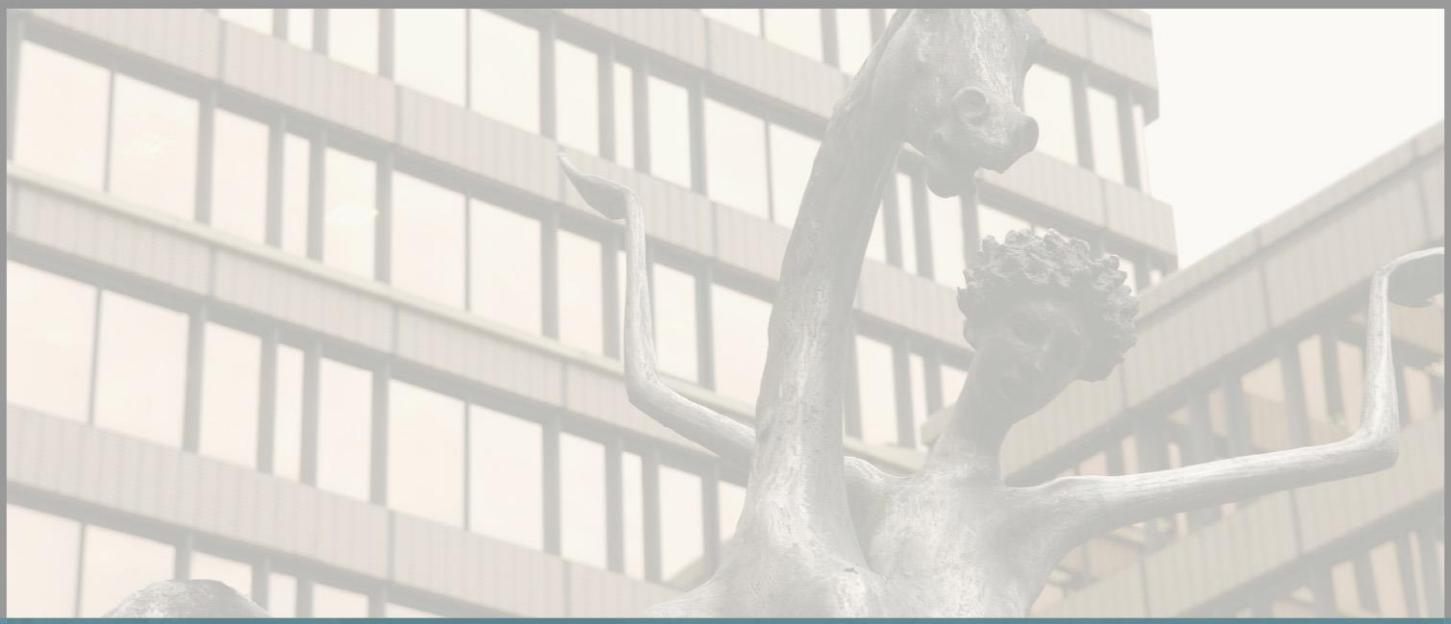

WRIGLEYS
SOLICITORS

Response to Confidentiality Clause Consultation submitted by Wrigleys Solicitors LLP

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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.**

   Settlement agreements may contain several clauses relating to confidentiality. If wording which sets out the right to make a protected disclosure is only attached to one or selected examples of these clauses it might lead a worker to conclude that right relates specifically to the clause(s) it is attached to.

   For instance, a settlement agreement might contain clauses requiring the worker to keep the entire agreement and its terms confidential, save for being able to tell a spouse, HMRC or legal advisor. The agreement specifically deals with sexual harassment claims and the worker is clear they are receiving a payment in part or in whole in relation to such a claim or potential claim. The agreement separately contains confidentiality clauses concerning the trade secrets and intellectual property of the employer. However, either by design or accident, the protected disclosure wording may only be included in the intellectual property/trade secret clause. As a result the worker might assume that the right to make a protected disclosure relates only to issues concerning company IP/ trade secrets.

   Compare this to the effectiveness of protected disclosure wording expressed as a stand alone 'bolt on' clause towards the conclusion of a settlement agreement in which it is clearly stated that nothing in the agreement prevents the worker from making protected disclosures. This provides more clarity to the fact that there is an overriding right to make a protected disclosure.

   Our clients raised an example of how confidentiality issues may be clouded in settlement agreements by the use of generic terms stating the individual agrees, as a term of the agreement, not to 'pursue a grievance'. This type of term does not generally feature in the "confidentiality clause" section of the agreement and it does not normally carry the standard caveat regarding protected disclosures. This may lead to a lack of transparency in the agreement as such a term could cover a wide range of issues, including potential protected disclosures, and may inappropriately discourage a worker from raising a protected disclosure.

   The third sector clients we spoke to commented generally on the confusion surrounding the issue of workers' rights to make a protected disclosure in the context of confidential information. For instance, some organisations struggled to differentiate between the principle of signing up to a settlement agreement to prevent an individual submitting employment tribunal claims and how this was separate to preventing workers from making disclosures. The clients that we spoke to said that it would be useful if this area of the law was made more clear generally. It appears there is a general lack of knowledge or confusion regarding whistleblowing law amongst some employers.

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

   See below.

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

   This proposal risks holding the police out to the general public as the main recipient of disclosures, which is desirable if individuals are clear that their disclosure concerns suspected criminal activity. However, there are a number of situations covered by s.43B ERA that are not criminal in nature and it is questionable whether the police are best placed to deal with non-

criminal queries and whether it is a desirable use of police time and resources to take and refer disclosures on to the appropriate authority.

When discussing these questions with our clients, no one raised any specific objection with the proposal that all disclosures to the police be clearly excluded from confidentiality clauses. However, our clients agreed that the proposed general exclusion may be interpreted by individuals as making the police a focal point for protected disclosures. Clients recognised that this raised a number of potential issues. For instance, the police might not be seen as the appropriate body for a particular disclosure because it is unclear whether the act complained of is criminal in nature, in which case an individual may not raise their issue at all.

Clients expressed concern that if the public saw the police as a central hub for all disclosures it would further blur the line of the police role in society and have an impact on the use of resources. Some clients also raised a concern that, if the police were held out as the authority to contact, vulnerable individuals and those who may be distrustful or fearful of the police could be discouraged from making a criminal or non-criminal protected disclosure, particularly if they had to contact their local police force to do so.

Our clients' view generally was that it should be clear there are a range of appropriate bodies from which individuals can seek advice and to whom they could make disclosures; however there was also recognition that if this option was too wide it could be counter-productive. For example it could lead to significant variance in the quality of guidance and advice available and general confusion about who to disclose information to and what that body should do with the information.

Our clients considered whether there may be an expectation for individuals to have taken independent legal advice before entering into confidentiality agreements so they better understand what disclosures may be made to the police or any other body. While this proposal may be relatively easy to introduce with regard to settlement agreements it was recognised that most individuals will have not have taken independent legal advice when they encounter confidentiality clauses at the point of entering a contract of employment. It is also worth noting that employees may settle employment tribunal claims under the terms of a COT3 agreement, which may include a confidentiality clause, in circumstances where they are not in receipt of independent legal advice.

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

For reasons outlined in our response to questions 2 and 3 we are of the opinion that workers and the public generally should be made aware of alternative organisations, particularly if their disclosure is not, on the face of it, criminal in nature.

For example, with reference to s.43B ERA consideration could be given to specifically excluding the Ministry of Justice, the Health and Safety Executive and the Environment Agency. In addition, provision could be made to exclude trade unions and other regulated professional organisations provided that certain levels of safeguarding and confidentiality are in place to protect the individual making the disclosure.

These organisations should in turn be able to sift and refer particular disclosures to more suitable excluded organisations if required.

Our clients in particular considered whether or not communications with various professionals who themselves operate under strict rules of confidentiality might also be excluded from the terms of a confidentiality agreement.

For instance could therapists, doctors and domestic violence advisers receive information which may otherwise be considered confidential? We also discussed with clients whether there should be an explicit list of the type of individuals to whom the worker would be permitted to share confidential information. Generally, our clients were supportive of this proposal and in particular believe the individual should be able to speak to their counsellors or medical advisers including GPs.

There was a concern it would not be feasible to list all potentially relevant organisations to whom disclosures can be made and it could be misleading to have a partial list. Consideration could be given to referring workers to the list of prescribed persons in the whistleblowing legislation.

Most settlement agreements currently provide for disclosure of confidential information regarding a settlement agreement and the circumstances leading to the agreement to legal advisers, HMRC and immediate family members provided they promise to keep details confidential. In discussions with us clients felt it would be difficult to make this list more comprehensive as they thought different organisations and their workers would have different requirements.

Some clients who did not support a prescribed list of individuals or organisations to whom a worker may make disclosures of information did suggest an added expectation on solicitors advising a client with regard to the terms of a Settlement Agreement. They proposed the solicitor should, in addition to current statutory requirements, also advise their clients on the categories of individuals or organisations to whom they may disclose information. Some clients, in turn, felt that it would be preferable to have a statutory list of public bodies to whom confidential disclosures could be made such as social services and the local authority.

One client in particular was keen to point out that workers should not be denied access to a support network on account of restrictions on disclosure of confidential information. It felt such support should be considered a high priority, particularly as it would be beneficial to support workers recovering from poor experiences in the work place and preparing them for future employment.

Clients accepted workers are less likely to "blow the whistle" to newspapers if there was a statutory prescribed list of organisations to which they could disclose information. The question was raised as to how pro-actively the prescribed organisations would deal with any disclosures made to them. Our third sector clients felt quite strongly that organisations like the Charities Commission would be pro-active within the charity sector and felt that bodies with an oversight role in the public sector would also take a pro-active approach.

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

In our own professional view the current limitations on confidentiality clauses in regard to protected disclosures are adequate. The issue at hand would appear to be more clarity and better signposting to ensure individuals are clear as to what matters they can disclose, via what process and to whom.

Our clients agreed that greater clarity could be achieved if confidentiality clauses that are clearly aimed at protecting IP and/or trade secrets were listed separately to other terms relating to confidentiality. A number of our clients felt that it would be good practice for there to be statutory guidance on the content of confidentiality terms and for the guidance to be readily accessible to the public.

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?**

   See below.

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

   Overall, our clients agreed with the premise of question 6 that all confidentiality clauses and written statements of employment particulars should be required to clearly highlight the disclosures that confidentiality clauses do not prohibit.

   In discussions with clients the government's concerns that providing a statutory form of wording could become unwieldy was clearly accepted. However, the government could look into publishing guidance on what is considered best practice when entering into contractual arrangements containing confidentiality provisions. This might, for instance, suggest more generic wording to encapsulate the types of disclosures that are exempt. Section 43B ERA could form the basis of this.

   Our clients did express a view that if the government were minded to introduce specific wording this could act as a 'bare minimum', allowing an employer to expand upon and highlight specific examples most relevant to the employer or sector. This led to conversations around the creation of a statutory definition for confidential information in the same way there is already a definition for example of disability. However, we recognised that not all organisations would want to lose the ability to define what amounts to confidential information themselves, particularly in the commercial sector.

   Another key issue raised by a number of our clients was that each organisation is likely to have their own unique circumstances. Although having a specific form of words agreed either across all sectors or at sector specific level may be a good idea, there is a risk employers will rely on generic wording and not consider the specific application to their circumstances.

   Our clients accepted that it is sometimes possible to refer to matters which are not covered by a confidentiality clause without the need to set them all out in the relevant clause. For example, a confidentiality clause may be no more explicit than setting out what it covers 'except for' matters related to 'protected characteristics', requiring reference to the Equality Act for the relevant definition.

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

   A number of our clients were clearly in favour of the suggestion that the adviser should specifically advise on the impact of the confidentiality clauses and on what is not included. It was agreed the legislation would need to change to cover this eventuality. A recommendation was made to change the wording in the adviser's certificate to cover the provision of advice regarding confidentiality provisions.

This proposal could significantly broaden the advice required of an independent advisor who is currently required to provide advice to the individual on the terms of a settlement agreement in respect of the right to bring claims before an employment tribunal.

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?**

In our opinion this suggestion would be a step too far. Introducing this proposal would create a regime whereby an employer's legitimate business interests are put at risk by the voiding of the entirety of their confidentiality clauses. It would, in our view, make more sense that clauses, or parts of clauses, which fail to meet the required standard are rendered unenforceable.

Confidentiality does exist outside of the terms set out expressly in an employment contract or settlement agreement to protect trade secrets. However, careful consideration will need to be given to the damage that could be done to employers if employees were to believe a voided confidentiality clause gives them licence to act in ways contrary to the terms covering protection of trade secrets.

When discussing this issue generally with our clients it was agreed a distinction should be made between void and unenforceable. In particular, it was noted that it is already the law that a confidentiality clause in a settlement agreement does not prevent individuals from speaking to the police or from making a protected disclosure, even if an employer did try and prevent this. It is unnecessary to make the entire clause void.

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?**

The enforcement mechanism for the provision of terms and conditions has helped put the issue closer to the forefront of employers' minds. For that reason, we agree that putting in a similar enforcement mechanism in respect of confidentiality clauses will increase awareness of the issue.

When discussing this provision with clients, it was noted the government's proposal is not a particularly harsh punishment but that it may focus employers' minds on the new requirement to draft a fair and reasonable confidentiality clause within an employment contract. The introduction of new requirements for confidentiality clauses within employment contracts and proposed enforcement mechanism could be introduced at the same time as the introduction of "day one" rights to workers (for example the proposed introduction of a right to a statement of particulars on the first day of work). The information campaign to employers would sharpen the focus on the new legal requirements and the enforcement mechanism.

The primary concern of our clients when discussing the enforcement of new legislation relating to confidentiality clauses was the practical aspects an employer would face to be compliant. For example, employers would need to decide whether to issue new contracts to existing staff or introduced revised and legally compliant clauses by way of a side letter. A number of our clients considered that such a change would place an administrative and financial burden on smaller organisations which could affect a number of our third sector clients. However the general view of our clients was that they welcome the prospect of employees having the benefit of the proposed changes to confidentiality clauses, and that the proposed enforcement mechanism would be positive. Overall it was felt the proposed mechanism is workable. Clarity should be provided on whether the proposed law would apply to employment contracts entered into before the commencement date.

The government could consider secondary ways in which to ensure that employers are informing their employees of their rights to make protected disclosures and the extent to which they owe their employer a duty of confidentiality.

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