Our response to the BEIS consultation on confidentiality clauses

Consultation details

Title of consultation: Confidentiality clauses: consultation on measures to prevent misuse in situations of workplace harassment or discrimination.

Source of consultation: Department for Business, Energy and Industrial Strategy (BEIS)

Date: 29 April 2019

For more information please contact

Francine Morris Francine.morris@equalityhumanrights.com 0161 829 8443

Matthew Smith Matthew.smith@equalityhumanrights.com 0161 829 8244

Heather Hunt Heather.hunt@equalityhumanrights.com 0161 829 8552
# Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive summary</td>
<td>2</td>
</tr>
<tr>
<td>Background</td>
<td>2</td>
</tr>
<tr>
<td>Our consultation response</td>
<td>5</td>
</tr>
<tr>
<td>Our response to question 1 of the consultation</td>
<td>5</td>
</tr>
<tr>
<td>Our response to question 2 of the consultation</td>
<td>6</td>
</tr>
<tr>
<td>Our response to question 3 of the consultation</td>
<td>7</td>
</tr>
<tr>
<td>Our response to question 4 of the consultation</td>
<td>8</td>
</tr>
<tr>
<td>Our response to question 5 of the consultation</td>
<td>9</td>
</tr>
<tr>
<td>Our response to question 6 of the consultation</td>
<td>9</td>
</tr>
<tr>
<td>Our response to question 7 of the consultation</td>
<td>10</td>
</tr>
<tr>
<td>Our response to question 8 of the consultation</td>
<td>10</td>
</tr>
<tr>
<td>Our response to question 9 of the consultation</td>
<td>11</td>
</tr>
<tr>
<td>Our response to question 10 of the consultation</td>
<td>11</td>
</tr>
</tbody>
</table>
Executive summary

The Equality and Human Rights Commission (the Commission) is a statutory body established under the Equality Act 2006. It operates independently to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights. The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. It encourages compliance with the Human Rights Act 1998 and is accredited at UN level as an 'A status' National Human Rights Institution in recognition of its independence, powers and performance.

Whilst action to prevent the misuse of confidentiality agreements in issues of workplace harassment is very important and necessary, the Commission considers that this should be only one part of a broader focus of governments, regulators and employers on changing the culture to eradicate workplace harassment and shifting the onus to employers to effectively prevent and resolve harassment.

We welcome the opportunity to provide a response to this consultation. Where we refer to confidentiality clauses we mean clauses which prevent or discourage disclosure of acts of discrimination, not commercially sensitive information.

Background

In March 2018 the Commission published the report ‘Turning the Tables: Ending sexual harassment in the workplace’\(^1\). This report is based on evidence from around 1,000 individuals and employers experiencing and dealing with complaints of sexual harassment. The evidence collected revealed the stark reality of individuals whose careers and mental and physical health have been damaged by

\(^1\) Turning the Tables: ending sexual harassment in the workplace, Equality and Human Rights Commission 2018
corrosive workplace cultures, which silence individuals and normalise harassment. We also found a lack of consistent, effective action on the part of too many employers.

Our report set out a number of recommendations aimed at more effectively preventing and responding to sexual harassment and other forms of harassment in every British workplace; these included a mandatory duty on employers to take reasonable steps to prevent harassment at work and a statutory Code of Practice on harassment and harassment at work.

Section 2.3 of our report made specific recommendations on the use of confidentiality clauses including a proposal that the UK Government should introduce legislation making any contractual clause which prevents disclosure of future acts (i.e. those taking place after, rather than before the contractual clause has been entered into) of discrimination, harassment or victimisation void.

We also recommended that the statutory Code of Practice on sexual harassment and harassment at work should, subject to consultation on the code, set out:

- The circumstances in which confidentiality clauses preventing disclosure of past acts of harassment will be void;
- Best practice in relation to the use of confidentiality clauses in settlement agreements including that the employer should, for example:
  - Pay for the employee to receive independent legal advice on the terms of the agreement, including the reasonable costs of agreeing changes to the terms;
  - Give the employee a reasonable amount of time to consider the terms of a settlement agreement before it will become effective;
  - Allow the employee to be accompanied by a trade union representative or colleague when discussing the terms of a settlement agreement;
  - Only use confidentiality clauses at the employee’s request, save in exceptional circumstances;
o Annexe a statement to the settlement agreement explaining why confidentiality clauses have been included and what their effect is.

The Commission intends to issue technical guidance in the first instance in summer 2019, which will become a statutory code at a later date.

We believe our recommendations can be applied equally across all forms of discrimination, for example cases of race and pregnancy and maternity discrimination.

The Commission also provided evidence to the Women and Equalities Committee (WESC) Sexual Harassment in the Workplace Inquiry\(^2\) and more recently to its inquiry into the use of non-disclosure agreements in discrimination cases. The WESC report echoed many of the Commission’s recommendations from our Turning the Tables report.

We welcome the Solicitors Regulation Authority’s updated guidance for solicitors drafting confidentiality agreements. We look forward to the Law Society of Scotland and the Faculty of Advocates taking similar steps. We were disappointed to learn that the Bar Standards Board have changed their position on this issue, and will not now bring in similar guidance for barristers – we encourage them to reconsider this decision. The UK Government should ensure that all guidance on the use of settlement agreements in the public sector is updated to state that clauses should not be used to prevent disclosures about sexual harassment.

Our answers in these submissions are largely based on our research and publicly available evidence, as there is little statistical data available. We welcome the Government’s commitment to gather regular data on the prevalence and nature of workplace sexual harassment.

\(^2\) Sexual harassment in the workplace inquiry report, Women and Equalities Committee 2018
Our consultation response

Our response to question 1 of the consultation

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.

The Commission was asked recently to advise on the legality of a proposed confidentiality clause which provided that the worker “shall not make any approach to, pursue any previous approach to, or initiate any investigation by, the Equality and Human Rights Commission in relation to the Respondent, its officers or employees, including without limitation… or any other alleged contravention of the Equality Act 2010”. Our view is that such a widely drafted clause is not only designed to prevent the worker from making a protected disclosure, but also from disclosing any information and any future acts of discrimination whatsoever, irrespective of whether the information was acquired as a worker or as a service user of the employer. The Commission considers such clauses are unlawful and unenforceable.

It is of great concern that such clauses are being proposed where workers do not always have legal representation, nor have access to advice and information that would help them negotiate a more reasonable clause, or indeed to resist such a clause.

The Commission understands from its research and publicly available information (see footnotes 3 and 4) that some employers and agencies require workers to sign non-disclosure agreements at the start of an employment relationship, or in advance of a particular event. Such agreements are not necessarily used to prevent disclosures of discrimination. However, evidence suggests that pre-event confidentiality clauses are more likely to be used in situations where there is a higher risk of sexual harassment or harassment related to sex to discourage workers from reporting harassment and discrimination.
For example, there were media reports that agency staff employed at the President’s Club dinner in December 2017 were asked to sign non-disclosure agreements before the event. Similarly, the Guardian reported that two Czech models said they “sometimes” experienced sexually inappropriate behaviour at the Ice Totally Gaming Conference. However they declined to talk about it or say which agency they worked for, because they had signed non-disclosure agreements. It appears these workers believed they could not disclose information which would have been a protected disclosure. This illustrates the need for better regulation of the use of confidentiality clauses to protect workers from exploitation, and for employers to provide clear information to workers about their rights in respect of making protected disclosures.

Our response to question 2 of the consultation

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

The Commission considers that, in order to have clarity, any disclosures of harassment or discrimination to the Police should be explicitly excluded by law from confidentiality clauses.

Whistleblowing legislation provides that a confidentiality clause which seeks to prevent an employee from making a protected disclosure is void. However, the police are not a prescribed person to whom a protected disclosure can be made and not all allegations of sexual harassment would otherwise satisfy the necessary conditions to constitute a protected disclosure.

---

3 Men Only: Inside the charity fundraiser where hostesses are put on show, Financial Times 24 January 2018

4 Gambling firms defy calls to stamp out sexist behaviour at event, The Guardian 7 February 2018

5 Employment Rights Act 1996 section 43J
It is likely that any clause which seeks to prevent any disclosure to the police will be void due to other existing common law principles and statutory provisions. For example, a person will commit a criminal offence if, by requiring another person to enter into a confidentiality clause, they are seeking to pervert the course of justice, and a contractual clause will not be enforceable if it is illegal. Further, in common law, equity will not uphold a confidentiality clause if it is iniquitous.

However, the legal landscape in this regard is complex. In situations where an employee is not required or not able to take independent legal advice on a confidentiality clause, it would be unrealistic and unreasonable to expect victims to make an accurate legal analysis of whether any clause is enforceable or not. Even in situations where an employee is required to take independent legal advice on the terms of a settlement agreement including confidentiality clauses, that legal advice may not be clear cut. In addition, if the legal adviser needs to provide complex legal advice, it may not be possible for them to do that within any limited costs contribution made by the employer. Therefore, the law should provide clarity, that disclosures to the police cannot be prevented by a confidentiality clause.

Furthermore, our research suggests victims could well be discouraged from reporting conduct that could be criminal to the police through fear of falling foul of an agreement on confidentiality. Such reports could potentially lead to identifying criminal or predatory behaviour by an individual or within an organisation, as a result it is in the public interest that victims are not deterred from reporting sexual harassment and discrimination to the police.

Therefore bringing forward legislation that excludes disclosures to the police from confidentiality clauses would provide clarity in the law, may give confidence to victims to report wrongdoing, serve as an incentive to employers to eradicate workplace discrimination, and deter the use of confidentiality clauses.

**Our response to question 3 of the consultation**

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

There would be a range of positive consequences including:
- increased opportunities to identify systemic problems of harassment and discrimination and serial harassers in order that they can be tackled.
- the ability of victims to report to the police without fear of adverse consequences of breaching a confidentiality clause could serve as an incentive for employers to eliminate harassment and discrimination from the workplace.

There would potentially be an impact on police resources if significant numbers of victims reported workplace harassment which turned out not to disclose any criminal conduct. However, we believe this risk could be minimised by, for example, public education as to conduct that may be criminal and conduct that is unlikely to be criminal. Furthermore the Commission is to become a prescribed person under the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 507, and so workers who wish to make disclosures about discrimination and harassment may make them to the Commission in the first instance, thus reducing the impact on the police.

**Our response to question 4 of the consultation**

**Should disclosures to any other people or organisations be excluded?**

Protected disclosures of harassment and discrimination made to the Commission should be excluded. Adding the Commission to the list of prescribed persons could well lead to the Commission having intelligence from which it can identify systemic or serious problems of harassment and discrimination and potentially use its enforcement powers to tackle them. As stated above, this could well incentivise employers to eradicate discrimination and harassment from the workplace, negating the need for the confidentiality clause to operate.

Disclosures to doctors, and other professionally qualified carers such as psychologists or counsellors should also be excluded. This is necessary to protect the health of victims who may require treatment for conditions caused or exacerbated by the alleged discrimination that led to the confidentiality clause. These groups will themselves be bound by a duty of patient confidentiality so are
unlikely to present a risk of disclosures that would breach a workers or an employer’s rights. This is necessary to protect the health of victims.

In our response to question 1, we explained that anecdotal evidence suggests workers are not aware that confidentiality clauses cannot prohibit protected disclosures to prescribed persons under Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 507. The Commission observes that during the course of its work around confidentiality clauses more could be done by government to highlight this important protection to workers. The Commission intends to highlight this issue in its technical guidance.

**Our response to question 5 of the consultation**

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

The Commission considers that legislation should be enacted to ensure that confidentiality clauses cannot be used to prevent disclosures of future acts of discrimination occurring after the clause has been entered into. Such clauses leave workers vulnerable to the suggestion that they have waived their rights not to be discriminated against or harassed. Evidence from our Turning the Tables report suggested many harassers are senior colleagues. Given the imbalance of power in employment relationships, and the reliance of many people on insecure work, it is vital that workers are very clear that their rights not to be harassed or discriminated against cannot be removed, waived or contracted out of, under any circumstances.

**Our response to question 6 of the consultation**

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?

The Commission agrees with this proposal in principle but considers a mandatory statement of what clauses do not prohibit (annexed to an employment or
settlement agreement) is a more practical means of providing certainty to both employers and workers (see response to question 7 below).

Our response to question 7 of the consultation

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

The Commission considers that a statutory form of words could have unintended consequences and a ‘one size fits all’ confidentiality clause is unlikely to be suitable for all employment contracts and non-disclosure agreements.

A mandatory statement of worker’s rights in respect of confidentiality clauses (annexed to the agreement or employment contract) appears to the Commission to be a more workable measure that will protect employees.

Our response to question 8 of the consultation

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

The Commission agrees that the advice a worker receives about a settlement agreement should include, specifically and separately, advice on the confidentiality agreement, what it means, and the limits of it.

The current legislation states that “the employee or worker must have received advice from a relevant independent adviser as to the terms and effect of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an employment tribunal.”

The law should be amended to make clear that this advice must include specific advice on any confidentiality clause in the agreement. The likely effect of this amendment would be that when employers seek confirmation from advisers that the employee has received advice on the settlement agreement, that confirmation will include specific reference to advice on any confidentiality clause. This will prompt
employers and those advising employees to take care to ensure workers receive advice on the confidentiality clauses they propose.

**Our response to question 9 of the consultation**

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?

The Commission does not agree with the proposal that there should be a required form of words in confidentiality agreements, and as a result does not have a view on whether clauses which do not comply with the requirements should be void in their entirety. We believe that such a scheme could have unintended consequences for both workers and employers. For example, if a confidentiality clause was rendered void in its entirety, there is nothing to stop one party revealing the circumstances of the settlement agreement. This could be very damaging to the reputation of an employer who had otherwise acted in good faith; similarly it could be distressing for a worker if the circumstances of the agreement became known because the confidentiality clause was void.

The Commission considers the focus should be on changing the culture to eradicate workplace harassment and discrimination.

**Our response to question 10 of the consultation**

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

The Commission’s view is that as a matter of best practice confidentiality clauses should not be used in cases of harassment unless the victim requests it, and then only in exceptional circumstances.

Rather than requiring all confidentiality clauses to adhere to a prescribed form of words, the Commission prefers the mandatory provision of a statement with all
contracts of employment and settlement agreements which explains to the worker the limits on any confidentiality clause to which they may become subject.

It is not clear how the proposed enforcement mechanism would be of assistance for those who don’t bring claims in an Employment Tribunal. Workers who settle a dispute with an agreement that includes a confidentiality clause, and workers who do not bring a claim or settle a dispute, will not be protected by the enforcement mechanism. Those workers are more likely to be at risk of believing they are bound by an unduly restrictive confidentiality clause in the employment contract.

In principle, the Commission does not object to a right to compensation for a defective confidentiality clause in an employment contract, if such mandatory clauses are brought into law. Similarly, if a mandatory statement of rights in respect of confidentiality clauses is brought into law, the Commission would support an enforceable right to compensation for non-compliance by employers. However, this is unlikely to have a significant impact on the many workers who do not bring claims in the employment tribunal and is therefore unlikely to change the culture around harassment and discrimination.

As stated above the Commission considers the focus should be on changing the culture to eradicate workplace harassment and discrimination. Our Turning The Tables report listed the following recommendations which are based on research and evidence from those who have experienced harassment at work:

- a mandatory anti-harassment policy
- improved training for line managers and staff
- anonymous reporting tools
- unbiased handling of complaints and protection for complainants, and
- procedures to protect people reporting sexual harassment from victimisation.

Our report also recommended strengthening workers’ rights in respect of discrimination and harassment. Examples of measures which are more likely to help reduce harassment and discrimination include fining employers, lengthening
the time limit for bringing a claim, increasing the levels of compensation available and providing greater access to legal advice.