



Bar Council response to the Department for Business, Energy and Industrial Strategy (BEIS) consultation paper on Confidentiality Clauses (measures to prevent misuse in situations of workplace harassment or discrimination)

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to Department for Business, Energy and Industrial Strategy (BEIS) consultation paper on Confidentiality Clauses (measures to prevent misuse in situations of workplace harassment or discrimination).¹
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Question 1: Do you have any examples of confidentiality clauses, in employment contracts or settlement agreements, that have sought to cloud a worker's right to make a protected disclosure, or overstretch the extent to which information is confidential? If so, please describe these.

4. In our experience most settlement agreements are based on pre-drafted precedents that are then amended by the parties. The vast majority of those precedents expressly reference the ability of the individual to make a protected disclosure.

¹ [BEIS consultation on Confidentiality Clauses](#)

5. Where this is not positively stated in the agreement, other wording often remains, e.g. “the parties agree to keep the fact of and terms of this agreement confidential, save as permitted by law.” This, arguably, does no more than make explicit the position at common law having regard to public policy, but in a field in which claimants are frequently in person and without the benefit of legal aid or advice, we consider that clarity is a desirable aim.

Question 2: In your view, should all disclosures to the police be clearly excluded from confidentiality clauses? Why?

6. It is right that any clause which seeks to prevent a disclosure to the Police is unlawful.

7. We would urge caution in requiring prescriptive exemptions to be positively stated. There are a number of organisations to whom a disclosure could not be excluded, for example, the National Crime Agency or HMRC that could fall outside the definition of ‘Police’.

Question 3: What would be the positive and negative consequences of this, if any?

8. One issue might arise in the context of the Police as an employer (using the term loosely as Police Officers are office holders, though civilian staff and PCSO’s are employed) and the extent to which any restriction caused difficulty in interpreting any clause relating to the Police.

9. A further issue could arise in the context of the Police being utilised as a method of getting information into the public domain where no criminal offence has been committed. Is the fact of the report to the Police confidential? Is the content of the report to the Police confidential? Is there a hope in a particularly notorious case that someone in the Police would leak the information?

10. The key positive point is that it is in the public interest for people to be able to report matters to the Police without restriction. It is hard to see what negative consequence there is in this regard.

Question 4: Should disclosures to any other people or organisations be excluded?

11. Creating an exhaustive list is problematic for the reasons identified above. Ideally clauses should permit disclosures “as permitted or required by law” or words to that effect. This is what is often seen in practice in employment settlements.

Question 5: Are there any other limitations you think should be placed on confidentiality clauses, in employment contracts or settlement agreements?

12. Not over and beyond a prohibition on attempting to prevent disclosures permitted or required by law.

Question 6: Do you agree that all confidentiality clauses in settlement agreements, and all written statements of employment particulars, should be required to clearly highlight the disclosures that confidentiality clauses do not prohibit?

13. No. We consider that a prescriptive and exhaustive list is problematic. We would prefer wording such as “except as permitted or required by law” and also to include language emphasising that public interest disclosures as defined in law are permitted. This would be sufficiently wide to offer protection to the individual. It would be sensible to define the meaning of ‘public interest disclosure’ so that a party to such an agreement does not simply take their own (subjective) view as to what that might mean. It has often been said that that which is of interest to the public is not necessarily that which is in the public interest.

Question 7: As part of this requirement, should the Government set a specific form of words?

14. No. This would be too prescriptive save for the caveat expressed in paragraph 6 above.

Question 8: Do you agree that the independent advice a worker receives on a settlement agreement should be specifically required to cover any confidentiality provisions?

15. Arguably, advice on the “terms and the effect of the proposed agreement...” contained within s.203(3)(c) Employment Rights Act 1996 and s.147(3)(c) Equality Act 2010 means that regulated advisers currently have a duty to advise in relation to this point already.

16. If this point were to be clarified further, we do not have any principled objections to an express statutory provision requiring the individual to be advised in relation to the confidentiality provisions. Indeed, this may be desirable.

17. We would note that whilst there are statutory requirements in relation to the identity of the person who is advising the individual on the settlement agreement, there is no statutory requirement in relation to the identity of the adviser (regulated or otherwise) that is drafting the agreement.

18. The consultation also needs to consider the use of confidentiality provisions in ACAS COT3s. In those circumstances the individual may have had a brief phone call

with ACAS. They are unlikely to have received written advice in relation to the confidentiality clause and if they have received advice it is from an ACAS adviser and not a regulated lawyer.

Question 9: Do you think a confidentiality clause within a settlement agreement that does not meet any new wording requirements should be made void in its entirety? What would be the positive and negative consequences of this?

19. Drawing upon our experience in restraint of trade cases, where one clause is found to be void, an attempt will be made in a subsequent clause to provide for the enforceability of the clause or the obligation, notwithstanding the unenforceability of any part of it.

20. Settlement agreements are often structured in a manner so that separate consideration is provided for confidentiality.

21. Such a voiding process could possibly be overcome by drafting additional clauses in the same agreement without the potentially void element or providing for the enforceability of the obligation as a separate clause. In effect, a second attempt within the same agreement.

22. Whilst legal clarity would be welcome, we would caution against any approach that would simply serve to increase the complexity of the drafting process or encourage satellite litigation, for example as occurred previously in consumer credit law when mandatory statutory requirements led to expensive and complex litigation. The consequence of this proposal would be to increase the number of clauses and the complexity of such clauses in any agreement. That is not a desirable policy outcome.

Question 10: Do you agree with our proposed enforcement mechanism for confidentiality clauses within employment contracts? What would be the positive and negative consequences of this?

23. We agree that this would be one method of encouraging parties to comply with their legal obligations. It would possibly have some deterrent effect, though it is more likely to have a punitive effect on those who did not understand their legal obligation rather than a significant and widespread deterrent effect on those seeking to draft clauses that would be unlawful under the new law.

Bar Council
29 April 2019

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