

Use of Non-Disclosure Agreements in the Diocese

48/23 Non-Disclosure Agreements

(A report of the Standing Committee.)

Key Points

- A review has been conducted into the use of Non-Disclosure Agreements (**NDA**s) (and the like) in the Diocese. While NDAs and similar instruments have been used in various ways in the Diocese, the present review focused on their use in employment contexts.
- This report offers theological (and other) principles which ought to guide the use of NDAs in the Diocese.
- There are certain circumstances in which the limited ongoing use of NDAs is appropriate. However, it is recommended that NDAs ought not to be used in any way that contravenes the principles articulated in this report.

Purpose

1. The purpose of this report is to provide the outcomes of a review of the use of Non-Disclosure Agreements (**NDA**s) in the Diocese and recommend that all parishes, diocesan organisations, and schools adopt the principles articulated in relation to the future use of NDAs.

Recommendations

2. Synod receive this report.
3. Synod, noting the report 'Use of Non-Disclosure Agreements in the Diocese' (**the Report**) –
 - (a) endorse the principles articulated by the Report,
 - (b) endorse the recommendations made at paragraphs 36, 37, and 38 of the Report,
 - (c) encourage all parishes, diocesan organisations, and schools to –
 - (i) adopt a policy in relation to the use of Non-Disclosure Agreements (**NDA**s) which reflects the principles of the Report and the recommendations made at paragraphs 36, 37, and 38, or
 - (ii) make a public “pledge” in relation to the use of NDAs which reflects the principles of the Report and the recommendations made at paragraphs 36, 37, and 38,
 - (d) encourage all parishes, diocesan organisations, and schools to consider whether they have used NDAs in the past which contravene the principles and recommendations of the Report; and, if they have done so, to welcome approaches from those who may have been subject to such NDAs with a view to considering the offer of an apology for the use of such NDAs, and, the offer of a formal (written) release from the terms of the NDA, and
 - (e) agree to consider a motion at the next session of the Synod by which the Synod will apologise to all those who have, historically, been subject to NDAs which contravene the principles and recommendations of the Report.

Background

4. At its meeting on 22 August 2022, the Standing Committee appointed a committee to conduct a review of the use of non-disclosure agreements, confidentiality clauses, non-disparagement clauses and suchlike in the Diocese. The Non-Disclosure Agreements Committee (**the Committee**) was asked to examine the following questions –

- (a) Are NDAs (or similar) used in parishes, or Diocesan organisations, and if so, when and how often?
 - (b) Are any of them recommended by the Professional Standards Unit, SDS Legal, SDS HR, or HR departments of diocesan organisations, and if so, why?
 - (c) What theological and practical reflections might we have on their use in regards to –
 - (i) promoting or preventing transparency, truthfulness, accountability, reconciliation and restored relationships,
 - (ii) promoting or preventing privacy, confidentiality and protection of reputation,
 - (iii) promoting or preventing healing and the general welfare of parties, especially for victims in abuse situations,
 - (iv) promoting or preventing whistleblowing, the duty to report, and ‘victim silence’, and
 - (v) any other factor that Christian churches and organisations ought to consider.
5. The Committee consisted of the following members: Archdeacon Simon Flinders (Chair), Mrs Stacey Chapman, Ms Yvette McDonald, the Rev Alli Muscat, and Mr Mark Streeter. The Committee met on eight occasions from November 2022 to February 2024.
6. By resolution 48/23, the Synod requested the Committee’s report be presented to the next session of the Synod, with a recommendation concerning the use of such agreements in our Diocese.
7. In the course of its work, the Committee –
- (a) Conducted a survey which was completed by representatives of the Office of the Director of Safe Ministry (**ODSM**), SDS Legal, SDS HR, Anglicare, Youthworks, the Anglican Schools Corporation, and Moore Theological College. The purpose of the survey was to seek information regarding the use and purpose of NDAs (or the like) in their organisations/work, and inviting comments and reflections on their utility and impact. Organisations completing the survey were assured that the final report would not make reference to the specific practices of any organisation.
 - (b) Met with Dr Julie Macfarlane, distinguished professor emerita at the University of Windsor (Canada) and director of the National Self-Represented Litigants Project: co-founder of “Can’t Buy My Silence” campaign to ban NDAs.
 - (c) Invited Uphold (formerly known as the Gospel Workers Advocacy Group) to make a submission on the subject of the use of NDAs and similar instruments in diocesan organisations. This submission was received along with a copy of the results of a survey Uphold had previously conducted.
 - (d) Received a submission from a member of the Synod, and consulted a large number of current resources such as blog posts, newspaper articles, videos, documentaries, reports, and books related to the topic of NDAs. It is acknowledged that, notwithstanding that sufficient information was gathered to make an assessment about the use and impact of NDAs across the diocesan fellowship, there may well be many stories the Committee was not able to hear.
8. A list of definitions of key terms is attached as Appendix A. For the purposes of the rest of this report, the term **NDA** will be used to refer at once to non-disclosure agreements, confidentiality clauses, non-disparagement clauses and suchlike (unless otherwise indicated).

Discussion

Current use and policies

9. NDAs are currently used widely across the Diocese, and often recommended for use. They are most commonly used by diocesan organisations for the purpose of protecting intellectual property, commercially sensitive information, or information that is otherwise confidential or private- e.g., in governance, employment or other commercial contracts. They are also commonly utilised at the point of employment separation to prevent disclosure of the sum of a “separation” payment which is made by the employer in excess of statutory or contractual obligations (usually in order to avoid the setting of a precedent that might affect future claims by others). Sometimes NDAs are used in the context of misconduct or discipline to protect victims of abuse or harassment and to protect whistleblowers.

From time to time, a form of NDA is used (most commonly a “deed of release”) in the context of sensitive employment separations.

10. It is important to acknowledge that the focus of the review has been the use of NDAs in employment contexts. Whilst the use of NDAs in relation to victims of historic sexual abuse was considered, it was not the primary focus of the present review. Further, the review did not specifically seek to consult with other groups who may experience disadvantage (e.g., the culturally and linguistically diverse, or those with disability).
11. Where NDAs are used in the context of employment separations, organisations and parishes may seek legal advice from any source they choose and may sometimes proceed to use an NDA under legal advice that has not been the subject of any critical or theological reflection. Whilst there is wisdom in seeking legal advice in the context of employment separations, it is also important to weigh the advice provided.
12. Where NDAs are used in the context of employment separations, it is also important to note that a breakdown in relationship may have occurred and fault on either side may not have been established by any kind of objective investigation. In such situations, it is impossible to establish with any confidence whether misconduct has occurred (even if there is an evident power-differential between the parties). This is to say, that often separation settlements are reached before the facts of the matter have been reliably established. In such situations it is also important to note that the use of NDA often terminates any formal or informal investigation process that may have begun.
13. As far as it has been possible to establish, it does not seem that the use of NDAs is currently regulated by written policy or protocol in any parish or organisational context within the Diocese.

Theological reflections

14. All people are made in the image of God (Genesis 1:26) and should be treated in a way that reflects their dignity as those created and esteemed by God (e.g., Matthew 5:43-45, James 3:9).
15. The reality of human sin affects every individual, every relationship, and every community (e.g., Romans 3:10-12, 1 John 1:8).
16. The Scriptures stress the importance of truthfulness. It is an aspect of Christian faithfulness that ought to reflect and point to the faithfulness of God (Numbers 23:19, Matthew 5:33-37, Ephesians 4:15,25). Truthfulness is also related to what we often refer to as ‘transparency’ but which the Bible often speaks of as ‘walking in the light’. To walk in the light involves both brave confession of our sin (e.g., 1 John 1:5-10), and exposing the fruitless deeds of darkness (e.g., Ephesians 5:8-12). The Scriptures also remind us that the pursuit of the truth will usually mean listening carefully to both sides of a story (e.g., Proverbs 18:17).
17. Nevertheless, the Bible also urges us to restrain our speech (even our truthful speech) where love requires it. Our speech should always build others up, and should never descend into gossip or slander (e.g., Proverbs 11:13, 20:19, 2 Corinthians 12:20, Ephesians 4:25-32). We are called upon to be slow to speak, especially in anger (e.g., Proverbs 14:3, James 1:19-20). We are also reminded not to ‘gloat over disaster’ lest we show contempt for our Maker (Proverbs 17:5). In addition, discretion in speech can be a way to protect the weaker conscience of a fellow-believer (e.g., 1 Corinthians 8). For all of these reasons, Christians ought to acknowledge that there are appropriate contexts for our truth-speaking (and, by implication, inappropriate contexts). There are times when confidentiality is the way of love.
18. Where the conduct of Christian leaders fails to meet the standard expected by God, there is a place for more public forms of rebuke, exposure, or discipline- not just for the sake of the sinful leader, but for the benefit of the whole church (e.g., 1 Timothy 1:20, 1 Timothy 5:19-21, 2 Timothy 1:15, 2 Timothy 2:17-18).
19. Humility demands that we accept that only God knows all truth (e.g., Romans 11:33-34), and that it is the Lord alone who can lay bare the secrets of our hearts (e.g., 1 Corinthians 14:25, Hebrews 4:12-13).

4 Second Session of 53rd Synod : Proceedings for 2024

20. Without question, we have an obligation to care for the vulnerable and to exercise leadership, power and authority with care and an attitude of selfless service (e.g., Psalm 35:10, Proverbs 14:31, 22:22, 31:9, Matthew 20:25-28, John 13:1-17, Philippians 2:1-11, 1 Peter 3:7, 5:3).
21. Where there is conflict between believers, we should always have the goal of reconciliation on view (Matthew 5:23-26, 7:1-5, 18:15-20, Romans 12:14-21, Ephesians 4:26-27), recognising that, in a broken world, it will not always be possible. This will involve repenting of our own sins, pointing out faults in others only with great humility, and offering and receiving forgiveness.
22. God cares for those who are vulnerable and is angry when power is abused and the vulnerable are mistreated (e.g., Amos 4:1-2, James 5:1-6). God also welcomes every sinner who repents (e.g., Luke 15:11-24, Luke 23:40-43). Therefore, Christians will always be those who express concern and show love to injured parties but also to the guilty, enabling pathways for apology and reconciliation at the proper time (e.g., 1 Corinthians 5:5, Galatians 6:1). Our love for sinners will always prioritise the seeking of repentance but ought not be limited to that.
23. As in every area of our lives, the way we conduct ourselves as Christians ought not to bring Christ's teaching into disrepute with the people of the world (e.g., Titus 2:5,8,10) but ought to point unbelievers to the glory of God (1 Peter 2:9-12). So we should pay attention to how the wider society sees us for the sake of the gospel.
24. Ultimate justice and satisfaction rests in the hands of the Lord (e.g., Genesis 18:25, Psalm 98:9, Acts 17:31).

Other reflections

25. It is impossible to consider the use of NDAs in the Diocese outside of the context of the way the Diocese responds more broadly to complaints about the conduct of church leaders and conflict between church leaders. The broader principles of justice and fair-dealing in these areas were outside of scope for the present review and will instead be addressed in the context of responding to Synod Resolution 9/23, which will investigate complaints processes in the Diocese more widely.
26. In particular, careful consideration should be given to developing a well-resourced system that enables independent investigation of complaints (even if they don't require the attention of ODSM), and a well-resourced system for the provision of independent mediation services for those in conflict. These suggestions are made cautiously and humbly, recognising that whilst our processes for dealing with broken relationships can become more satisfactory, even the best processes are often not entirely satisfying for those involved.
27. It is important to acknowledge that NDAs are instruments used in our society at large often with little or no ethical reflection. By contrast, if NDAs are used by a church or a Christian organisation, they ought to be used subject to careful and godly thought about their purpose and effects. Our approach to the use of NDAs should not merely be to adopt a common practice but to develop a distinctively Christian practice. It is acknowledged that some who work for our Anglican schools and organisations do not share our Christian faith or convictions. Nevertheless, a distinctly Christian framing of this issue can be another way for us to commend the gospel to such people.
28. Given the wide use of NDAs in the society at large, and their wide acceptance in the legal fraternity, those seeking to resist an unreflective use of NDAs will likewise need to resist legal advice in the process (since standard advice prefers un-nuanced approaches to the use of NDAs) and will need encouragement to feel confident to do so.
29. Where NDAs are used in contexts involving those who are or who could be victims of abuse, a trauma-informed approach is required. This requires awareness and consideration of the dynamics of power in the relevant relationships, and the creation of environments and processes that provide safety and agency.
30. A significant amount of time was spent considering the complex circumstance where a relationship between two people has deteriorated, where an employment separation is sought by one or both parties, and where an NDA is signed as part of the separation. We acknowledge that the use NDAs in these circumstances can be used to cover up ungodly behaviour or to protect an individual or organisation from reputational damage. We also acknowledge that in a circumstance like this the effect

of an NDA might prevent the appropriate reporting of misconduct, or even the healthy processing of the events by the people involved. Further, we acknowledge that when NDAs are used in this way, a party to an NDA who feels aggrieved by the way they were treated may later regret having signed it. Nevertheless, it is also recognised with compassion that at the time of signing, the NDA may seem to the aggrieved party as a “lesser of two evils”- preferring to sign in order to bring the kind of immediate resolution to a difficult chapter which could assist their future employment prospects, their mental health (or the mental health of other family members), or their immediate financial circumstances. A member of the clergy may feel especially constrained in these circumstances by the unique vulnerability they and their families experience in times of change, given that the loss of a job usually also entails the loss of a familiar home, an established church family, and settled schooling for children.

31. In addition, it is noted that the Diocese of Sydney is a relatively unique and small community in which reputation is a carefully-guarded commodity (more so than in other employment contexts). For this reason, it is a community in which anxiety about gossip and reputational damage is particularly high.
32. Arrangements under which church workers are engaged are diverse and complex. Clergy experience particular vulnerabilities as a result of being licensed office-holders rather than employees in the normal sense (for example, not having access to some of the protections afforded by the Fair Work system in Australia). The privilege of tenure enjoyed by rectors in the Diocese, and the corresponding vulnerabilities sometimes felt by other members of staff teams in churches, are acknowledged.
33. At times, a church or Christian school/organisation may commend the use of an NDA on the grounds that choosing not to speak of a conflict any longer may be in the best interests of “unity” or “gospel witness”. But churches (including our own) have a long and shameful history of using such arguments to cover up sin. So we affirm, rather, that true gospel witness and true unity are always based on truth and the humble acknowledgement of sin and brokenness.
34. There is an opportunity in relation to this issue for the Diocese to express its Christian convictions by exercising thought-leadership in the pursuit of justice. This is an aspiration the Diocese should embrace.

Conclusions and recommendations

35. NDAs in and of themselves are morally neutral. They are not in essence either right or wrong. The context of their use is thus crucially important. For this reason, in order to arrive at our conclusions, we must examine the way in which NDAs are used and the purpose for which they are employed.
36. The following uses of an NDA would not contravene any of the theological (and other) principles established above –
 - (a) Where an NDA is employed to ensure confidentiality with respect to the sum of a financial settlement (e.g., in the context of employment separation, or in the context of redress payments for victims). It is presumed in this context that the use of an NDA is designed to enable a generous settlement without setting a public precedent. A “deed of release” used in this context could also legitimately protect against future financial claims, or requests for reinstatement to a position.
 - (b) Where an NDA is employed to ensure appropriate confidentiality of intellectual property or other commercially sensitive information.
 - (c) Where an NDA is utilised as an instrument between two or more corporate or legal entities (i.e., it does not involve a “natural person” or individual).
 - (d) Where an NDA is employed in governance contexts to ensure confidentiality of matters discussed by a Board or Committee.
 - (e) Where an NDA is used in the context of Pastoral Supervision or a coaching, counselling, or mentoring context.
 - (f) Where an NDA is used in the context of a third-party conflict mediation process (to preserve the confidentiality of the mediation meetings).
 - (g) Where a victim of abuse or other misconduct (established as such by a reliable process of independent investigation) requests the use of an NDA and where the NDA in question binds the perpetrator and/or the organisation by whom they are employed, but which does not bind the victim (i.e., a one-directional NDA).
 - (h) Where an employer initiates use of an NDA in order to constrain speech on the part of a perpetrator of abuse or other misconduct (established as such by a reliable process of

independent investigation), where the purpose of the NDA is to protect the victim and/or the employer from the unwanted commentary of the perpetrator in question, and where the NDA does not also bind the victim (i.e., a one-directional NDA).

- (i) Where a breakdown in relationship has occurred between parties to a dispute, where the NDA is time-limited (ideally, around 12 months); where the purpose of the NDA is to facilitate peaceable separation, to facilitate both parties moving in other directions without fear of disparagement, and to facilitate calm and objective (less heated) reflection; where the NDA does not constrain either party with respect to making a formal complaint about the conduct of any other party to an appropriate authority within the relevant body or organisation; and where both parties have obtained independent legal advice which supports the use of the time-limited NDA in the circumstances. In such circumstances we also recommend that the NDA is accompanied by a mutually-agreed written statement (and which is, therefore, not subject to the NDA). *Note: This paragraph is not intended to preclude the subsequent use of a further NDA which is not time-limited, provided that the subsequent NDA is mutually-agreed after the parties have obtained independent legal advice.*
37. All other uses of NDAs may contravene one or more of the theological (and other) principles established above and should therefore not be used. This would include, but is in no way limited to, the following –
 - (a) Where an NDA is used to protect the confidentiality of a financial sum but where the NDA could be understood to include confidentiality with respect to any other matter.
 - (b) Where the payment of a financial sum in excess of regulatory or contractual requirements (in any kind of settlement) is made contingent upon the signing of an NDA which includes confidentiality with respect to any matter other than the financial sum itself.
 - (c) Where an NDA is proposed at the point of employment separation and is not time-limited (except in the case where the NDA relates only to a financial sum, or where the NDA is one-directional in favour of a victim of abuse/misconduct where they are found to be a victim by a reliable independent investigative process).
 - (d) Where a one-directional NDA is proposed in an employment settlement but where there has not been an independent investigative process which establishes the “facts” of the case.
 38. An NDA should never be employed in such a way as would restrict any party from making a formal complaint about the conduct of any other party to an appropriate authority within the relevant body/organisation. An NDA should also never be employed in such a way as would restrict any party from discussing their circumstances with a health professional.
 39. All parishes, diocesan organisations, and schools should be encouraged to either –
 - (a) adopt a policy in relation to the use of NDAs which reflects the principles of this report and the recommendations made at paragraphs 36, 37, and 38, or
 - (b) make a public “pledge” in relation to the use of NDAs which reflects the principles of this report and the recommendations made at paragraphs 36, 37, and 38.
 40. All parishes, diocesan organisations, and schools should be encouraged to consider whether they have used NDAs in the past which contravene the principles and recommendations of this report; and, if they have done so, to welcome approaches from those who may have been subject to such NDAs with a view to considering the offer of an apology, and, the offer of a formal (written) release from the terms of the NDA.
 41. Synod should be encouraged to consider a motion by which it apologises to all those who have, historically, been subject to NDAs which contravene the principles and recommendations of this report.

For and on behalf of the Standing Committee.

Terms	Definition
Non-Disclosure	<i>Encyclopaedic Australian Legal Dictionary:</i> The failure to reveal, divulge, or uncover.
Non-Disclosure Agreement	A contract or agreement that restricts or prohibits the disclosure of information by a consumer in relation to the supply of goods or services by a person or business: <i>Fair Trading Act 1987</i> No 68 Division 2 – Miscellaneous s 86AB: Ins 2018 No 65, Sch 1.1 [6].
Non-Disclosure Agreement (general)	A contract or agreement between Party A to disclose information to Person B on the condition that this information is to be treated as confidential and Person B agrees to restrict the use of this information and be prohibited from using the information for any other purpose than for which it was provided. A Non-Disclosure Agreement may operate both ways.
Duty of confidentiality	<i>Encyclopaedic Australian Legal Dictionary:</i> A duty owed by a recipient of confidential information not to misuse the information obtained.
Confidentiality Clauses	It is a principle of equity that a person who “receives information in confidence shall not take unfair advantage of it”, including by using it or disclosing it to the detriment of the person who provided the information: <i>Marshall v Prescott</i> (Marshall) at [51], quoting <i>Seager v Copydex Ltd</i> at [417]. Similarly, as the High Court stated in <i>Australian Broadcasting Corp v Lenah Game Meats Pty Ltd</i> (Lenah) at [30], a person who comes into possession of information, which that person knows to be confidential, may come under a duty not to publish it. A contractual clause in an agreement or deed that places the recipient of specific information under an obligation to maintain the confidentiality of that information.
Non-disparagement Clauses	Non-disparagement clauses prevent parties from making derogatory comments about each other. The purpose of a non-disparagement clause is to protect a person or organisation from some other person making negative comments about them to third parties. Disparagement is any comment, remark, or state, in writing or verbally, that falsely or injuriously harms a person or organisation. Disparaging comments hurt the reputation and confidence that other people have in that person or organisation. A contractual term sets out the expectations and obligations of the parties to the agreement.
Indemnity	An indemnity is a promise by the promisor that he or she will keep the promisee harmless against loss as a result of entering into a transaction with a third party: <i>Sunbird Plaza Pty Ltd v Maloney</i> (1988) 166 CLR 245 at 254; 77 ALR 205; <i>Total Oil Products (Aust) Pty Ltd v Robinson</i> [1970] 1 NSW 701. <i>Encyclopaedic Australian Legal Dictionary</i> “Indemnity”: 1. Security or protection against loss or injury. 2. A sum of money paid to compensate a person for liability, loss or expense incurred by the person 3. Legal protection against liabilities arising from one's actions.

Terms	Definition
Deed of Indemnity	A deed of indemnity refers to a contractual agreement between a person or organisation and another person that is intended to protect that other persons against claims made by third parties.
Deed of Release	A release executed in the form of a deed. The general words in a release are limited to issues which are specially in the contemplation of the parties at the time when the release is given: <i>Grant v John Grant & Sons Pty Ltd</i> (1954) 91 CLR 112; 28 ALJR 217.2. An example is where a person releases another person from a legal liability in respect of a claim arising from a stated factual scenario or relationship.
Deed	<p>A deed is the most solemn act that a person may perform with respect to a particular property or contract and the form of a deed is that which is laid down by the law from time to time.</p> <p>A deed is an instrument which either of itself passes an interest, right or property, creates an obligation binding on some person, or amounts to an affirmation or confirmation of something which passes an interest, right or property. Any instrument purporting to be a deed but which does not convey any such interest is considered to be imperfect. In order to be a deed at common law, an instrument needs to comply with a number of formalities:</p> <ol style="list-style-type: none"> (1) it must be written on parchment, vellum or paper; (2) it must be sealed; and (3) it must be delivered.