**Response by Littleton Chambers to Government Working Paper on Options for Reform of Non-Compete Clauses in Employment Contracts dated 26 November 2025**

## Littleton Chambers

1. Littleton Chambers ("**Littleton**") is a leading set of barristers specialising in employment law, with particular expertise in the law of employee competition. Our barristers provide specialist advice to both employers and employees on cases involving employee non-compete clauses ("**NCs**"), restrictive covenants (the wider class of clauses into which NCs fall) and confidential information. Many, if not most, of the leading cases in this area have been argued by our barristers. As a result, Littleton has for the last 50 years been at the forefront of the development of the law relating to restrictive covenants, confidential information and employee competition more generally.

2. The leading textbook on restrictive covenants used by solicitors, barristers and the courts "Employment Covenants and Confidential Information" (4th ed 2018) is edited by Selwyn Bloch KC of Littleton (with Kate Brearley), with substantial contributions by many other Littleton barristers.

3. These submissions have been reviewed by Adam Solomon KC and Selwyn Bloch KC who express their agreement with their contents. The members of the Littleton team who have compiled these submissions are Lydia Banerjee, Benjamin Gray and Callum Rodgers. These submissions also reflect discussions between its authors and other Littleton members on the issues raised by the consultation.

4. Members of Littleton Chambers regularly advise both employers and employees on issues concerning restrictive covenants and confidential information. As a consequence, members of Littleton Chambers have appeared in cases on these issues (on one or both sides of the case) before the High Court ("HC"), Court of Appeal ("CA") and the Supreme Court ("SC"). Examples (with their subject matter summarised) of the many reported (or too recent to be reported) cases include:

- ***Credit Suisse Asset Management v Armstrong*** [1996] ICR 882 (CA) (restrictive covenants and garden leave);
- ***Dawnay Day v de Braconier d' Alphen*** [1997] IRLR 442(CA) (restrictive covenants – protectable interests/non poaching covenants);
- ***TFS Derivatives v Morgan*** [2005] IRLR 246 (HC) (principles regarding reasonableness of restrictive covenants/garden leave);
- ***Thomas (Huw) v Farr Plc*** [2007] IRLR 419 (CA) – Non competes (protectable interests);
- ***Duarte v Black & Decker Corp*** [2008] 1 All ER (Comm) 401 (HC) (non competes – enforcement in UK of foreign law covenants);
- ***Tullett Prebon v BGC Brokers LP*** [2010] IRLR 648; [2011] IRLR 420 (CA) (restrictive covenants/garden leave);
- ***Standard Life v Health Care v Gorman*** [2010] IRLR 233 (CA) (repudiatory breach/garden leave: restrictive covenants of independent agents);
- ***QBE Management Services (UK) Ltd v Dymoke*** [2012] IRLR 246 (HC) (non competes – principles/springboard injunctions);
- ***Caterpillar Logistics Services v Huesca de Crean*** [2012] IRLR 981 (HC) (confidential information);
- ***East England CIC Schools v Palmer*** [2014] IRLR 191 (HC) (restrictive covenant injunction);
- ***Petter v EMC*** [2015] IRLR 847 (CA) (jurisdiction/anti-suit injunctions/restrictive covenants);
- ***Willis Ltd v Jardine Lloyd Thompson Group plc*** [2015] IRLR 844 CA (springboard injunctions);
- ***Dyson v Pellery*** [2016] ICR 688 CA (restrictive covenants – principles for injunctions);
- ***Tradition Financial Services v Gamberoni*** [2017] IRLR 698 (CA) (non competes/garden leave);
- ***Forse v Secarma Ltd***. [2019] IRLR 587 (CA) (springboard injunction at interim relief stage);
- ***Tillman v Egon Zehnder Limited*** [2020] AC 154 (SC) (blue-penciling of restrictive covenants);

- ***Travel Counsellors Limited v Trailfinders Limited*** [2021] EWCA Civ 38 CA) (confidential information of employment); and
- ***Create Financial Management LLP v. Lee & Scott*** [2021] 1 WLR 78 (HC) (springboard injunctions).
- ***Jump Trading International Ltd v Couture*** [2023] EWHC 1305 (KB) (concerning a covenant expressed to be between 0 and 12 months to be determined at the election of the employer)
- ***Dare International Ltd v (1) Stephen Soliman (2) Ashley Hikmet*** [2025] EWHC 227 (KB) (enforceability and enforcement of restrictive covenants after a period of extended absence)

**5.** Our expertise in this area of law is unparalleled. It is also unbiased: we act for all parties, both ex-employers, current and former employees and future or new employers. That is the context in which this submission should be received.

## INTRODUCTION

**6.** While we recognise the potential effect of NCs on outgoing employees, in our view the proposed statutory reforms are not well-founded and unlikely to bolster growth or achieve their intended effects. Instead, they would likely lead to a variety of employer workarounds, as well as other unintended consequences, following a disruptive period of legal uncertainty which would only benefit the lawyers working in this currently well-settled area of law.

**7.** These unintended consequences would include difficulties for start-ups in particular. Start-ups are uniquely vulnerable to ex-employees joining competitors or setting up in competition themselves armed with their ex-employer's valuable confidential information. For that reason start-ups frequently stand to benefit from NCs to protect their fledgling business' interests so that they can attract investment in an increasingly global economy, grow and ultimately take on more employees.

## CURRENT LANDSCAPE AND USE OF NCS

**8.** The reality of the legal landscape in this area militates strongly against any blanket statutory limits. The common law governing NCs and other restrictive covenants is the product of long, careful and continuous development over hundreds of years. It constitutes a fine balance between competing public policy considerations such as the general prohibition on restraints of trade, as well as freedom of contract and the legitimate protection of business interests. It is "*one of the earliest products of the common law*" yet, through the adaptability of the common law itself, it is incrementally updated to adapt to social change.[1]

**9.** Currently, the principles are sufficiently well-settled that the vast majority of disputes in this area are now resolved by negotiation and agreement between the parties rather than by litigation calling for a judicial decision. Where litigation does happen, the real issues are often about what happened factually rather than what the law is. NCs are already only enforced by the courts where they are held to be "no wider than reasonably necessary" in all the circumstances taking into consideration the legitimate interests of employees, employers, and the general public.

**10.** This approach allows courts – when needed – to assess the reasonableness of a clause in each case by reference to the business in question, an employee's specific role, and the particular interests said to require protection in a given case. Proposals to impose blanket statutory limits on the duration of NCs, or to restrict their use by reference to salary thresholds, employer size or similar criteria, are proposals to use a blunt instrument where there is a finely tuned system already in place.

**11.** The way these issues are litigated in practice reinforces this conclusion. For example, it would be wrong to assume that NCs are relevant only to highly paid or senior employees, or only to large employers. In many businesses – large and small – the "crown jewels" of the enterprise are its customer or client connections (which are often contained in confidential lists detailing client details and interactions). That is just as true of local estate agents and hairdressing salons as it is of

[1] *Tillman v Egon Zehnder Limited* [2019] UKSC 32, paragraphs 22 and 26.

commodities brokerage firms and foreign exchange traders. All these businesses may make fair and proper use of NCs to protect their valuable client lists or other confidential business information from being disseminated to competitors by outgoing employees – particularly where it would be difficult in practice to prove the underlying theft of the information.

**12.** The range of businesses in which NCs are legitimately used, and the diversity of roles to which they may properly apply, is very broad. Customer relationships vary in their durability and importance, and confidential business information varies in its nature, longevity and replicability. As a result, a business's need for protection does not correlate neatly with employee salary level, job title or organisational scale.

**13.** Indeed, artificial limitations on the use of NCs based on employer size, salary, or duration of the NC might allow a competitor business to start up or to compete more effectively initially, but at the cost of causing such significant economic damage to the ex-employer that there is no net benefit to the economy - or even a deficit.

**14.** Further, while general enforcement trends have developed over time, there are inevitably exceptional businesses, or employees, that justify departure from those trends. For example, in highly specialised areas of work where businesses are dependent on the protection of confidential or proprietary information with a long shelf life, Courts currently have the flexibility to enforce even long NCs where appropriate. For example, in at least one case in 2025 the High Court held that a 12 month NC was enforceable even in combination with a garden-leave period of up to 12 months, which could have resulted in nearly 24 months out of the market.[2] Imposing any of the proposed reforms would tie the courts' hands in these cases, preventing them from using their expertise in applying the long-developed common law to the facts of the case in question.

[2] *Dare International Ltd v (1) Stephen Soliman (2) Ashley Hikmet* [2025] EWHC 227 (KB) at [246].

**15.** The Working Paper also proceeds on an assumption that NCs and restrictive covenants are challenged by employees bringing claims against their employer to challenge their enforceability. This is not usually what happens in practice.

**16.** Although an employee can in theory bring a claim for a Court to declare a restrictive covenant unenforceable, this almost never happens in practice because there is no good reason to do so even in a strong case. This is because:

**a.** As a matter of law such covenants are presumed unenforceable unless the employer proves otherwise;

**b.** There is almost never a good reason for an employee to spend time and money bringing a claim for declaratory relief if their former employer is not going to sue them;

**c.** It is therefore rarely if ever good advice for an employee to bring a claim in their own right – it is almost always a better scenario to see if the former employer is actually willing to sue on the covenant.

**17.** For those reasons, it is almost invariably in an employee's best interests to tell a former employer to "put up or shut up" than to start proceedings challenging the covenant themselves. This is not due to any inequality of arms but because it is commonsense not to start litigation when your opponent may have no real intention to do so.

**18.** In addition, disputes concerning the enforcement of NCs are often in reality between competing businesses rather than between a business and the individual ex- employee. This is because the new employer frequently funds, supports, or directs the defence on behalf of their new employee, with this often negotiated or 'baked-in' as part of their recruitment.

**19.** In those instances the employee is party to the dispute in name only, often having little or no interest in whether the new employer pays damages to their former employer, or is forced to place the employee for a period of paid garden leave. Against that background, reforms said to be designed to protect employees are unlikely to achieve that aim in practice. They may instead alter the balance of

commercial risk and bargaining power between competing businesses without delivering meaningful benefit to individual workers.

## ANALYSIS OF THE PROPOSALS

**20.** There are serious problems with the practicability and implications of all of the proposals. They cut against the Government's stated aim of seeking to promote innovation and growth. They are likely to replace the settled law in this area with uncertain, costly and complex litigation that expands into the realm of satellite disputes *additional* to the original questions of legitimacy and reasonableness. In practice, they are likely to operate as deterrents to hiring, expansion and innovation.

**21.** Our concern regarding these proposals is that:

**a.** They detach the legislation of NCs from the factual scenario in which they operate.

**b.** They represent an artificial cap on NCs that are currently only upheld when they are no more than reasonably necessary to protect a legitimate business interest. The imperative of a business to protect its legitimate interests is a constant, and businesses will conduct themselves in a way that is most likely to do so. In many cases that will mean seeking lawfully to avoid any caps which have been imposed. Any legislative proposal should recognise this.

**c.** The introduction of additional legislative criteria is likely to increase the complexity and cost of disputes in what is otherwise a well-settled area of law.

### *Limits on Length*

**22.** Regardless of the policy intent, the introduction of a statutory cap on the length of a covenant will in practice be viewed as both a target and a benchmark set by Parliament. The risk at paragraph 32 of the Working Paper is real, and our

experience from wider litigation is that it is unlikely to be mitigated by the Government's proposal to make clear that the existing common law principles continue to apply.

**23.** Instead, what is likely to happen in reality is that the imposition of a statutory cap will have the opposite effect. Under the current law an employer must justify both the legitimacy of the NC in principle (as an appropriate form of restriction) *and* that its length goes no wider than what is reasonably necessary. There is no imposed specific limit, and that forces the employer and their advisors to consider, specific to the employer and the employee's role for them, a period that represents the *minimum* length required for the NC.

**24.** By contrast, these proposals are likely to create a powerful anchoring bias in which employers and their advisors (consciously or otherwise) *in practice* start from the presumption that a NC with a period of restriction extending up to the cap (whatever cap is set) is reasonable and reason backwards to provide a rationale that justifies it. Employees and their advisors are likely to face similar biases from the other side, focussing on arguing away or down from a ceiling, rather than forcing the employer to justify the specific number they have identified. For those employers and employees who are unable or unwilling to take legal advice, the existence of a cap is likely to be perceived as decisive and would disincentivise any exploration on either side of whether a shorter period would have been more appropriate.

**25.** In other words, the practical effect of the proposals is that parties and advisors will no longer work from a starting position of "0" but instead start from the capped figure and work backwards.

**26.** It is our view that the legislative proposal may well have the unintended consequence of increasing the average length of NCs devoid from any factual justification, which is the opposite of the intention.

***Limits According to Company Size***

**27.** This proposal appears to be wrong in principle and in practice is likely to disincentivise innovation, expansion and growth.

**28.** There is no principled link between the size of a company and the legitimate business interest a NC might seek to protect.

**29.** A large company may be engaged in the type of innovative work that legitimately requires a longer NC to ensure that the investment in R&D is sufficiently protected to be financially viable. There is no sensible policy reason to seek to deter large firms from engaging in precisely the sort of R&D and similar investment and hiring that is necessary to support the Government's growth and productivity ambitions.

**30.** Underlying the proposal appears to be a highly questionable assumption that the sort of innovation, investment or other work that justifies a longer covenant is solely the preserve of smaller businesses. That in our experience is incorrect.

**31.** However, even taken on its own terms the proposals cut against their stated goal. Despite claiming that such a proposal '*could benefit start-ups and scale-ups*', our assessment is that the opposite is likely to be true. Capping the length of NCs or other covenants based on the size of a business may well serve as a powerful deterrent to any hiring expansion.

**32.** Taking the scenario at paragraph 34 of the Working Paper, an innovative start-up may reasonably consider that it needs a NC of 6 months (or, alternatively, more than 3 months) to protect its legitimate interests and ensure that its business is viable. If the current proposals were enacted, there would be a strong and unfortunate incentive for it to avoid hiring any more employees, in order to retain a longer NC period. It is precisely this sort of proposal that is likely to inhibit the scaling-up apparently desired by the Working Paper.

**33.** It is also difficult to see how a rule based on company size would work in practice. If based on the size of the company when the contract is signed there would be certainty, but it could mean that employees who join early experience longer restrictions than colleagues who join later. If two employees join around the same time, employee 249 could have a NC period twice the length of employee 250. That would be so even if they joined on the same day or if employee 250's role justified a longer NC period than employee 249. There is no rational basis to justify such an outcome. If on the other hand enforceability is judged at the point of litigation, it creates uncertainty on any given day whether the non-compete is

enforceable, as staff numbers fluctuate and are often unknown by individual employees.

**34.** It also creates an incentive for businesses to engage people on contracts other than as employees (e.g. as contractors, consultants or other workers) or otherwise manipulate the size of the company (e.g. through using multiple corporate structures and legal relationships) to try and avoid the cap. Even if these efforts were ultimately unsuccessful, an employee would have to spend considerable time and resources litigating complex legal and factual issues. This is another situation likely to disadvantage individuals, the very people the proposals are intended to support.

***Bans in Contracts of Employment***

**35.** A blanket ban is likely to discourage hiring.

**36.** If the ban is limited to contracts of employment, then hirers will seek to mitigate that risk by seeking to use contracts other than that of employment. That creates an unfortunate incentive to undermine employment protection in the workplace. Even if such arrangements are capable of challenge, employment status disputes are notoriously complex and are likely to generate greater uncertainty and risk for both sides in litigation. It is unlikely to support the Government's aim of protecting the vulnerable.

**37.** An extension to "wider workplace contracts" is unlikely to address this satisfactorily. This term has no meaning in law and there is no obvious place to draw the line within or between the various types of contracts these may cover. Both within and between these contracts are a wide range of relationships and business interests, and no obvious rule to distinguish between them.

***Salary Thresholds***

**38.** Salary thresholds are not a reliable indicator of the legitimacy of a business interest or what length of a NC is justified. This is because there is no meaningful link between remuneration and those business interests. Furthermore, salary is often only one part of a more complicated remuneration structure in many of the roles

to which NCs most commonly apply, which frequently involve commission, performance bonuses or equity participation. There is also a highly questionable assumption that there is no reason to require NCs for low-paid roles. For example:

**a.** Many of the most innovative companies start with their initial staff drawing low salaries. Those members of staff are often sophisticated individuals with high earning potential who take a calculated risk. They draw low salaries because that is all the start-ups can afford, but retain shares or share options in the hope that the business eventually succeeds. Quantifying the value of those shares is an inherently speculative and difficult exercise given the risks inherent in innovation and start-ups: some may reasonably judge them to be valueless, others priceless. If such businesses were banned or severely restricted in their ability to use NCs that would otherwise be lawful, the incentives to start them up would be reduced.

**b.** There is a strong justification in requiring longer NCs from the most senior individuals such as Directors and C-suite officers. But such individuals may be remunerated with comparatively low salaries but considerable other incentives and benefits. Constraining the ability to protect legitimate business interests with NCs would be anomalous and difficult to justify as a matter of principle.

**c.** Lower-paid sectors still have strong and legitimate business interests in NC clauses. Hair and beauty businesses, for example, tend to employ local people and operate businesses dependent on client lists that they have built up over time. In the absence of a NC, it is in practice difficult to prevent outgoing staff from using those client lists to poach customers unfairly.

**39.** As these examples show, the level of salary is not an indication of the relevance of an NC to the employee or the business.

**40.** There appears to be an assumption in the Working Paper that innovation, sophistication and commercial success are automatically linked to high incomes. This is most clearly seen in Question 7, which assumes that innovation, expertise and entrepreneurship automatically equate to high pay. Such a view is highly

questionable and does not pay proper regard to how innovation, expertise and entrepreneurship happen in the real world.

**41.** Innovation and commercial success come from risk-taking. As explained above it is not uncommon for founders and early employees to receive low salaries in the formative years of the new business. This is also the time at which the business is most acutely vulnerable to their innovation, and investment being threatened, poached or stifled by less innovative competitors with deeper pockets (who might themselves be permitted under the proposals to require significantly longer NCs).

**42.** It would create an obvious unfairness and anomaly for innovative start-ups to be confined to shorter NC clauses whilst larger, better funded (and potentially less innovative) incumbents would be entitled to longer ones with all the security and protection that affords. Far from encouraging competition and innovation, this would amount to an unjustified restriction on the ability of innovative new entrants to compete on an equal footing.

**43.** If such enterprises faced significant restrictions on their ability to use NCs in appropriate cases, as opposed to the existing legal regime, starting an innovative business would become less viable and attractive.

**44.** Salary and remuneration thresholds also create a significant risk of practical problems and satellite litigation.

**45.** As we have already said, many of the roles that involve NCs contain complicated remuneration arrangements rather than just a clear salary. For example, finance and sales roles are frequently remunerated according to a combination of base salary, commission and/or bonus. The base salary may fall below an identified threshold, but the other remuneration elements may bring it above that threshold. It is difficult to prevent employers from tweaking their remuneration structures to work around any salary or other remuneration cap imposed on NCs.

**46.** Employers, employees and advisers must be able to advise on the enforceability and implications of a contract at the time it is signed. That means that all sides must be able to know clearly what side of any threshold an employee falls. It would obviously be undesirable for employees with variable earnings to have

"Schrödinger's Covenants" whose enforceability fluctuates based on actual remuneration received.

**47.** In theory, this problem could be remedied through the use of an "On-Target Earnings" figure ("OTE"). But in practice this is a recipe for inappropriate incentives and unwieldy litigation. Employers might be incentivised to set high OTE figures in order to justify longer non-competes and there would be little obvious incentive to do otherwise:

**a.** However, a high OTE figure is both apt to mislead a prospective employee, and give the employer the ability to justify taking action against that employee for failing to achieve an OTE figure that was in reality never achievable.

**b.** It would be difficult for an employee to challenge the validity of the OTE calculation either at the time of signing or in a subsequent dispute, both due to the inherent complexities of proving or disproving the figure (the data for which will be almost entirely in the employer's possession), and the obvious disincentive to an employee to argue that they should be less well-paid or ambitious.

**c.** Any argument in Court about whether an estimate of earnings of this nature was genuine or reasonable is likely to involve complicated evidence (including potentially the need for expert accountancy evidence). It is likely to add to the complexity of disputes rather than facilitate clear advice or resolution.

**d.** If an employee was minded to move to a competitor, they could seek to depress their earnings in order to either argue that their OTE was too low or that their salary in practice fell below the threshold. Attempts to reduce or restrict earnings to avoid similar cliff-edges are well-known in respect of income tax and are likely to happen in this context too. This would be obviously undesirable.

***Combined Bans***

**48.** It is difficult to see how combinations of these restrictions would make the situation any better. If the aim of this exercise is to try and avoid complex and costly litigation about the enforceability of such clauses, it is difficult to see how the introduction of additional interlocking multifactorial legal tests will achieve that goal. It will simply broaden the scope of any legal dispute and increase the time, complexity and cost of its resolution.

**49.** There is also a seeming disconnect between suggesting that smaller businesses might be allowed longer NCs and yet there might also be a minimum salary requirement to permit NCs. The combined effect sees to separate the justification for the existence of, and length of, any NC from the factual scenario and needs of the business seeking to apply it and into a space which benefits larger business with better access to legal advice as to structures or arrangements to work around the rules, or deeper pockets to litigate these satellite issues. This is not the stated intention of the proposals but is their likely effect.

***Other Covenants***

**50.** The range of covenants that can be included in an employment contract is wide. This in turn reflects the width of business interests that the law recognises as legitimate and justifying some degree of protection.

**51.** There is no evidence within the Working Paper or more generally that the Government has given any proper consideration to the range of such covenants, the types of interest they seek to protect, or why it would be better overall if businesses were banned from protecting those legitimate business interests.

***Litigation Complexity***

**52.** As explained above, the Working Paper, in our view, does not appear to have sufficient regard to how litigation works in this area.

**53.** This is most clearly reflected in paragraph 51 of the paper – which focusses on concerns about '*obstacle[s] to bringing claims on restrictive covenants*' and '*whether*

*prospective claimants have access to any of the above mechanisms to reduce the financial risk of bringing a claim…*' This section, and the associated questions, suggest an assumption that claims about the enforceability of NCs are brought by the employee affected (without being financed by another party, usually the new employer). As explained above, that is rarely the case.

**54.** However, we have a wider concern about the assumptions underlying the Working Paper given its apparent desire to try and reduce cost and complexity in this area. For the reasons given, we consider that the proposals are likely (if anything) to have the opposite effect.

**55.** Currently, any dispute requires the *employer* to show:

**a.** That there is a legitimate business interest that the NC seeks to protect; and

**b.** The terms of the NC (including the fact it is a NC, the length of the term and the scope) are no wider than reasonably necessary.

**56.** Under the current proposals a combined ban would require the parties *also* to have to consider:

**a.** The headcount of the employer (which may include questions about corporate structure and ownership, and how many people engaged by the employer are employees);

**b.** The employment status of the employee (or whether they fall into some other form of currently undefined "workplace contract");

**c.** The calculation of that employee's earnings for the purpose of the relevant threshold – bearing in mind that this may have to be a prospective exercise assessed at the time the parties entered into the contract; and

**d.** Whether the clause in question is a "NC" in substance or practice, or a "disguised NC" e.g. a clawback clause in relation to vested equity participation.

**57.** These issues are not straightforward, and in many cases would require the setting of new law by the higher courts in litigation that could take years to resolve. It

encourages the proliferation of satellite points in litigation rather than a clear-headed focus on the essential and simpler questions about the necessity and scope of a particular covenant. Many of the answers to these questions would not be easily ascertainable to an employee's advisors (e.g. the size of the employer or the realism of an OTE figure) and therefore risk further satellite disputes and disclosure exercises.

***Transitional impact***

**58.** Any change to the law would involve a complicated assessment of how to give it effect, would it have retrospective effect or only prospective effect? If retrospective effect this could impact on accrued rights, and if prospective effect it could lead to a disparity between new and existing employees. Either scenario would likely lead to claims whether for potential indirect age discrimination or potential breach of the Human Rights Act. It is also very likely to lead to discontent in the workforce between those doing the same work but subject to different terms. It may lead to employers preferring to pay more to retain employees on 'old terms' stifling recruitment and job mobility as 'new' employees are not seen as attractive given the inability to protect the business in the event of their departure. This effect is unlikely to be desirable in the present time of high unemployment.

## ANSWERS TO THE SPECIFIC QUESTIONS

**59.** The answers to the specific questions are based on and derive from the reasoning above. It is not repeated under each question heading but should be read as a whole.

***1. Introducing restrictions on non-compete clause***

**60.** For the reasons set out above we do not recommend introducing restrictions on NCs and commend to the Government the existing settled legal test which is:

**a.** well known;

**b.** understood by employers and employees as well as those advising;

**c.** expressly limited to be no more than is necessary to protect legitimate business interests;

**d.** tailored to the specific role performed by the individual;

**e.** accessible to all businesses; and

**f.** one that provides invaluable protection to businesses from the smallest to the largest.

***2. A statutory limit on the length of non-compete clauses***

**61.** As explained above, a blunt tool of a statutory limit risks inadvertently increasing the average length of restrictions by becoming a target or default and it risks losing the precision of the present regime.

**62.** We do not support the proposal.

***3. A statutory limit that differed according to company size***

**63.** This proposal is particularly worrying, lacking any indication of how it would operate in practice. It is impossible to see how it could do anything other than increase uncertainty and generate more litigation. A company's size bears no relation to its need for NCs.

**64.** We do not support the proposal.

***4. The length and company size thresholds should be set at, for example:***

***a) A statutory limit of 3 months for companies with more than 250 employees and a limit of 6 months for companies with 250 or fewer employees***

***b) A statutory limit of 3 months for companies with more than 50 employees and a limit of 6 months for companies with 50 or fewer employees***

***c) Other – please explain***

**65.** As explained above, company size is not indicative of innovation or need for protection: both large and small companies have legitimate interests in protecting business assets. These proposals (if given effect) would we believe be fundamentally flawed:

**a.** In this context 250 or 50 are arbitrary numbers, which would lead to arbitrary outcomes on either side of the line;

**b.** any limit based on the size of the company would lead to questions around when the size is to be assessed;

**c.** such limits also create uncertainty, especially for individuals who are unlikely to have precise data around company size;

**d.** there is no reason to think NCs are more or less relevant based on the size of the company; and

**e.** arbitrary restrictions of this nature are vulnerable to manipulation by businesses avoiding engaging people as employees and instead engaging them on another basis, or through complex corporate structures, which would be likely to have a detrimental impact on the rights of individuals in the workplace, generate business inefficiency and risk complex litigation.

***5. A ban on non-compete clauses in contracts of employment***

**66.** As explained above, a ban on NCs makes the UK a less attractive place to do business, particularly for innovative start-ups where the ability to protect legitimate business interests is part of the decision as to where to register and do business.

**67.** Any restriction on NCs in 'contracts of employment' would likely lead to side agreements or 'disguised NCs'. NCs would continue to exist but not within 'contracts of employment' and/or would push more people into alternative work

arrangements such as consultancies, reducing the rights and protections of individuals.

**68.** Businesses would still have legitimate business needs to protect. A complete ban would likely simply lead to new, more convoluted efforts to secure that protection.

***6. A ban on non-compete clauses in contracts of employment below a salary threshold***

**69.** This proposal would not work. There is no correlation between salary and the need for NCs. NCs apply to both lower paid roles and higher paid roles.

**70.** Salary is not easy to ascertain and a cap on this basis simply invites a raft of further questions. For example, should it be salary at the outset? Should it be salary as well as commission, bonus, benefits, equity participation (and if so, what effect would that have on estimations of OTEs)? Should it be salary at the point of enforcement, notwithstanding that the enforceability of a NC is otherwise assessed as at the time it was entered into? All of this generates uncertainty of outcome which increases the risk of litigation taking place and the risks involved in litigating.

**71.** We cannot recommend a proposal which contains so much uncertainty and is unlikely to achieve the stated aims of the proposals. In the experience of members of these chambers some of the most important NCs have been in contracts where the salary is not high, but the value of the business contacts is critical to the business in question. The availability of NCs should not be limited to those who can pay more to include them.

***7. How the government could ensure that a ban below a salary threshold also supports higher-paid innovators, experts and entrepreneurs in the UK***

**72.** For the reasons set out we do not see that any proposal involving a salary threshold would be effective in supporting higher-paid innovators, experts and entrepreneurs. The problem with any such proposal will always be that NCs should be no more than is necessary to protect the business interest; salary does not reflect that.

***8. A combination of a ban below a salary threshold and a statutory limit for those who earn above the threshold***

**73.** As explained above, salary is not an indicator of the appropriateness of NCs and any cap based on salary introduces a range of complex questions both for the policy itself which would inevitably, need to be explored in litigation. This proposal also risks shutting out small businesses and leaving start-ups vulnerable while at the same time creating incentives to manipulate pay to avoid or secure NCs. It would be likely to increase litigation complexity while inviting workarounds from employers.

***9. Whether restrictions should be limited to non-compete clauses only or should also apply to other restrictive covenants***

**74.** We have already set out our objections for restricting NCs beyond the current legal test. For the same reasons, we consider there is no basis for expanding proposals to other covenants, all of which are subject to the balanced legal test which has worked for many years and has been flexible enough to evolve with modern business practices.

**75.** The consultation does not in any event appear to have given any due consideration to the range of different restrictive covenants or what legitimate interests they may be seeking to protect. It is well-known that different restrictive covenants are based on different considerations – the logic constraining one type of covenant such as a NC does not automatically translate over to other types of covenant. In the absence of any such analysis we do not endorse the apparent "one size fits all" approach this proposal appears to suggest.

***10. How the government can ensure that other restrictive covenants, for example non-dealing clauses, are not used in a way that would have a similar effect as a non-compete clause, if restrictions were limited to non-compete clauses only***

**76.** The problem with this question is that it does not identify what "effect" the Government is seeking to prohibit. The effect of any lawful restrictive covenant is

to protect a legitimate business interest such as confidentiality. If that effect cannot be achieved by a NC, there is no reason in principle why it should not be achievable by an appropriately drafted non-dealing clause.

**77.** If the undesirable "effect" is not clearly identified, then such proposals would amount to little more than making it impossible for businesses to properly protect objectively legitimate business interests. If it is something else, then the courts are likely to be occupied for years with more complex disputes about the purpose or effect of clauses rather than a clear-eyed focus on the business interest engaged, whether it is objectively legitimate, and whether the covenant is no wider than reasonably necessary.

**78.** If NCs are not effective (or are made impossibly complex) then businesses will look for alternative methods. If one type of clause cannot properly protect a legitimate business interest, then the Courts may well consider whether that justifies an alternative covenant to achieve that goal, even if it is more onerous than the NC. We consider that the Government would be best advised to retain the current legal test rather than pushing the issues into unknown territory with the attendant increase in uncertainty and litigation.

***11. Whether restrictions on non-compete clauses should be limited to employment contracts or whether the government should consider applying them to wider workplace contracts***

**79.** As set out above this proposal is impossibly wide.

**80.** There is no clear or obvious definition of a "wider workplace contract" in law. Questions as to what this term means and how far it would reach would create a new and complex category of dispute. Further, each other kind of 'workplace contract' would also bring with it its own set of policy and legal questions e.g. the Courts have traditionally been more likely to enforce NCs in contracts with consultants or independent contractors as there are fewer concerns about inequality of bargaining power. It is unclear whether the same considerations underpinning the proposed reforms would apply to these other categories of workers, yet any restriction applied only to employees is likely to lead to businesses engaging more

individuals on these alternative bases as explained above. This is simply not workable.

***12. Any evidence demonstrating that a ban, or restrictions, on non-compete clauses could impact inward investment or investment in training and upskilling***

**81.** In the Employment Lawyers Association's response to the Government's 2021 consultation on measures to reform post-termination non-compete clauses in contracts of employment, respondents set out typical concerns that we regularly encounter in practice, e.g.:

a. "*If the government introduced a ban on non-compete clauses, we would not hire anyone in the UK. As it would represent an unacceptable risk for our knowledge-based business*."; and

b. "*Being a UK company who invests considerably in intellectual property, changing the rules on restrictive covenants would have negative implications to either internal communications reducing sales effectiveness and/or where we would choose to recruit and base critical employees – i.e. we would consider moving outside of the UK jurisdiction*".

**82.** Several empirical studies have documented an association between NCs and employers' investment in training.

a. At paragraphs 22-23 the Working Paper itself refers to some of this evidence, including a 2019 study that NCs are associated with a 14% increase in firm-sponsored training and the CMA's observation that NCs are associated with slightly more opportunities for formal on-the-job training. It is our view that if NCs were banned or artificially limited in any of the blanket ways proposed then the firms that previously relied on NCs (not captured by the existing studies) would likely significantly reduce their investment in upskilling current employees.

b. Further, in the United States, literature summarised by Ryan Nunn in Non-Compete Contracts: Potential Justifications and the Relevant Evidence (Brookings Institution, 2020) refers to research showing that firm-sponsored training is more common in states with more stringent non-compete enforcement.[3]

c. Finally, broader surveys of the empirical literature, such as the IZA World of Labor article by Kurt Lavetti (2021), conclude that non-compete agreements can promote investments in intangible assets, including worker training, consistent with the assessment that such clauses reduce employers' fear of immediate worker departure after upskilling.[4]

***13. Any obstacles to bringing claims on restrictive covenants, including non-compete clauses, in the courts***

**83.** As explained above, individual employees are almost never the parties seeking to bring claims on restrictive covenants. Instead, it is the ex-employer that typically seeks to bring a claim against the outgoing employee. These businesses often have the resources to bring such claims where they think it necessary to do so.

**84.** To the extent there are any obstacles in those circumstances, the biggest is the cost of litigation and the lack of court availability for quick hearings. Remedying this requires investment in Court and Judicial capacity to ensure that cases can be brought on swiftly.

**85.** One further way to address the challenges of the costs of litigation is to prepare non-statutory guidance to assist those for whom legal fees are an issue. However, as stated above, these claims are very rarely litigated by individuals but by competing businesses and this should be kept in mind when considering guidance.

[3] Non-compete contracts: Potential justifications and the relevant evidence | Brookings

[4] IZA World of Labor - Noncompete agreements in employment contracts

***14. Whether these obstacles are related to concerns about the costs of bringing a claim, and whether there are barriers to prospective claimants accessing mechanisms to reduce or predict costs (for example, FRC, LEI, CFA or DBA)***

**86.** As above, individual employees are almost never the real parties seeking to bring claims on NCs or other restrictive covenants. None of the costs mechanisms identified in this question would be particularly relevant to assisting ex-employees, who would almost always be the defendants in these claims. Notwithstanding that, providing information as to ways that individual outgoing employees can access cheap or free legal advice (or advice on a no-win no-fee basis) may assist in combating the behavioural effect of NCs that employees simply comply with them notwithstanding that they may be unenforceable. This could be included in non-statutory guidance.

***15. Any suggestions for what the most appropriate response would be, and how it might be implemented***

**87.** It is our view that the present legal test is the best answer to the concerns in the paper. It is tailored, well tested and well understood. The Working Paper's proposals are likely to replace an area of settled law with a significant increase in complexity and uncertainty

**88.** Should the Government feel that more is needed then non-statutory guidance is the most appropriate way to manage the concerns in the Paper. By increasing knowledge and understanding among both employers and employees, the Government can assist those for whom costs are an issue and avoid a patently onerous clause from being honoured out of misplaced fear by an individual.

**18 February 2026**