



Confidentiality Clauses: Consultation on measures to prevent misuse in situations of workplace harassment or discrimination

Publication

We consent to the publication of this response, as well as our organisation's name and address. We also agree to be contacted by the Department in the future in relation to this consultation.

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About Us

The Scottish Women's Rights Centre (SWRC) is a unique collaborative project that provides free legal information, advice and representation to women affected by violence and abuse. The SWRC exists because of abuses of power and because a gap persists between women's experience of violence and abuse and their access to justice. The SWRC strives to fill these gaps by working with specialist solicitors and experienced advocacy workers. Informed by our direct work with victims/survivors of violence and abuse, we seek to influence national policy, research and training to improve processes and systems, and ultimately to improve the outcomes for women who have experienced gender-based violence.

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.

We are not able to share specific examples. However, the SWRC has had contact with women who have found their experience of sexual harassment in the workplace was compounded by the powerlessness experienced when reporting this and again when a confidentiality clause was imposed. Confidentiality clauses are used to stop people from discussing: what happened when they were sexually harassed, how the employer responded to this when it was reported and the outcome of the settlement. This compounds the inequality and trauma experienced by victims/survivors of sexual harassment. Many victims/survivors are unable to hold their employers to account because they feel unable to face the prospect of a tribunal and there are barriers to doing so, particularly the time limit and difficulties in accessing legal representation.

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

Yes. The use of confidentiality clauses and non-disclosure agreements (NDAs) must be better controlled and regulated to ensure that they are not used unethically or unlawfully. We believe that all disclosures to the police should be clearly excluded from confidentiality clauses to enable employees to feel able to disclose wrongdoing, prevent employers from using individuals' lack of knowledge of the legal limits to confidentiality clauses to intimidate them into silence and minimise the risk of these agreements perverting the course of justice.

It is clear that there have been cases in which such agreements have sought to inhibit disclosures to the police. This is plainly unethical and it is in the public interest to make it expressly clear in confidentiality clauses that disclosures to the police are permitted, which may not be clear to lay people under the provisions relating to whistleblowing.

There are significant barriers to reporting sexual crimes and confidentiality clauses should not contribute to this.

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

In our view, one of the positive consequences of ensuring that all disclosures to the police are clearly excluded from confidentiality clauses would be providing clarity to parties regarding their right to approach the police. It would reassure and empower parties in a transparent way that they have a legal right to make disclosures to the police without fear of breaching the terms of a confidentiality clause. It would also assist in preventing the abuse of such agreements by employers as a means by which to shield themselves from accountability. It would prevent people in a potentially vulnerable position from being taken advantage of, particularly survivors of sexual harassment. Moreover, it would also contribute to reducing the concealment of criminal activity. This should have the effect of increasing the number of employers/individuals being held to account for workplace harassment — including sexual assault— and, over time, reducing the prevalence of such wrongdoing in the workplace.

Criticism is frequently directed at those who are victims of sexual harassment for not doing enough to stop it, for not reporting it, for not telling anyone. If clarity around this removes a barrier to reporting and increases the number of reports to the police and other authorities, this could improve the narrative around sexual harassment and reduce victim-blaming.

A possible negative consequence could arise if the proposed changes would lead to a reduction in the use of NDAs. For some people who have experienced sexual (or other types of) harassment, the use of such agreements may be their preference, as opposed to going to an employment tribunal. We do, however, support protections being brought in to prevent such agreements from being abused.

A further potential negative consequence is that an employer who may be wishing to diminish or hide such behaviour in their workplace may feel vindicated in doing so if the police do not bring charges. Sexual crimes are difficult to corroborate, not all sexual harassment will reach the requirements needed to bring criminal charges, but this does not mean that sexual harassment has not occurred or that it should not be taken seriously.

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

We believe that it may not be necessary to exclude disclosures from being made to any other organisations beyond those already excluded under the current legislative framework governing whistleblowing, other than the clarity required in terms of reporting to the police, as discussed above. However, the limits of clauses must be clear (see below). Consideration should be given as to whether there is a need to prevent limits being placed on disclosure to health professionals to allow people to obtain counselling and/or medical treatment. Further, consideration should be given

to making it expressly clear that any disclosures can be made to lawyers for the purpose of obtaining legal advice.

In our view, in order to effectively prevent the abuse of confidentiality clauses and agreements, it is important that strict sanctions are put in place in cases where agreements prevent lawful disclosures. We therefore support the proposal to render the entire clause void should it prevent lawful disclosure. Accordingly, the legislative limitations on these clauses would require to be reasonably narrow. Furthermore, access to legal advice is crucial in this respect to ensure that parties are able to provide informed consent and fully understand the effects of the agreement that they are considering entering into, thus enabling protected disclosures. Legal aid should be available for this advice where appropriate.

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

A requirement should be brought in to prevent restrictions on employees being given a copy of the agreement. This is essential to enable them to understand the terms of the agreement and to obtain legal advice.

For the reasons set out above (see Question 4), increasing the limitations on confidentiality clauses may not be an effective option. However, greater clarity and guidance from the Government to members of the public would likely improve understanding and awareness of the limitations of confidentiality clauses and the circumstances in which lawful disclosures can be made.

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?

Yes, for the reasons stated by the Government in this consultation. It is our view that it is essential and in the interests of the parties to these types of agreements, as well as in the interests of justice, to provide clarity regarding what is not prohibited by the confidentiality clauses in terms of disclosures. In doing so, parties will be able to provide informed consent and have a better understanding of their rights in relation to the circumstances in which they can or cannot disclose information.

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

No, this should not be necessary if these reforms are implemented.

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

Yes. We agree that the independent advice that a worker receives on a settlement agreement should be specifically required to cover any confidentiality provisions. In our view, this is essential and could potentially be the most effective way to prevent lawful disclosures from being inhibited. We believe that information should be provided as to where this type of advice can be accessed —such as from Trade Unions, ACAS, solicitors and so on. This is to ensure that individuals fully understand their rights and that there are certain disclosures which are allowed despite the existence of a confidentiality clause; so, for example, they are not prevented from discussing any criminal acts with the police.

Even with improvements in the clarity of the wording of confidentiality clauses, lay people are likely to require legal advice in order to fully understand these provisions. For example, the definition of a protected disclosure is not likely to be widely understood. This is a legalistic area that requires expertise in employment and contract law. In order to ensure that there is informed consent and that parties are, equally, empowered to contract in this manner, it is important that obtaining legal advice on confidentiality clauses specifically becomes part of the process for entering into these agreements.

The Scottish Women's Rights Centre will be launching a specialist sexual harassment service (funded by the Justice and Equality Fund administered by Rosa) in mid-2019, which will provide advice, information and representation to women in Scotland who have experienced sexual harassment.

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?

Yes. In our view, a confidentiality clause within a settlement agreement that does not meet any new wording requirements should be made void in its entirety in order for this reform to be effective.

A positive consequence of this would be that it would act as a deterrent to employers who may seek to mislead employees in order to inhibit disclosure to the police or

other appropriate authorities. We believe that, if any limitations brought in are sufficiently narrow so as not to make this unreasonable, then such an approach would appear to be the most effective deterrent to employers in seeking to abuse such clauses. As mentioned above, the negative consequence of this could be, if this has the effect of removing NDAs as an option for those for whom it may be the best option.

However, we believe that the effectiveness of the proposed change may be undermined if legal advice is not also accessible. Individuals are unlikely to know with any certainty whether a clause is void or not and would be reliant on legal advice to fully benefit from the proposed change. In terms of making the proposed change effective in practice, we believe that it would be necessary to also take steps to ensure people are able to access independent legal advice from the outset, and after signing an agreement.

We note that it has been made clear that regulated practitioners, such as solicitors, must ensure that they are mindful of their obligations to third parties when they are involved in drafting and negotiating the terms of NDAs. Regulatory bodies should follow through with appropriate consequences for any misconduct in this regard. Further, as solicitors are not always involved in the drafting of such agreements, in our view these reforms are necessary in order to prevent misuse of confidentiality clauses.

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?

In our view, the proposal does not go far enough. We believe that the consequence of the confidentiality clause failing to meet the required standard wording or attempting to preclude a disclosure to the police, including within an employment contract, should be to render the clause void. We note the need to protect legitimate business interests, including protecting trade secrets, however, submit that this is proportionate, because the proposed change aims to prevent the abuse of confidentiality clauses for the purposes of precluding individuals from reporting harassment. In order to effectively achieve this aim, there needs to be sufficient deterrent to employers. Further, if employees understand the terms of their employment contract to prevent disclosures to the police, the proposed enforcement mechanism would not address the potential for these clauses to inhibit such disclosures.

We note again the importance of access to legal advice in relation to these clauses and their effects.

We believe the positive consequences of this would be to enable people to seek protection in cases of harassment and reduce the ability of confidentiality clauses to prevent this (either through overly restrictive/all-encompassing provisions or lack of understanding of the terms of the clause). This would ensure that people are able to make lawful disclosures freely and without undue fear of breaching the terms of their employment contract.

It is important that there is clarity in terms of the types of disclosures that can be made and the consequences of attempting to use these agreements to prevent disclosures regarding harassment. The sanctions for the abuse of these agreements must be clear and accessible. There are many reasons why people would not wish to, or be able to, take a case to the Employment Tribunal.

Conclusion

In our view, the reforms described in this response are necessary and proportionate to seek to ensure confidentiality clauses are drafted and implemented fairly, without taking unfair advantage of people, inhibiting lawful disclosures and potentially perverting the course of justice. The extent to which disclosure of information is prevented by a confidentiality clause should be clear, sanctions must be strengthened and made clear, and advice must be available before and after signing an NDA.