



**Department for Business, Energy and Industrial Strategy
Consultation – “Confidentiality Clauses”**

**A Response by
The Chartered Institute of Legal Executives (CILEX)**

[April 2019]



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1. Summary of Recommendations

- 1.1. CILEx welcomes these proposals to highlight the limitations of confidentiality clauses (Para 3.1) as there is a current lack of awareness around this (Para 6.1), as well as other related protections under whistleblowing legislation. (Para 5.1)
- 1.2. Member feedback demonstrates that improper use of confidentiality clauses is still witnessed/experienced in the workplace (Para 4.1), particularly with regards to settlement agreements. (Para 4.2)
- 1.3. It is important to recognise that it is not always clear or apparent that a confidentiality clause has been improperly used, and there may be alternative ways by which to silence employees/workers. (Para 4.3)
- 1.4. The police as well as other persons/organisations (including: legal representatives and trade unions) should be expressly excluded from confidentiality clauses. (Para 5.2-5.3)
- 1.5. Confidentiality clauses should be required to clearly highlight the disclosures that they do not prohibit, as should legal advice that is sought in the context of settlement agreements. (Para 6.2-6.5)
- 1.6. Whilst government approved wording for this notice may be too prescriptive, guidance should be issued on how to best ensure that these limitations are 'clear' to a lay person. (Para 6.4)
- 1.7. To overcome wider issues of enforcement, parallel reforms should be implemented to improve access to justice within the employment tribunal, including: extending time limits for bringing claims, providing the tribunal with powers to enforce their own orders, and opening up access to legal aid. (Para 7.2)
- 1.8. These reforms are all the more necessary given the Government's track record with implementing an unlawful Employment Tribunal Fees regime. (Para 7.2.1)

2. Introduction

- 2.1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 20,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers. Amongst these almost 1,250 specialise in employment law.

- 2.2. As it contributes to policy and law reform, CILEx endeavours to ensure relevant regard is given to equality and human rights, and the need to ensure justice is accessible for those who seek it.

- 2.3. This response has been informed by member views drawn from contributions made in a personal capacity. CILEx members shared their own experiences of confidentiality clauses within employment contracts and settlement agreements, and these views and opinions have been expanded in more detail below.

3. General Points

- 3.1. CILEx welcomes the reforms put forth in this consultation which seek to improve awareness around the limitations of confidentiality clauses. Members who contributed to this response unanimously supported proposals which would require confidentiality clauses to clearly highlight the disclosures that they do not prohibit, and for the same to apply in the context of legal advice obtained on settlement agreements.
- 3.2. Members brought to our attention that wider factors, other than a general lack of awareness, may also contribute to employees/workers not challenging illegitimate confidentiality clauses. These included: 1). fear that this might negatively impact upon the employee/worker's reputation (particularly for future employers), and 2). the practical difficulties of bringing a case especially where there is an inequality of arms. The importance of improving awareness around employment rights and protections shall help to overcome these issues, as would parallel reforms to the employment tribunal for improving enforcement mechanisms.¹

4. Misuse of Confidentiality Clauses

- 4.1. Of the member feedback obtained, more than half of the personal experiences shared with CILEx related to an improper use of confidentiality clauses which had breached the existing limitations on their use. Member comments demonstrated that this was often the case in relation to settlement agreements following a termination of employment or a resignation by the employee/worker.
- 4.2. Members shared anecdotal experiences of settlement agreements being used to silence employees/workers from bringing claims for: 1). harassment and/or bullying in the workplace, 2). unfair dismissal, and 3). consistently late salary payments, and in some cases, unpaid work. These instances included situations where settlement agreements had been secured by the employer in exchange for additional payment or benefits (such as 3 month's health insurance following an unfair dismissal).
- 4.3. It is nonetheless clear from CILEx's findings that improper use of confidentiality clauses is not always so clear or apparent; 22% of members selected 'maybe' when asked if they had witnessed or experienced this kind of behaviour in the workplace. In addition, member comments highlighted instances in which members had been prevented from making a disclosure via alternative means, including one member who was threatened by their former employer with a defamation claim should they say anything negative about their experiences at the firm, as well as another who was forced to sign a confidentiality clause after being made to resign in order to obtain an employee reference.

¹ See paragraph 7.2 below.

5. Putting more limitations on confidentiality clauses in working relationships

- 5.1. CILEx agrees with the finding of the Women and Equalities Select Committee that legislation on employment protections for whistleblowers is complicated and can make it difficult for employees/workers to know whether or not they are protected.² Members shared with CILEx that in a fair percentage of cases there is a complete lack of awareness or only moderate awareness of the existing whistleblowing legislation and the rights provided under it, demonstrating that it is not enough to rely on these existing frameworks for employees/workers to know who they can make a disclosure to without falling foul of a confidentiality clause.
- 5.2. Accordingly, CILEx welcomes the proposal for all disclosures to the police to be clearly excluded from confidentiality clauses. Majority of the member views put forward agreed or strongly agreed with this proposal given the importance of eliminating any barriers to disclosure where there is a possibility of criminal behaviour, and thereby the need to make this explicitly clear to all employees/workers.
- 5.3. In addition to the police:
- Two thirds of members were of the opinion that trade unions should be clearly excluded from confidentiality clauses given the role that they play in protecting and representing employee/worker interests.
 - There was a strong consensus amongst member views that therapists and medical professionals should be clearly excluded from confidentiality clauses where they are being approached by an employee/worker in the capacity of a patient. This was in recognition of mental health issues that may arise where improper workplace behaviours have taken place, as well as in circumstances where there is a physical workplace injury.
 - There was unanimous agreement from members that legal representatives should be clearly excluded from confidentiality clauses so that employees/workers are fully aware that they can always turn to their legal representative for help. CILEx emphasises this point as improper use of confidentiality clauses may often go unnoticed as employees/workers are unaware that the clause is being illegitimately used to silence them from pursuing the rights and protections that they are unknowingly entitled to. To overcome this issue, it is essential that employees/workers explicitly know that they are able to turn to an employment lawyer to help them under these circumstances. The employment lawyer in turn, should be best placed to determine whether there are grounds for challenging the clause or not.
 - Member comments further suggested that the following organisations should be considered for exclusion: 1). Professional bodies, 2). Government Authorities, 3). Members of Parliament, 4). Family members.³

² Consultation paper, p.13.

³ This is provided that they are not employer in question.

6. Ensuring the limits of confidentiality clauses are clear to workers

- 6.1. Member feedback demonstrated first-hand that there is a lack of awareness around existing limitations on the use of confidentiality clauses as outlined within the consultation paper.⁴
- 6.2. CILEx thereby supports proposals for confidentiality clauses in settlement agreements, and all written statements of employment particulars, to be required to clearly highlight the disclosures that confidentiality clauses do not prohibit. All respondents unanimously agreed with this suggestion as it would highlight to employees/workers that there is an availability of redress where clauses are being improperly used, as well as help them to make an informed decision before signing.
- 6.3. In addition, member comments were sensitive to the lack of advice and information that employees/workers will commonly have when facing confidentiality clauses (particularly in settlement agreements), as compared with employers who are equipped with a Human Resources department and may even have a legal counsel at their disposal for advice. As this proposal would provide greater signposting of the limitations of confidentiality clauses, it was felt that this might help to rebalance this inequality of arms.
 - 6.3.1. Even where this isn't the case, one member pointed out that the proposed requirement would still be beneficial as it improves awareness for both parties (including the employer) of employment rights and protections.
- 6.4. Drawing from the contributions made, member opinion was largely reticent or unconvinced that prescribing a specific form of words for this new requirement would be the correct approach to use. CILEx acknowledges the government's concerns that approved wording could quickly fall out of date and may be overly prescriptive. One particular contention, voiced amongst survey comments, was that standardised wording may prevent employers from considering the actual situation at hand, as they are simply required to copy and paste the provision.
 - 6.4.1. Nonetheless, CILEx recognises that there is a risk of misuse where an employer is free to draft this clause as they wish, as notice of these limitations may not be clear or explicit enough for a lay person to understand. The government may wish to reassure itself that there is guidance in place to encourage best practice in the drafting of this notice, which would be of benefit to both employers as well as employees, as it would help to clarify the scope of this new obligation and ensure that the requirement to be 'clear' was adequately met.
- 6.5. For the reasons outlined above, CILEx similarly welcomes proposals for independent legal advice obtained on settlement agreements to specifically cover confidentiality provisions and their limitations, with a similar requirement to clearly highlight the disclosures that would not be prohibited.⁵

⁴ Consultation paper, pp.10-11. Only 30% of members were able to confidently say that they were 'very' or 'extremely' aware of these existing limitations.

⁵ Once again member views were in complete agreement with this suggestion, and CILEx is conscious that this should already be the general state of affairs in majority of cases.

7. Enforcement

- 7.1. CILEx recognises the benefits of enforcing these proposals using existing mechanisms where possible, i.e.: utilising the enforcement mechanisms already in place within the employment tribunal in the case of a written statement of particulars.
- 7.2. However, parallel reform projects, such as the Law Commission’s work on employment law hearing restructures, must first be implemented to combat wider issues of enforcement.⁶ Under these reforms, proposals to strengthen the employment tribunal’s role within workplace disputes are welcome, including: a). extending time limits for bringing claims, b). providing the tribunal with powers to enforce its own orders, and c). removing arbitrary technicalities which prevent ‘workers’ from having their case heard. Furthermore, as stated previously, CILEx fully endorses that legal aid should be available for litigants having their case heard in the employment tribunal, as well as other areas, so that access to justice can be improved.⁷
- 7.2.1.1. Integral to this is that the courts and tribunals are, and are seen to be, accessible to those who need them. This has particular significance with regard to employment claims given the Government’s Employment Tribunal fees regime that was found to be illegal in the Supreme Court’s judgment in *R (UNISON) v Lord Chancellor* [2017] UKSC 51. That fees regime will inevitably have lingering deleterious effects, and the government will wish to assure itself that the perception that the employment tribunal prices people out of justice is not putting people off bringing legitimate claims.

For further details

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⁶ This shall also be relevant where litigants are seeking to make claims regarding workplace harassment, discrimination and unfair dismissals more generally.

⁷ See: CILEx Submission, *Law Commission Consultation – Employment Law Hearing Structures*, (January 2019); CILEx Submission, *Department for Business, Energy and Industrial Strategy Consultation – Extending redundancy protections for pregnant women and new mothers*, (April 2019).