



Department for
Business, Energy
& Industrial Strategy

CONFIDENTIALITY CLAUSES

Response to the Government consultation on proposals to prevent misuse in situations of workplace harassment or discrimination.



Acknowledgements

The Government would like to acknowledge and thank all those who submitted evidence to the Government consultation, attended roundtable discussions and engaged on this complex and sensitive issue.

The Government would also like to acknowledge the Women and Equalities Committee for their inquiry into the use of non-disclosure agreements in discrimination cases, and their ongoing and important work in this area.



© Crown copyright 2019

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3 or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third-party copyright information you will need to obtain permission from the copyright holders concerned.

Any enquiries regarding this publication should be sent to us at: enquiries@beis.gov.uk

Contents

Executive Summary	4
Introduction	6
Proposal 1 - Legal Limitations	8
Proposal 2 - Ensuring the limits of confidentiality clauses are clear to the worker	10
Proposal 3 - Wording for all confidentiality clauses	11
Proposal 4 - Advice on settlement agreements	13
Proposal 5 - Enforcement	15
Proposal 6 - Monitoring and Reporting	17
Next Steps	19
Annex A – Consultation Responses	20

Executive Summary

Confidentiality clauses serve a useful and legitimate purpose in the employment context, as part of both employment contracts and settlement agreements. However, a number of cases have come to light where employers have used confidentiality clauses to prevent victims of workplace harassment or discrimination from speaking out. We previously responded to the Women and Equalities Select Committee's inquiry on sexual harassment in the workplace, that harassment of any sort is abhorrent and cannot be tolerated in the workplace. We believe misuse of confidentiality clauses is unacceptable and are seeking to introduce changes that protect the individual.

In March this year, we launched a consultation to seek evidence and views of the use of confidentiality clauses in the employment context. We also consulted on a number of proposals to limit the misuse of confidentiality clauses and enhance clarity for individuals on what they should and should not cover. We ran 6 round tables across the UK to gather further evidence and to discuss our proposals.

It is clear that there is a legitimate place for confidentiality clauses signed as part of an employment contract. These are used by employers to protect commercially sensitive information and to prevent their employees sharing such information with their competitors. We also heard evidence that many employees who sign a settlement agreement at the end of their employment with an organisation value the inclusion of confidentiality clauses, as they allow them to move on and make a clear break. However, using these clauses to silence and intimidate victims of harassment and discrimination cannot be tolerated, which is why we are introducing reforms.

We would like to thank the Women and Equalities Committee for their inquiry report into the use of NDAs in discrimination cases. Their work on this topic has challenged misuse. A number of their recommendations are addressed in this consultation response. We will respond fully in due course to all their recommendations.

We would also like to acknowledge and thank all the respondents to the consultation and participants in the roundtable discussions. This is a highly sensitive, emotional and technical topic. We particularly wish to recognise the individuals who responded and their courage in speaking out and taking a step to move on with their lives.

Our reforms set out in this document are part of a wider response to sexual harassment in the workplace. The Government Equality Office launched a consultation 11 July 2019 on sexual harassment in the workplace, focusing on steps to tackling inappropriate workplace culture. It is also relevant to our wider reforms to create a fairer labour market through the Good Work Plan.

In response to the consultation to tackle misuse of confidentiality clauses we are taking a number of measures. We will:

- Legislate to ensure that a confidentiality clause cannot prevent an individual disclosing to the police, regulated health and care professionals or legal professionals;
- Legislate so that the limitations of a confidentiality clause are clear to those signing them;

Response to the Government consultation on Confidentiality Clauses

- Legislate to improve independent legal advice available to an individual when signing a settlement agreement;
- Produce guidance on drafting requirements for confidentiality clauses; and,
- Introduce new enforcement measures for confidentiality clauses that do not comply with legal requirements.

This document provides an overview of responses to the consultation and sets out the steps we will now take.

Introduction

Through the Industrial Strategy we are working to transform our economy. It is creating a fairer and more equal workplace to boost productivity and earning power for all. Ensuring that everyone, no matter what their background, can enter into and progress at work lies at its heart.

Matthew Taylor's review of modern working practices outlined an ambition for all work in the UK economy to be fair and decent - and for employers to offer opportunities that give individuals realistic scope to develop and progress. We share that vision in the "Good Work Plan". On 4th March 2019, we launched a consultation with proposals to tackle the misuse of confidentiality clauses in cases of sexual harassment and discrimination. This was following a number of high-profile cases which highlighted the inappropriate and illegal use of confidentiality clauses and settlement agreements. The proposals we consulted on support the Good Work Plan by helping to create a more level playing field between workers and employers, providing more understanding over rights and legal responsibilities, and providing protections for the most vulnerable.

Confidentiality clauses or Non-Disclosure Agreements (NDAs) are provisions in a contract which seek to prohibit the disclosure of information. They can serve a useful and legitimate purpose in the employment context, as part of both employment contracts and settlement agreements.

In November 2018, the Women and Equalities Committee (WESC) launched an inquiry into the use of non-disclosure agreements in discrimination cases, following their 2018 report on sexual harassment in the workplace. Kelly Tolhurst, Minister for Small Business, Consumers and Corporate Responsibility, submitted oral evidence to the Committee on 3 April 2019 and committed to wait for the Committee's report before publishing our final proposals in response to the confidentiality clause consultation.

WESC published their report on the use of non-disclosure agreements in discrimination cases on 11 June 2019. We welcome the recommendations that WESC have made on tackling this important issue. The report included 42 recommendations and concerns, a number of which are covered in this consultation response. We will formally respond separately to the WESC report, including on areas not covered in this document.

The Government Equalities Office (GEO) has also recently launched a consultation on sexual harassment in the workplace. Their consultation looks at whether the current laws on this issue provide the intended protections, whether there are any gaps in the law, and what more can be done at a more practical level to ensure people are properly protected at work.

We share the concern that non-disclosure agreements have been used to hide workplace harassment or intimidate victims into silence. This is clearly unacceptable, and that is why we have consulted to tackle the misuse of confidentiality clauses. However, we also believe that confidentiality clauses have a legitimate place in the employment context and are not misused in all scenarios. They can be used primarily in two ways, at different stages of an employment relationship: as part of an employment contract, for example to protect commercially sensitive information; and within a settlement agreement, to allow both sides of an employment dispute to move on with a clean break.

It is clearly unacceptable that confidentiality clauses are misused to cover up cases of harassment and discrimination, as this fails to tackle repeat offenders and perpetuates an unacceptable workplace culture. Already, confidentiality clauses cannot prevent an individual from making a protected disclosure or 'whistleblowing', nor can they prevent an individual from taking a matter to an employment tribunal, though some settlement agreements can waive this right.

We have consulted on a number of proposals to put an end to the unethical use of these agreements and encourage good practice from employers and lawyers. The proposals we consulted on were:

- Legislating so that no provision in an employment contract or settlement agreement can prevent someone from making any kind of disclosure to the police, in order to report a suspected crime.
- Legislating so that the limitations within confidentiality clauses are clear in the written statement of employment particulars, ensuring the worker understands the disclosure permissions.
- Whether a specific set of words should be used in a confidentiality clause to ensure the disclosure limitations are properly highlighted, can be easily understood by an individual and prevent exploitation.
- Extending Section 203(3) of the Employment Rights Act 1996 to ensure that the independent legal advice a worker signing a settlement agreement receives covers the nature and limitations of any confidentiality clauses.
- Considering enforcement measures for confidentiality clauses that do not comply with legal requirements.

The consultation received 582 responses and respondents included trade unions, campaign organisations, legal institutes, individuals and businesses. We also conducted 6 roundtable discussions with stakeholders in England, Scotland and Wales. A fuller analysis can be found at Annex A of this response.

Proposal 1 - Legal Limitations

Legislate so that no provision in an employment contract or settlement agreement can prevent someone from making any kind of disclosure to the police.

We consulted on the proposal to legislate so that no provision in an employment contract or settlement agreement can prevent someone from making any kind of disclosure to the police. Individuals can report a suspected crime to the police. However, recent high-profile cases on the misuse of settlement agreements have shown that some confidentiality clauses attempt to limit individuals' reporting rights. The WESC inquiry in 2019 also found cases where victims were made to feel they were not able to report sexual harassment and discrimination to the police.

This proposal received strong support from nearly all respondents to the consultation. Respondents believed that by legislating, this would provide individuals with more clarity on who they can disclose to, particularly for individuals who are unsure whether the harassment or discrimination they experienced is criminal.

The consultation also asked to which other organisations individuals, who have signed settlement agreements, should be able to disclose. Some individuals reported that they experienced an increase in mental health problems and were isolated by not being able to talk to appropriate professionals. Some respondents called for therapists and counsellors to be included in this provision.

We understand that for victims of sexual harassment and discrimination, access to medical and legal services are important. Victims should not be made to feel they are unable to disclose to regulated professionals, bound by confidentiality duties.

We also consider it important to ensure that the professional to whom a disclosure is made is bound to confidentiality. This is to ensure that confidential information from an individual's agreement, to which they are bound, is not disclosed further. Regulated health and care and legal professionals are covered by duties of confidentiality and both sectors have regulated, established practices for when confidential information is disclosed. Therapists and counsellors are not regulated professionals in the same way, though they can voluntarily join a register accredited by the Professional Standards Authority and thus be bound to observe confidentiality. Therefore, we will only extend disclosure permissions to regulated legal and health and care professionals.

In their report WESC recommended:

'Government should ensure that NDAs cannot prevent legitimate discussion of allegations of unlawful discrimination or harassment and stop their use to cover up allegations of unlawful discrimination, while still protecting the rights of victims to be able to make the choice to move on with their lives'.

Government Response

We agree with the WESC recommendation and believe it is right that individuals are not prevented from taking necessary steps to report a suspected crime. We are committed to ensuring victims are clear that they are able to report and will legislate to ensure that no provision in an employment contract or settlement agreement can prevent someone from making any kind of disclosure to the police, regulated health and care or legal professionals.

Proposal 2 - Ensuring the limits of confidentiality clauses are clear to the worker

Ensuring the limits of confidentiality clauses are clearly set out in a settlement agreement and as part of a written statement of employment particulars.

Our consultation asked respondents whether confidentiality clauses in settlement agreements and written statements of employment particulars should be required to clearly highlight the limitations of a confidentiality clause.

Government and the WESC inquiry highlighted cases where individuals were uninformed of the limits of their settlement agreement or confidentiality clauses.

There was large support (83% of respondents) for this proposal as respondents considered this would provide further certainty and clarity to individuals and would also prevent abuse by employers. Those who did not support the proposal were concerned this would make confidentiality clauses longer and may lead to additional confusion.

On this topic, the WESC recommended that the Government should:

'require standard, plain English confidentiality, non-derogatory and similar clauses where these are used in settlement agreements and ensure that such clauses are suitably specific about what information can and cannot be shared and with whom'.

Government Response

In response to the consultation and the WESC recommendation, we agree that it is important workers understand the rights they maintain when signing a confidentiality clause, so they are not given the impression that they cannot disclose information to the police about harassment, discrimination or other crimes.

For confidentiality clauses which form part of a settlement agreement, we will legislate to require confidentiality clauses to clearly set out their limitations.

For confidentiality clauses at the beginning of an employment relationship, we will legislate to require the limitations of the confidentiality clause to be included as part of a written statement of particulars.

Proposal 3 - Wording for all confidentiality clauses

Set a specific form of words to be used when drafting a confidentiality clause.

We consulted on the proposal to legislate that specific wording should be included in a confidentiality clause, i.e. that the limitations are described in a set form of words for all contracts where confidentiality clauses are used. Consultation respondents were split over this proposal, with 44% of respondents supporting the proposal and 43% rejecting the proposal.

Legal professionals and employers, who are most commonly involved in drafting these clauses, did not support this proposal. These respondents recommended that specific wording would not cover all uses of confidentiality clauses and would not allow any flexibility. Instead they suggested that guidance would provide the correct level of flexibility for drafting professionals.

Individual respondents felt that a specific set of words would provide clarity and reduce room for abuse. Campaign organisations also suggested that there was merit in specific wording, as it would reduce any legal ambiguity. However, it was also recognised that specific wording would require frequent updates and could be constricting, considering the different types of settlement agreements.

The 2019 WESC report acknowledged the difficulties standardised wording could introduce, and recommended Government instead legislate on drafting requirements so that they:

- *be clear and specific about what information cannot be shared and with whom;*
- *contain agreements about acceptable forms of wording that the signatory can use, for example in job interviews or to respond to queries by colleagues, family and friends;*
- *contain clear, plain English explanations of the effect of clauses and their limits, for example in relation to whistleblowing.*

Government Response

We agree in principle the WESC recommendation to legislate on drafting requirements. As set out above, we will take action to ensure that the limits of a confidentiality clause are clearly explained in a settlement agreement or written statement of particulars. In particular, we will ensure that provisions in the legislation will require that wording is clear and specific.

This new requirement will address the first and third parts of the WESC's recommendation.

We also intend to work with relevant stakeholders including the Solicitors Regulation Authority (SRA), the Equality and Human Rights Commission (EHRC) and the Advisory, Conciliation and Arbitration Service (ACAS) to produce suitable guidance for solicitors

and legal professionals responsible for drafting settlement agreements. EHRC is producing guidance in order to clarify the law relating to confidentiality agreements in cases of discrimination in employment and set out good practice in relation to their use. ACAS is also planning to produce guidance to help employers, workers and their representatives be clearer about the law and good practice around confidentiality clauses. The SRA has also committed to update its guidance to solicitors on the use of confidentiality clauses once our proposals are published, to align it with any legislative changes.

Proposal 4 - Advice on settlement agreements

Independent legal advice a worker receives when signing a confidentiality clause must cover the nature and limitations of any confidentiality clauses, in order for the settlement agreement to be valid.

We consulted on extending Section 203(3) of the Employment Rights Act 1996. For a settlement agreement to be valid, Section 203(3) of the Employment Rights Act 1996 requires that a worker has received advice from an independent adviser such as a lawyer or a trade union official as to the terms of the agreement. While the advice given should cover the nature of any confidentiality requirement, it might not always cover the extent to which a worker is still able to discuss their experiences with anyone or the specific legal disclosure rights they retain. We have heard of cases where individuals were not provided with adequate legal advice, were unclear of their rights to disclose and unsure of the limitations of the confidentiality clauses in their settlement agreements.

The 2019 WESC report welcomed our proposal, stating that individuals with good legal advice would have a greater opportunity to negotiate the terms of the agreement, which will lead to a more satisfactory settlement:

Minimum requirements for legal advice on settlement agreements are insufficient to ensure that individuals are properly advised on confidentiality and similar clauses...We welcome the Government's proposal to require that the independent advice a worker receives on a settlement agreement must cover the nature and limitations of any confidentiality clause in the agreement, and the disclosures that a worker is still able to make.

The Equality and Human Rights Commission (EHRC) also recommended in its consultation response that independent legal advice must contain specific advice on any confidentiality clause in an agreement, what it means and the limits of it.

Responses from campaign organisations, trade unions and individuals strongly supported this proposal, as often the independent advice offered did not result in an individual fully understanding their rights, and they believed it would bring some consistency to the advice provided. Legal respondents to the consultation overall did support this proposal, however in roundtable discussions legal participants felt this requirement was already covered by Section 203 of the Employment Rights Act 1996. Some were also concerned additional requirements would raise legal fees. Other legal organisations acknowledged that although the Employment Rights Act 1996 might already be read as covering this requirement, they would welcome greater legislative clarity on what confidentiality clause legal advice should contain.

Government Response

Following the WESC recommendation and the consultation responses, we propose to extend the legislation to ensure that individuals receive advice not only on the nature of the confidentiality requirement but also on the limitations of confidentiality clauses. This legislative change will ensure that legal professionals must provide clarity on the details

in a settlement agreement in order for it to be valid, so that individuals are not left with unsatisfactory agreements.

The SRA has also committed to update its guidance on the use of confidentiality clauses following our proposals. The guidance from stakeholders will help inform the independent advice from a relevant independent adviser, received by individuals, before they enter into a confidentiality agreement.

Proposal 5 - Enforcement

Our consultation proposed two enforcement mechanisms for the misuse of confidentiality clauses, as they are primarily used in two different contexts: settlement agreements and employment contracts. The use of confidentiality clauses in employment contracts and settlement agreements occurs at different stages within the employment relationship and may be enforced differently within the court/employment tribunal systems.

We proposed that confidentiality clauses in a settlement agreement that do not follow new legislative requirements should be made void in their entirety, without voiding the whole settlement agreement.

More respondents agreed with these proposals. Respondents believed this action would redress the power imbalance between employer and employee in a settlement agreement. Employers would have greater incentives to ensure the correct drafting of confidentiality clauses, to avoid the risk of the whole settlement agreement being invalidated.

WESC previously recommended, and reiterated in their recent report that:

The Government should make it an offence for an employer or their professional adviser to propose a confidentiality clause designed or intended to prevent or limit the making of a protected disclosure or disclosure of a criminal offence.

Government Response

We will legislate to introduce new enforcement measures for confidentiality clauses that do not comply with legal requirements.

Any confidentiality clause in a written statement that does not meet the new drafting requirements will permit the individual in certain circumstances to be eligible for additional compensation, when brought before an employment tribunal.

We are proposing to introduce a new requirement for the limits of any confidentiality clause to be included in the written statement of employment particulars, that must be given to all employees. The requirement to give employees a written statement already has an enforcement mechanism through the employment tribunals. When a worker brings a claim for an employment right to a tribunal, and it is found that their employer failed to comply with the requirement to provide a written statement, the worker is entitled to additional compensation in an employment tribunal award if they are successful in their claim. In the consultation, we proposed that this enforcement mechanism would also apply to the new requirement around confidentiality clauses in written statements. The new enforcement arrangements will not apply retrospectively.

Respondents felt it was correct that cases concerning confidentiality clauses were dealt with by the court system. Respondents also felt this enforcement mechanism was appropriate as it is consistent with enforcement measures already in place.

Government Response

We will legislate to introduce a requirement to be clear on the limits of any confidentiality clause in a written statement of employment particulars. A worker that receives a confidentiality clause in a written statement that does not meet this requirement will be entitled to receive additional compensation in an employment tribunal award, if they are successful in their claim.

Under current legislation if an employee does not receive a written statement within two months of starting the job, or the statement does not comply with what is required, they can refer the matter to an Employment Tribunal for a declaration as to what the particulars should have been. The intention is that this will also be available in relation to the new written statement requirements outlined above.

Proposal 6 - Monitoring and Reporting

Consider a reporting duty and monitoring body.

The consultation did not make proposals around monitoring and reporting. However, alongside the consultation, we conducted a number of roundtable discussions with relevant stakeholders including individuals, trade unions, campaign organisations and lawyers. During these meetings, attendees discussed the benefits of giving an organisation responsibility for monitoring and reporting the use of confidentiality clauses. Respondents to the consultation also recommended the introduction of a monitoring mechanism to prevent cases where employers repeatedly cover up allegations of sexual harassment and discrimination.

The WESC report recommended to Government that it consider requiring employers to collect data and report annually on:

- *the number and type of discrimination and harassment complaints, and the outcomes; and*
- *the number of settlement agreements containing confidentiality, nonderogatory and similar clauses they have agreed, and the type of dispute they relate to.*

It was argued that a reporting duty on the use of confidentiality clauses in cases of sexual harassment and discrimination would provide evidence on patterns of unacceptable behaviour and highlight which sectors or organisations should seek changes in their workplace culture.

Government Response

We have considered the WESC recommendations and the views from respondents on this area. We are sympathetic to the desire to have better information about the use of confidentiality clauses. However, we have significant questions about how a reporting duty would work in practice. Simply knowing the number of confidentiality clauses used by a company is not in itself very meaningful. Requiring all confidentiality clauses to be submitted for scrutiny would be burdensome, and even then, may not be meaningful without detail about the reasons why an employee leaves an organization or where a confidentiality clause is activated. There is also a risk that a requirement to report would discourage their use in situations in which they would be welcome and beneficial to victims, who would like to reach a private settlement and move on with their lives.

We believe efforts should focus on preventing sexual harassment and discrimination issues in the first instance. Everyone should feel safe at work so they can succeed and thrive; so, we are looking at whether the laws on sexual harassment in the workplace are operating effectively. We launched a consultation on sexual harassment in the workplace in July 2019, led by the Government Equalities Office. This consultation welcomes suggestions of alternative interventions to prevent and better monitor cases of sexual harassment and discrimination. Its outcomes will help to build on the Corporate Governance Code, while seeking to ensure we do not jeopardise the use of confidentiality clauses in circumstances where victims want to move on in their lives from these unfortunate circumstances.

Boards already have a responsibility, set out in the UK Corporate Governance Code and the Wates Corporate Governance Principles for Large Private Companies to establish a company’s purpose, values and strategy in line with the Code. Boards must ensure that workforce policies and practices are consistent with the company’s values and support its long-term sustainable success. In addition, directors have a legal duty under section 172 of the Companies Act 2006 to promote the success of the company for the benefit of shareholders, and in so doing to have regard, amongst other matters to “the interests of the company’s employees” and “the desirability of the company maintaining a reputation for high standards of business conduct”.

Next Steps

This report provides a response to the confidentiality clause consultation and sets out the actions we will take. We are grateful for the WESC report and will formally respond to the Committee's recommendations in full.

We will legislate to implement the relevant commitments we are making in this response when Parliamentary time allows.

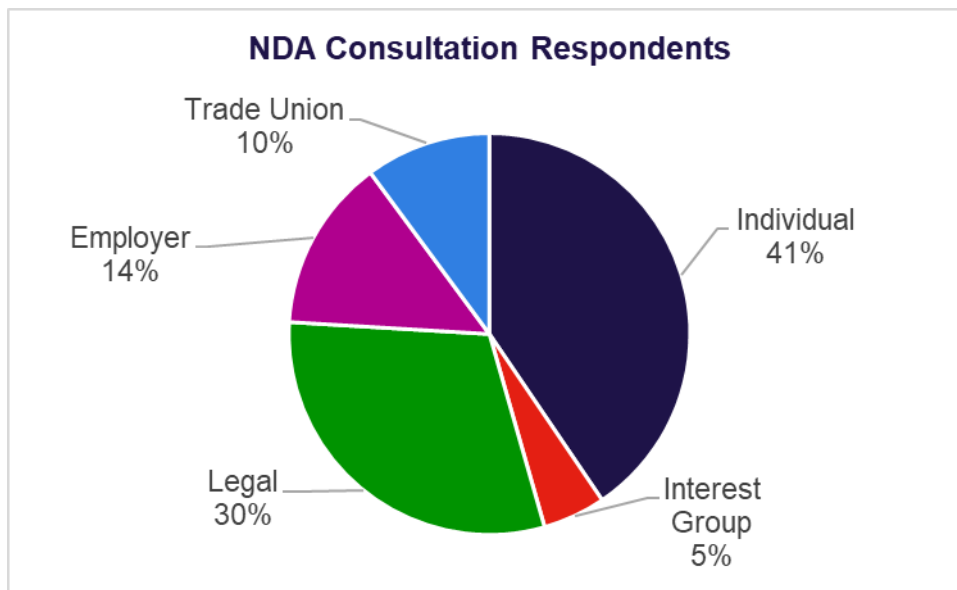
A consultation on sexual harassment in the workplace has been launched by Government Equalities Office (GEO), which includes a call for opinions on interventions, other than enforcement, to stop the misuse of non-disclosure agreements in these cases. We will consider these responses when looking at any future changes.

Annex A – Consultation Responses

Overall, the consultation received 582 responses, including 503 responses as part of a coordinated campaign (see Annex for more information on the campaign responses).

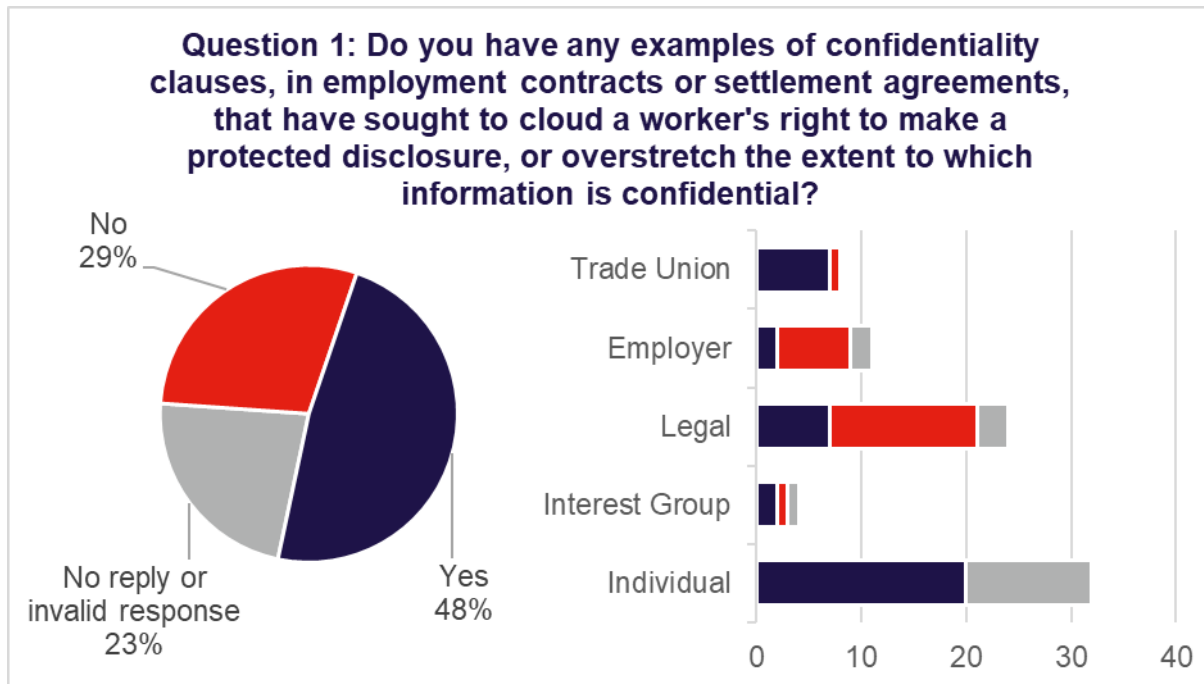
There were 79 formal responses to the consultation.

The largest number of formal responses to the consultation (41%) came from individuals, with the second largest group (30%) being legal organisations and professionals.



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.

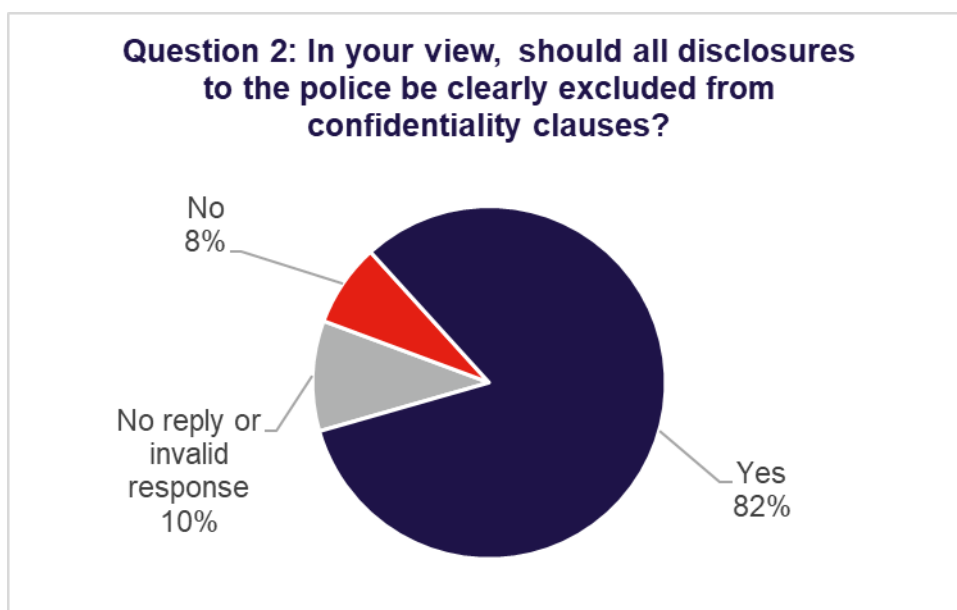
Almost half (48%) of the respondents to the consultation had seen an example of a confidentiality clause that sought to cloud a worker’s right to make a protected disclosure or overstretch the extent to which information is confidential.



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

82% of respondents agreed that disclosures to the police should be clearly excluded from confidentiality clauses. The majority of these respondents believed this would increase individual protections and ensure individuals know they can report crimes to the police.

8% of respondents didn't think disclosures to the police should be excluded from confidentiality clauses. Reasons included that disclosures should instead be reported to regulatory bodies, reporting to the police should already be excluded in confidentiality clauses, and that confidentiality clauses should be respected regardless of the content.



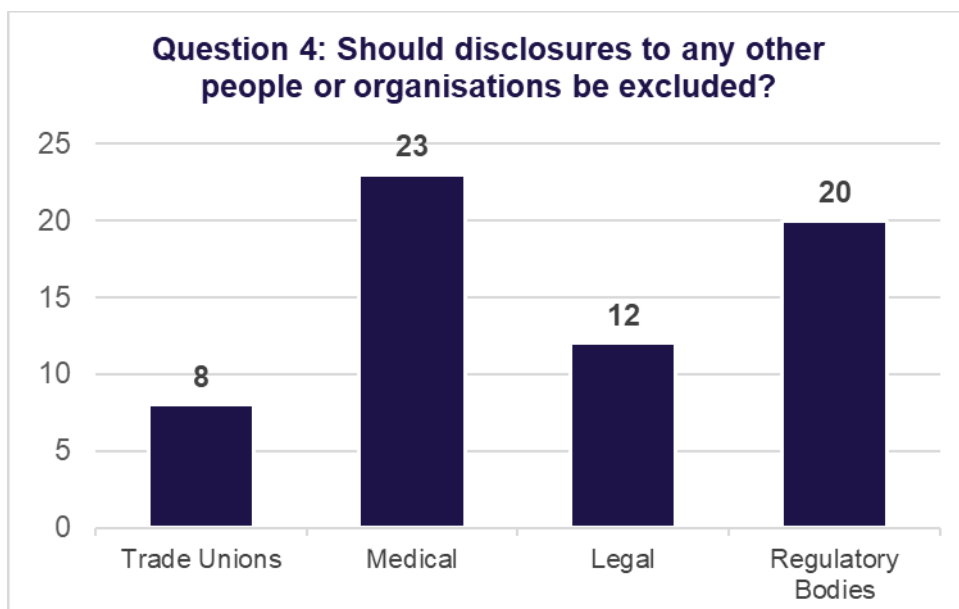
Question 3: What would be the positive and negative consequences of this, if any?

100% of trade unions and employers thought this proposal would result in positive consequences. Approximately 77% of individual and legal professionals and 50% of interest groups thought it would result in positive consequences.

Interest groups believed this policy may increase opportunities to identify systematic problems of harassment and discrimination and would encourage more women to report. One organisation thought this proposal didn't go far enough.

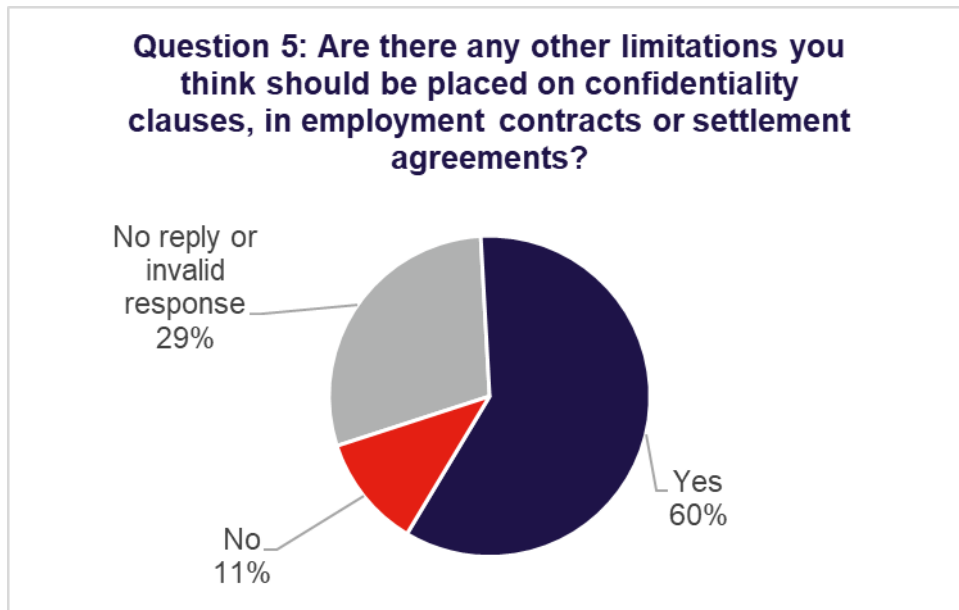
Question 4: Should disclosures to any other people or organisations be excluded?

There were 59 respondents to this question in the formal consultation responses who recommended other people or organisations. The most common recommendation was for disclosures to medical professionals.



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

60% of respondents thought additional limitations should be placed on confidentiality clauses. There was no clear theme of additional limitations, but examples included ensuring individuals could get future employment, removing the use of confidentiality clauses for cases of sexual harassment, and the idea of introducing 'cooling off' periods.

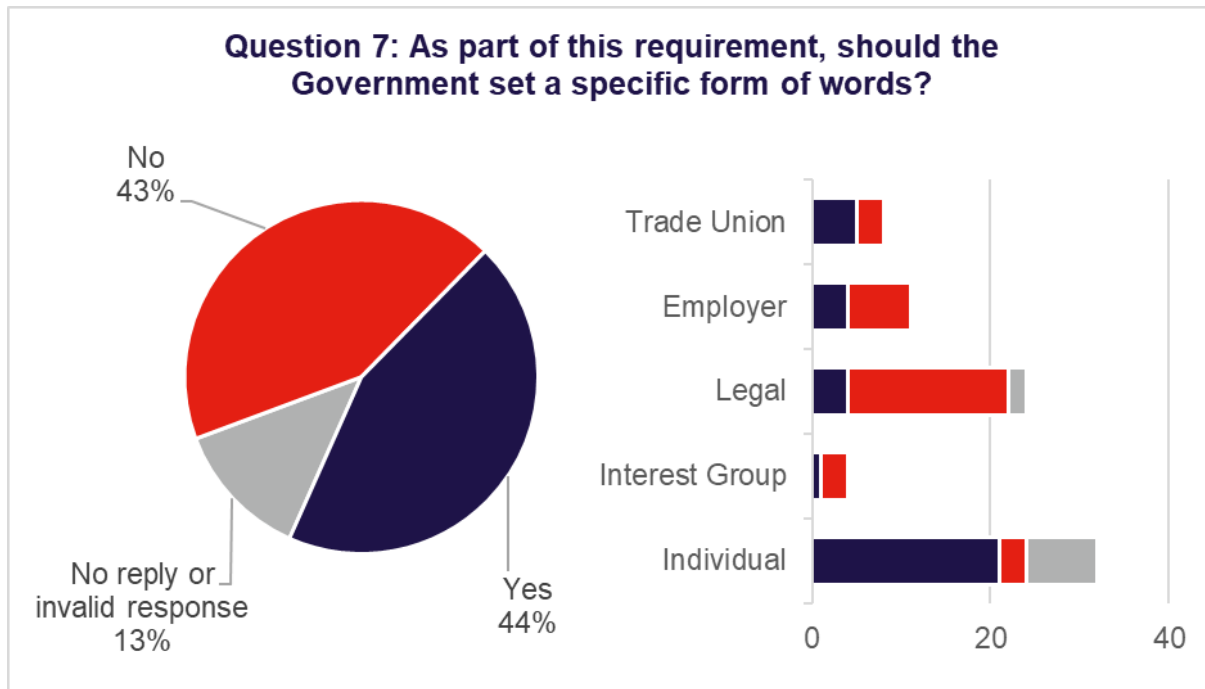


Question 6: Do you agree that all confidentiality clauses in settlement agreements, and all written statements of employment particulars, should be required to clearly highlight the disclosures that confidentiality clauses do not prohibit?

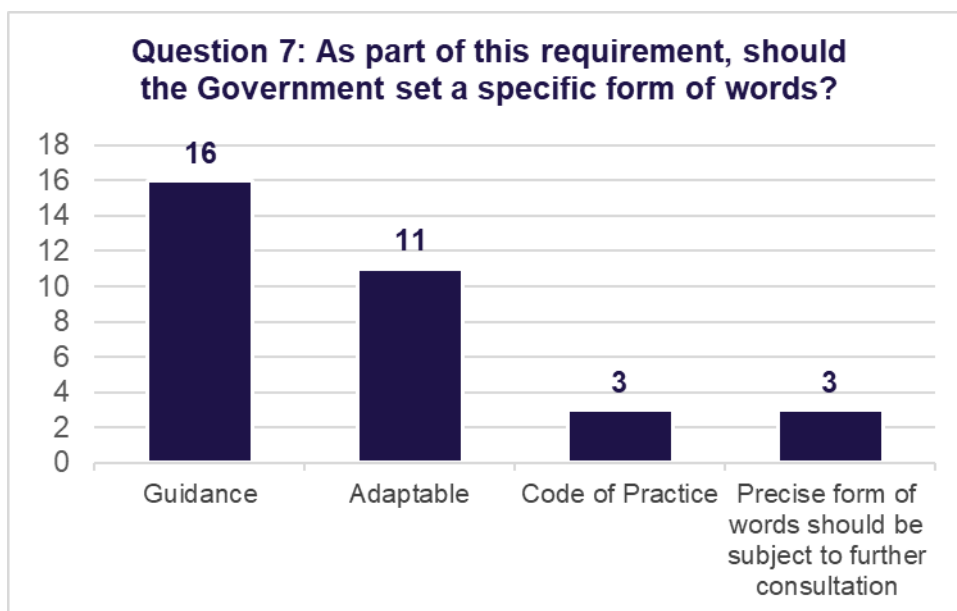
83% of respondents to the consultation thought that confidentiality clauses should clearly highlight the disclosures that are not prohibited. Of the 7 respondents who disagreed with this proposal, 6 were legal bodies. Their reasons for not supporting the proposal included concern that this would make confidentiality clauses long and complicated, and that confidentiality clauses should be written to reflect the organisation and situation, rather than being prescriptive.

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

Consultation respondents were split over whether we should legislate for a specific form of words, with 44% of respondents supporting the proposal, and 43% rejecting the proposal. Overall, legal respondents, employers and interest groups did not support the proposal. However, trade unions and individuals were more in favour with the proposal.

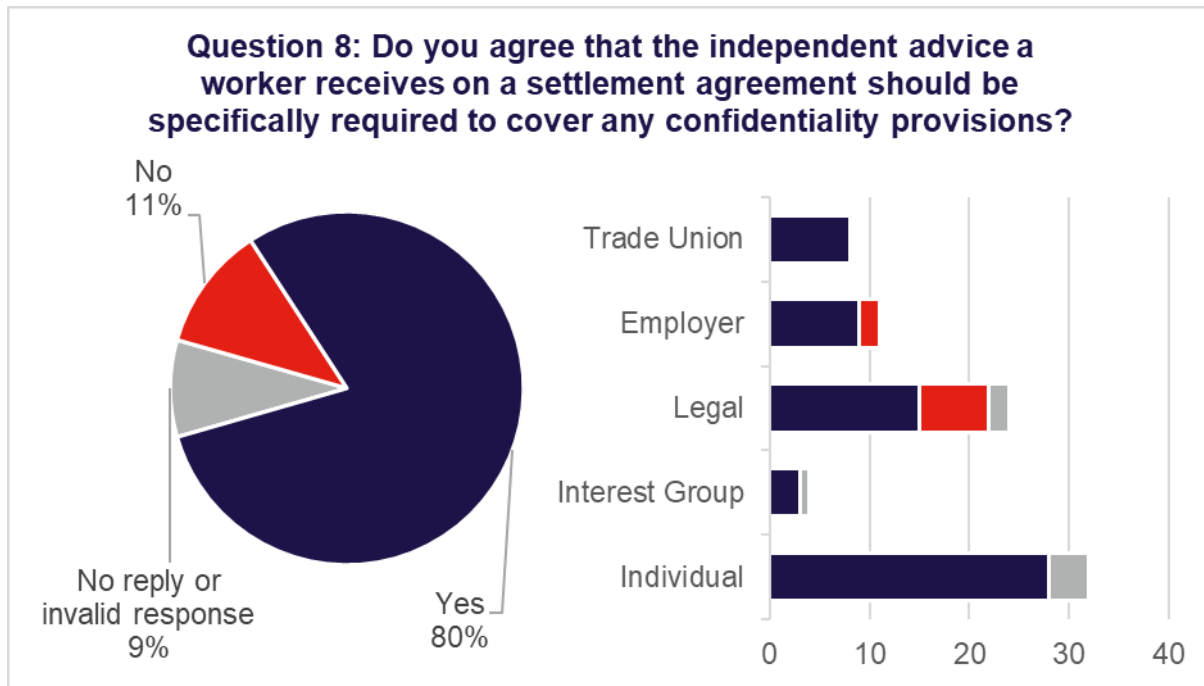


Respondents also commented on what should be provided as an alternative to a specific form of words, whether they supported the proposal or not. Guidance was the most common answer, and the second most common response called for either the wording or guidance to be flexible and adaptable.



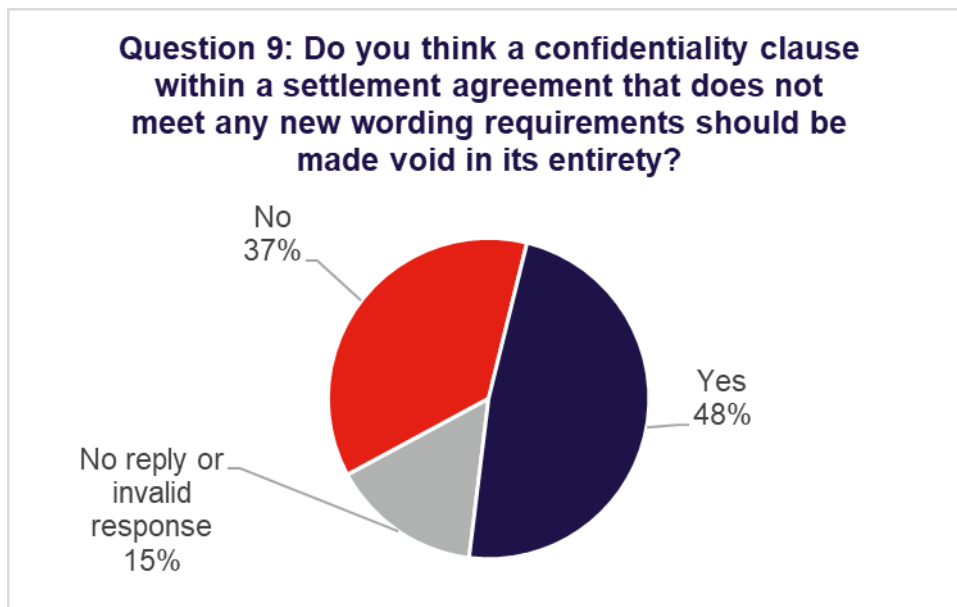
Question 8: Do you agree that the independent advice a worker receives on a settlement agreement should be specifically required to cover any confidentiality provisions?

80% of respondents agreed independent legal advice should cover any confidentiality provisions. Some themes emerged from respondents who elaborated on their response, including recommendations for additional guidance, concern about the cost of legal fees and that this is already an obligation under Section 203 of the Employment Rights Act 1996. Twice as many legal respondents replying to this point agreed (63%) as disagreed (29%).



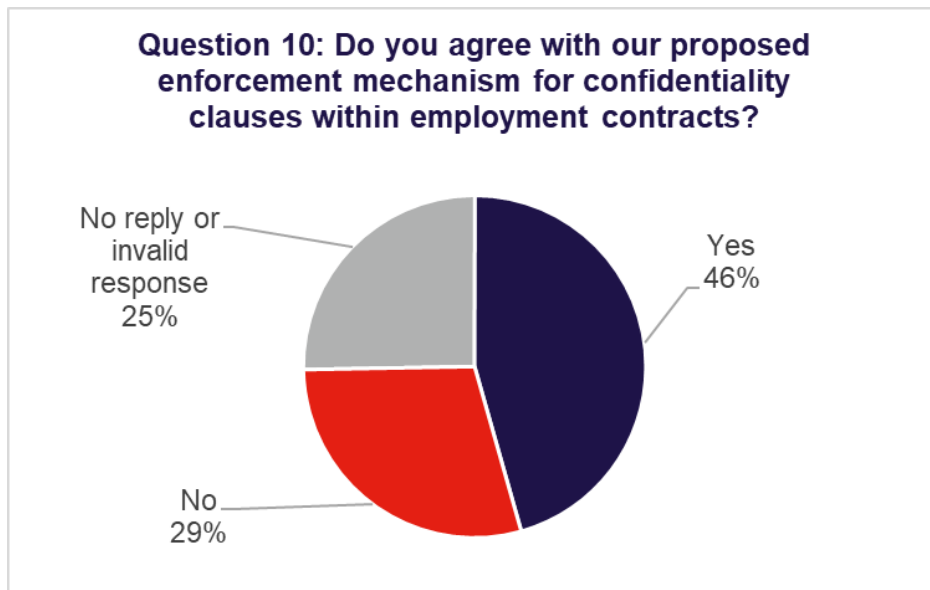
Question 9: Do you think a confidentiality clause within a settlement agreement that does not meet any new wording requirements should be made void in its entirety? What would be the positive and negative consequences of this?

48% of respondents thought that a confidentiality clause within a settlement agreement should be made void if incorrectly drafted.



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?

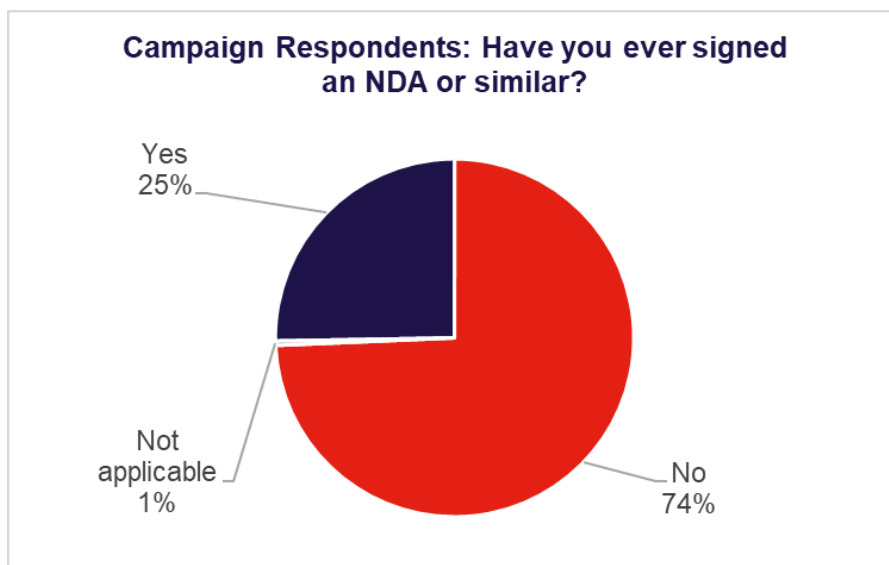
46% of respondents supported the enforcement mechanism for incorrectly drafted confidentiality clauses in written statements. 29% of respondents did not support the proposal and 25% of respondents either did not answer or gave an invalid response.



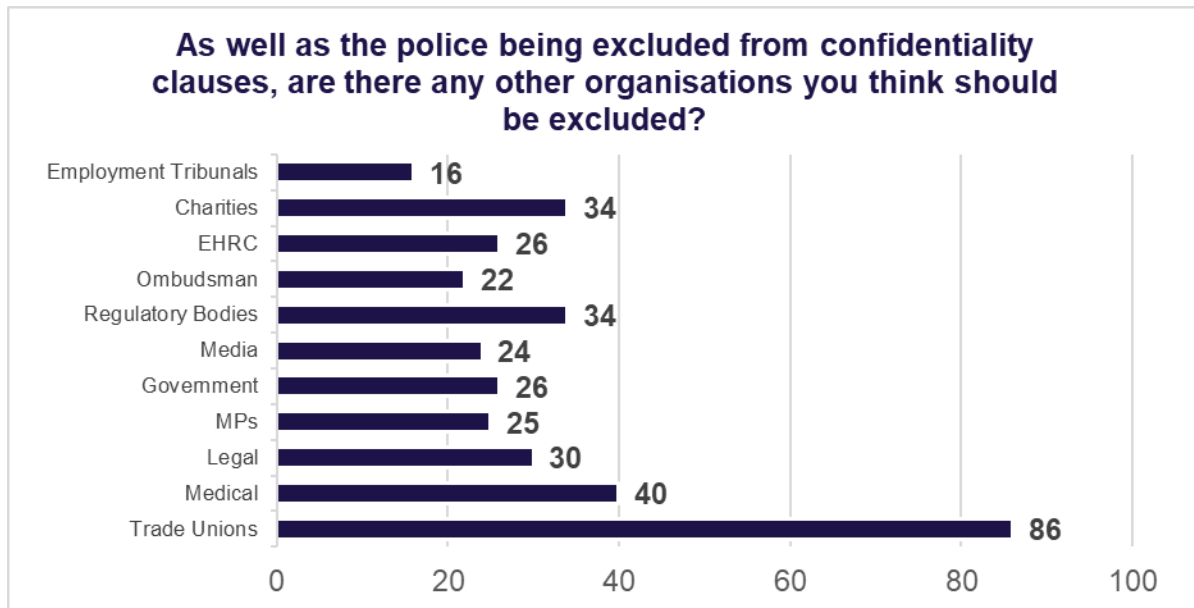
Email Campaign Responses

503 responses were received through a coordinated email campaign. The email campaign did not provide respondents with the original consultation document and amended the questions, so we have not been able to include them in our analyses of responses to the consultation questions asked. However, the analysis below highlights the key themes from these responses, relevant to the consultation.

25% of campaign respondents had previous experience of NDAs.



Respondents to the email campaign favoured allowing employees to make disclosures to a wider group of bodies. Trade Unions and medical professionals were the most favoured, and the Equalities & Human Rights Commission was specifically mentioned by a number of those replying.



This publication is available from: www.gov.uk/government/consultations/confidentiality-clauses-measures-to-prevent-misuse-in-situations-of-workplace-harassment-or-discrimination

If you need a version of this document in a more accessible format, please email enquiries@beis.gov.uk. Please tell us what format you need. It will help us if you say what assistive technology you use.