worker contracts or non-compete clauses. This means Government is not able to immediately see what the scale is of the use of such clauses, or where and in which circumstances they are used. There is an assumption that they tend to be used in higher skilled roles in the UK, and is why they may stifle the creation of start-ups.*

**Question 2a**

**Do you have examples where non-compete clauses have been used?**

The JLD membership comprises trainee and qualified solicitors of all legal disciplines. The JLD is aware of non-compete clauses being used in employment contracts for both trainee and qualified solicitors. It is already extremely difficult for junior solicitors to start their own businesses and non-compete clauses within their contracts would further impede this.

**Question 2b**

**In your experience, are non-compete clauses particularly used in certain sectors or are they generally used across the labour market?**

Certain Sectors  Across the Labour Market  Not sure

**Question 2c**

**If you answered that non-compete clauses are particularly used in certain sectors – which ones? And what is the justification for their use in those specific sectors?**

N/A

**Question 2d**

**In your experience, are non-compete clauses used only or particularly in relation to higher skilled roles in the UK such as science or tech based jobs? If yes what are they?**

Yes  No  Not sure

We consider the legal profession to be a profession which is highly skilled. It is however unlikely that trainee solicitors or newly qualified solicitors would have the type of relationships with their clients which non-compete clauses seek to protect. The non-compete clauses in place are often very restrictive and due to the nature of the industry, well drafted and therefore likely to be more enforceable. This overly restricts the more junior end of the legal profession.

**3. Have you as an employer used a non-compete clause? (Employers only)**

*We need to understand why an employer would use a non-compete clause, and if so what the justification would be as one can only be enforceable if it protects a legitimate business interest and be for a reasonable time. For example, a drugs research business could argue that preventing one of their scientists from working for a direct competitor for two years after termination of employment is proportionate, but the same could not be said if they sought*

*to prevent the scientist taking up a job in a bank. Even so, the employer would have to make the case that the same effect could not be achieved through other means – for instance, through a confidentiality clause.*

**Question 3a**

**Have you as an employer used a non-compete clause?**

Yes  No

**Question 3b**

**If you have used one. What was the type of job and what were the terms and restrictions you included in the non-compete clause?**

Although the JLD membership comprises employers we do not ourselves directly employ anyone, therefore we have elected not to answer this question.

**Question 3c**

**What was your justification for including a non-compete clause?**

N/A

**Question 3d**

**Do you use non-compete clauses only for certain jobs or do you use them as a blanket term across your business and worker contracts?**

- Certain Jobs
- Across all contracts
- I don't use them

**If you do use them, what jobs do you use them for?**

N/A

**Question 3e**

**Have you had to challenge an ex-worker you believe has breached such a clause? If so, please provide as much information as you are able to explain the issue, what action you took, and the outcome.**

N/A

**4. Have you ever been subject to a non-compete clause as a worker? (Workers only)**

*We need to understand if workers are aware of non-compete clauses in their contracts and how transparent they are.*

**Question 4a**

**Have you ever been subject to a non-compete clause as a worker?**

Yes  No

#### **Question 4b**

**If you have been aware of a non-compete clause in a contract you have held with an employer, what was the job and what were the terms and restrictions of the non-compete clause?**

The JLD is aware of members who have not been allowed to work in a solicitors' firm within a 2-mile radius (in London) and 15-mile radius (outside of London) of their former employer, not permitted to provide services to clients or to give jobs to former colleagues for six months.

#### **Question 4c**

**Were you aware of the non-compete clause in your contract when you signed your contract, and what the implications were for you? Did your employer explain the implications? Was it transparent?**

The JLD believes that it is not usual for employers to clearly spell out the non-compete clauses nor explain their consequences. However, there is an argument that as a solicitor the employee should at least have read their contract of employment.

There are sometimes clauses in the contract of employment which state that the employee has sought their own legal advice on the implications of any covenants however most do not actually do this.

#### **Question 4d**

**Have you ever dis-regarded a non-compete clause? If so, please explain the issue, if your employer responded or challenged you, and the outcome.**

The JLD's membership may wish to challenge the enforceability of their non-compete clauses however as the clauses are likely to have been drafted by legal professionals, junior members of the profession they are unlikely to be able to afford to seek legal advice on them.

#### **Question 4e**

**Have you tried to challenge a non-compete clause, either formally or informally? If so, please provide as much information as you are able to explain the issue, what action you took, and the outcome.**

N/A

### **5. Have you experience of where a non-compete clause has affected or prevented the ability of workers to move from one job to another new business or employer, or hindered their ability to start up their own business?**

*We would like to gather evidence to understand the nature and scale of the impact of non-compete clauses*

#### **Question 5a**

**Have you had a non-compete clause which has influenced your decision to leave or stay with an employer, or start a new business yourself?**

Yes  No

**Question 5b**

**If yes, what was the job (where the non-compete applied), and what were the terms of the clause?**

We believe that non-compete clauses do influence our members' decisions to leave or stay with their employers, or start a new business themselves particularly where they are overly-restrictive.

**Question 5c**

**Have you been influenced in a decision to hire or not hire someone by the terms of an existing non-compete clause?**

Yes  No

**Question 5d**

**If you have answered 'yes' to Q5c, please explain the terms of the non-compete clause, and the impact of the decision on the business, and the sector and specific job.**

N/A

**6. Could there be any repercussions or unintended consequences if Government restricted some forms of non-compete clauses?**

*If Government were to find evidence to suggest non-compete clauses are stifling start-ups, or being used unreasonably, one option might be to restrict their use in certain circumstances.*

**Question 6a**

**Would legislation to restrict the use of non-compete clauses in certain circumstances affect your business? If so, how?**

We believe that introducing legislation to restrict the use of non-compete clauses in certain circumstances to be fair and reasonable. Currently, non-compete clauses go far beyond protecting businesses and seek to overly restrict junior professionals. We believe that non-compete clauses are unreasonably preventing newly qualified and junior solicitors' ability to move employers which goes far beyond protecting the legitimate business interests of their current employer.

**Question 6b**

**Would legislation to restrict the use of non-compete clauses in certain circumstances affect your business? Please give information.**

See 6a

**Question 6c**

**Could you restrict their use in certain circumstances through non-legislative measures?**

We are not aware of how the use of non-compete clauses could be restricted without legislative measures.

**Question 6d**

**As an employer, would intellectual property law and confidentiality clauses suffice to protect your interests if legislation to restrict the use of non-compete clauses came into force? If not, why?**

Yes  No

Please explain

The JLD is not an employer however it believes that for junior lawyers, intellectual property law and confidentiality clauses should be sufficient to protect an employer's business.

**Question 6e**

**What types of businesses would (or ought) to benefit from additional restrictions on the use of on-compete clauses?**

N/A

**7. In your experience (as an employer, individual, or in your capacity as an advisor) are non-compete clauses transparent?**

*It is not immediately clear how transparent non-compete clauses are to workers and whether they understand the implications. In the same way, it is not clear whether employers understand the purpose of non-compete clauses and use them appropriately and alongside intellectual property law and confidentiality clauses, which are different to non-compete clauses.*

*Even without non-compete clauses, intellectual property rights will protect the legitimate interests of a former employer. These rights operate independently from any contract between an employer and its workers. For example, the law of confidence will prevent current or former workers from personally using their employer's trade secrets or confidential customer lists. Similarly trade mark and passing-off law will prevent former workers from suggesting that they have a connection with the business in which they formerly worked unless the former employer agrees to this. Copyright law will prevent a former worker from copying written works created in the course of his former employment where he does not have the consent of the former employer.*

*However intellectual property law does not prevent a former worker from taking advantage of the general experience he has acquired in the course of a former employment. Therefore, the legislation as it stands should not act as a barrier for someone leaving one business to set up their own on the basis of their personal knowledge and experience.*

#### **Question 7a**

**Are you aware of guidance or do you seek guidance on the use of non-compete clauses and the associated intellectual property law and confidentiality clauses? What sources do you use?**

N/A

#### **Question 7b**

**Could guidance be improved to assist both employers and workers in their understanding of how non-compete clauses should work, what business interests could legitimately be considered as justification for non-compete clauses, and how to prevent such clauses from being inserted in contracts inappropriately?**

The JLD is aware of a general view that non-compete clauses are in violation of restraint of trade and are therefore unenforceable. The reality of course is that a well-drafted clause could well be enforceable, but workers are entering into contracts in the belief that such clauses are automatically void. This general notion could be corrected effectively through education and information.

In terms of employers, explaining to them the types of legitimate interest they can protect would be helpful as they may mistakenly believe that the clauses give them protection, when they are drafted too widely or too unreasonably to do so.

#### **Question 7c**

**Do you think new or improved guidance would improve confidence around the valid use of non-compete clauses and where confidentiality and intellectual property is a more appropriate way to protect business interests?**

Potentially in some sectors, although we understand employers are generally seeking to stop their former employee doing the same type of work for their clients. In the legal sector, law is not confidential nor is it discovered or invented, therefore the aim is to prevent the expertise being used against the former employer.

#### **Question 7d**

**If you provide advice to employers in structuring and using non-compete clauses, what principles do you consider important to take into account?**

The length of the restriction, its geographical range and the sector/client base with which the employee worked must be reasonable in the context of the business interest.

Clauses should be tailored to the employee's particular role and not a 'one-size fits all' model.

For particularly key employees, independent legal advice should be considered.



**Question 7e**

**If you provide advice to workers in negotiating or challenging non-compete clauses, what principles do you consider important to take into account?**

As per 7d above.