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Let's talk about confidentiality:

NDA use in sexual harassment settlements since the Respect@ Work Report

Social Justice Practitioners-in-Residence

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Acknowledgement of Country

The University of Sydney's Camperdown campus is on the lands of the Gadigal people with campuses, teaching and research facilities on the lands of the Gamaraygal, Dharug, Wangal, Darkinyung, Burramadagal, Dharawal, Gandangara, Gamilaraay, Barkindji, Bundjalung, Wiradjuri, Ngunawal, Gureng Gureng, and Gagadju peoples.

We recognise and pay respect to the Elders and communities of these lands, past, present and emerging, who for thousands of years have shared and exchanged knowledge across innumerable generations, for the benefit of all.

We recognise and acknowledge First Nations people and their survival of policies and practices that today we call modern slavery, including forced labour, removals, segregation, servitude, sexual servitude, child labour and forced marriage. These wrongs remain unresolved and remain, shamefully, part of the Unfinished Business of the Land.

Our vision for reconciliation is for a society in which Aboriginal and Torres Strait Islander people and other Australians live and work together with mutual respect and understanding, free from discrimination and harassment, at their workplace and in their lives generally.

This land always was and always will be Aboriginal land.

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Content Warning

This report focuses on sexual harassment in the workplace, which can include sexual assault. Some readers may find this upsetting and triggering.

If you feel upset or triggered by the content, reach out to 1800 RESPECT on 1800 737 732 or your treating medical practitioner.

If you have experienced sexual harassment and need legal advice, or you have an NDA and want further advice about it, you can ask your local community legal centre for assistance clcs.org.au/findlegalhelp

Disclaimer

This report reflects the views of the authors expressed in their personal capacities. This project was conducted with ethics approval and in accordance with guidelines concerning research involving human subjects.

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Foreword

When the #MeToo movement exploded into the public consciousness following the revelations of Harvey Weinstein's serial abuse, the use of non-disclosure agreements (NDAs) to cover-up wrongdoing highlighted how the law and the legal profession has protected and enabled men like Weinstein. The courage of survivors and those bound by NDAs, like Zelda Perkins, in coming forward and speaking out was astonishing. Zelda chose to spoke out in the face of serious legal threats and at the risk of immense financial cost – and even bankruptcy. Weinstein could have sought an injunction to silence her or sued her for damages for speaking to the media, requiring her to engage in legal proceedings that can cost hundreds of thousands and even millions of pounds, and where the courts are still likely to uphold his contractual right to her silence over her right to free speech. Luckily for Zelda, he didn't sue. But this is what makes scrutiny of the NDAs so difficult: they are by their nature confidential and we only learn about them when someone takes the risk to violate their terms – and at immense potential personal and financial cost.

Following the revelations about Weinstein and other powerful figures who contracted victims into silence, NDA use has rightfully become a matter of public interest. How can those that misuse their power be held accountable if they are protected by a legally enforced culture of silence that enables impunity? How can there be a cultural shift if we cannot know or learn about how the most powerful operate?

NDAs can be a mutually agreed and legitimate solution, including in incidents of harassment. But the systematic overuse of NDAs, together with unchecked power imbalances in workplaces, has also enabled employers to cover up patterns of misconduct and protect repeat abusers. This abuse of NDAs is just one of the ways in which the law disadvantages and discriminates against women, particularly women of colour and indigenous women. As Dr Keina Yoshida and I write in our book, *How Many More Women? Exposing how the law silences women* (2022, Allen and Unwin):

> *Placing survivors in silos of silence under NDAs creates a culture of impunity that enables further abuse. How can we as a society tackle gender-based violence and workplace harassment if those affected by it can't talk about it?*

That rate of sexual harassment in Australian workplaces is high: one in three people have been sexually harassed in the last five years. This comes as no surprise to me nor would it surprise any women with experience in Australian workplaces: we experience harassment at far higher rates than men. But, until now, we haven't known or understood the extent of the use of NDAs, the conditions in which they are implemented, the variety of forms they can take – or their impact on enabling and covering up sexual harassment in the workplace. Could the figures be even higher than we know?

The Respect@Work Report – thanks to the important work of then Sex Discrimination Commissioner Kate Jenkins – highlighted the problems we set out in our book: how NDAs can enable and cover up abuse and harassment. In response to her findings, in 2022 we also saw the publication of *Guidelines on the Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints* ('the Respect@Work NDA Guidelines') to mitigate against this problem. But how has the legal profession responded?

This is precisely why Bargon and Featherstone's report, "Let's Talk About Confidentiality", offers such an important contribution to our understanding the use of NDAs in the context of sexual harassment in Australian workplaces. By drawing on data gathered from interviews and surveys with legal professionals, this report offers invaluable insights into how lawyers are approaching the use of NDAs.

The picture is worrying: despite the Respect@Work NDA Guidelines – NDAs are continuing to be used, misused – and over-used. Bargon and Featherstone's research and data shows that 75% of the profession have never reached a sexual harassment settlement without strict NDA terms and that 50% of respondent solicitors have never advised their clients that sexual harassment matters can be resolved without strict NDA/confidentiality terms.

In this way, this reports sheds important light on how the legal profession has responded – or failed to respond – to the broader public and policy discussions on workplace sexual harassment and the extent to which NDAs obscure the scale of the problem – and highlights how much further we need to go. But most importantly, Bargon and Featherstone's report offers a way forward, with recommendations for improvement in practice that will ensure a victim-centred approach and better protect women in the workplace.

What is clear from this report, and as we argue in our book, we need an approach to NDAs which better protects freedom of speech and the public interest in employees being able to speak out about sexual harassment and gender-based violence – and ensures that women are not being unfairly silenced.

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Executive Summary

While we know that sexual harassment at work disproportionately harms women and women with multiple intersections of lived experience,[1] there is so much we don't know about this area of law. This report investigates the use of non-disclosure agreements **(NDAs)**[2] in resolving out-of-court workplace sexual harassment complaints by conducting empirical research on the practices of Australian lawyers in these matters. It examines how lawyers responded to the Guidelines on the Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints (the **NDA Guidelines**) around NDA use, released following the Respect@ Work Report[3] and measures their effectiveness.

Our work found that broad and exhaustive NDAs (being blanket confidentiality and non-disparagement terms) remain the default confidentiality term used by lawyers in workplace sexual harassment settlements in Australia. This practice persists despite a suite of reforms to Australia's sexual harassment landscape since the global #MeToo movement. NDAs can be beneficial for both parties, however the Respect@Work Report raised concerns about their widespread use and the impact they have on transparency. The Respect@Work Council issued the NDA Guidelines in workplace sexual harassment settlements in December 2022, urging NDAs to be used on a case-by-case basis.

NDAs require parties to keep the details of the settlements — which often includes the alleged conduct and settlement amounts — confidential. In this report we specifically examine the practice of using strict NDAs, being blanket confidentiality obligations – meaning that the victim survivor cannot speak to anyone about the incident(s).

By conducting a survey of 145 sexual harassment legal practitioners across Australia, we found that approximately 75% of the profession, being 69.3% of applicant and 79.24% of respondent lawyers, have never resolved a sexual harassment complaint without a strict NDA. We learned that many consider these clauses to be 'standard'. The widespread use of strict NDAs means we continue to know very little about what

1 Australian Human Rights Commission ('AHRC'), Time for Respect: Fifth National Survey on Sexual Harassment in Australian Workplaces (30 November 2022) 130 <https://humanrights.gov.au/time-for-respect-2022> ('Time for Respect').

2 This Report adopts the global term "NDA" for consistency and keeps the definition per AHRC, Respect@Work: Sexual Harassment National Inquiry Report (2020) (5 March 2020) <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020> ('Respect@Work').

3 Respect@Work (n 2).

is happening with sexual harassment in our workplaces and the impact of recent law reform in curbing perpetrator behaviour.

Applicant lawyers told us how negotiations are stifled when respondent lawyers assume that strict NDAs would form part of settlement terms. One interviewee described negotiations about 'default terms' as a "wall rather than an invitation to discuss further" and spoke about their role having to both negotiate terms and educate the respondent of alternates.

We also learned there was no uniformity in the legal profession in the use of NDAs. While many thought that NDAs without examples are standard, some lawyers told us that they often drafted carve-outs for victim survivors to speak to supports such as doctors or family. Others spoke of seeking confidentiality around settlement terms only, allowing victim survivors to otherwise speak about their experience.

NDA use is so entrenched that many lawyers do not advise of the option of not having one: close to 30% of applicant lawyers and 50% of respondent lawyers have never provided this advice to clients. This may constitute a breach of professional legal obligations which require clear and timely advice so that clients can make informed choices in their instructions. What follows is that complex and nuanced advice on the range of possible NDA options is not being provided i.e. for time capped NDAs, or exceptions for complainants to speaks to supports, or other alternatives.

The misuse of NDAs is internationally recognised as a problem – that is using NDAs as a tool to conceal sexual harassment and protect perpetrators. While many jurisdictions are looking towards legislative reform to modulate the use of NDAs and move away from these clauses being 'standard', another effective response may instead be to consider how we regulate legal practice. Until recently in Australia, the conduct of lawyers in negotiations was not commonly framed as a disciplinary or professional conduct issue. This changed in Victoria in September 2023, when the Victorian Legal Services Commission + Board published advice on how lawyers should use NDAS when resolving workplace sexual harassment complaints.

Lawyers are reminded to maintain the professional duty to act with independence and integrity when also acting on their duty to act in the best interest of their client. This requires careful consideration of clients' short and long term interests. A confidentiality clause may be useful in the short term to protect an employer from reputational damage but the same clause may operate against a client's long term interests if the same perpetrator sexually harasses another person and it becomes public knowledge that the business had been using NDAs to hide this conduct.

We are especially interested in how lawyers will advise clients and use NDAs given the new positive duty on employers to eliminate sexual harassment from the workplace.

While the use of strict NDAs remains standard practice, with 69.3% of applicant lawyers confirming this practice, it also means that close to a third of applicant lawyers resolve matters with less restrictive NDAs. This data is useful when considering the perception that without blanket confidentiality there is no settlement. We had several lawyers, both applicant and respondent tell us that they have settled multiple matters in the last twelve months without exhaustive NDAs with multiple lawyers estimating this at four to six matters. We learned that lawyers who advocate on this issue and do so regularly, can achieve successful, tailored outcomes for their clients.

However, there are limits to the efficacy of persuasive argument when latent legal practices are entrenched in the broader profession. Ultimately, change and education within the profession is needed to ensure NDAs are advised on and are not misused, which will, in turn contribute to greater transparency around sexual harassment.

To facilitate change on strict NDA use, [we have prepared withthe assistance of Clayton Utz draft model confidentiality clauses which may assist by the profession when tailoring clauses to meet the needs of all parties in line with a victim centric approach.

"Let's Talk About Confidentiality": structure of the report

This report is set out in eight chapters:

- **Chapter 1** explains Australia's current sexual harassment landscape, including background to the NDA Guidelines and uses previously unpublished data from the Australian Human Rights Commission **(AHRC)** on the resolution of sexual harassment complaints subject to NDAs before and after the creation of the NDA Guidelines.
- **Chapter 2** looks at the practice of using NDAs including both advantages and disadvantages. Pertinently, this Chapter examines how NDAs are treated as ubiquitous, and positions sexual harassment as a collective problem, existing on a spectrum of gender violence and contextualises how NDAs operate in that framework. This Chapter examines the bargaining power between parties and publishes testimony from victim survivors subject to NDAs as provided by the Victorian Trades Hall Council.
- **Chapter 3** sets out our research including methodology and showcases how NDAs are used in practice in Australia. Our findings indicate how lawyers utilise

the NDA Guidelines in settlement practices, advise on NDAs and advocate for higher settlement figures.

- **Chapter 4** interrogates the enforceability of NDAs and questions how confidentiality can be given by victim survivors in the context of workers' compensation complaints or whistleblowing which cannot be contracted out of by way of a deed of release.
- **Chapter 5** explores the intersection between defamation and sexual harassment with the growing trend of concerns' notices being issued to victim survivors after internal workplace disclosures of sexual harassment. This Chapter makes the point that there are many complaints which do not proceed because victim survivors have agreed to silence by way of an offer to make amends for alleged defamatory imputations.
- **Chapter 6** examines how other countries have addressed the misuse of NDAs in sexual harassment matters by reframing the issue as a legal professional conduct issue, drawing on guidance from the Victorian Legal Service Commission + Board and United Kingdom counterpart, the Solicitor Regulation Authority. Sexual harassment prevention is now also being considered a significant environmental, social and corporate governance obligation.
- **Chapter 7** looks at how other jurisdictions across the world have responded to the misuse of NDAs in sexual harassment settlements by implementing legislative reform, largely to limit the use of NDAs unless applicant initiated.
- **Chapter 8** provides our concluding comments and recommendations that greater education and advocacy needs to be implemented in the legal profession on this issue.
- **Appendix A** includes template confidentiality clauses which complement the NDA Guidelines and are intended for distribution and use in the profession.

1. Current Australian sexual harassment landscape

Sexual harassment is an unwelcome sexual advance or unwelcome request for sexual favours (or any other unwelcome conduct of a sexual nature) in circumstances in which a reasonable person, having regard to all of the circumstances, would have anticipated the possibility that the person would be offended, humiliated and/or intimidated.[4]

Sexual harassment is endemic in Australian workplaces: the 2022 AHRC's Time for Respect Report found one in three people were sexually harassed at work in the last five years.[5] Yet only 18% of sexual harassment incidents are reported.[6]

Sexual harassment comes in many forms. It can be sexually suggestive jokes, intrusive questions about a person's private life, inappropriate staring or leering, unwelcome touching (hugging, kissing, cornering) and general inappropriate physical contact.[7]

Women are sexually harassed at work more than men.[8] The Australian Bureau of Statistics **(ABS)** found that 320,200 women were sexually harassed at work in the financial year 2021-2022.[9] The prevalence of sexual harassment is compounded for people with multiple intersections of lived experience, including their cultural backgrounds, disability status, sexual orientation and gender.[10] Almost 9 out of 10 Aboriginal and Torres Strait Islander people will experience sexual harassment during their lifetime.[11] Similarly, 92% of women with a disability will experience sexual harassment in their lifetime.[12]

Sexual harassment has significant mental health impacts.[13] The financial cost is also significant, with Deloitte estimating conservatively that it costs the economy around $3.8 billion dollars.[14]

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4 Sex Discrimination Act 1984 (Cth) s 28A ('SDA'). Note: there are sexual harassment provisions in the same or very similar terms in each state and territory.

5 Time for Respect (n 1) 130.

6 Ibid.

7 Ibid.

8 Ibid.

9 Australian Bureau of Statistics ('ABS'), Sexual harassment: 2021-22 financial year (Web Page, 23 August 2023) < https://www.abs.gov.au/statistics/people/crime-and-justice/sexual-harassment/2021-22> ('ABS, 2021-22').

10 Natassia Chrysanthos, 'New sex discrimination commissioner urges wider lens to tackle inequality', Sydney Morning Herald (online, 12 September 2023) [2] <https://www.smh.com.au/politics/federal/new-sex-discrimination-commissioner-urges-wider-lens-to-tackle-inequality-20230911-p5e3ma.html>.

11 Time for Respect (n 1).

12 Ibid.

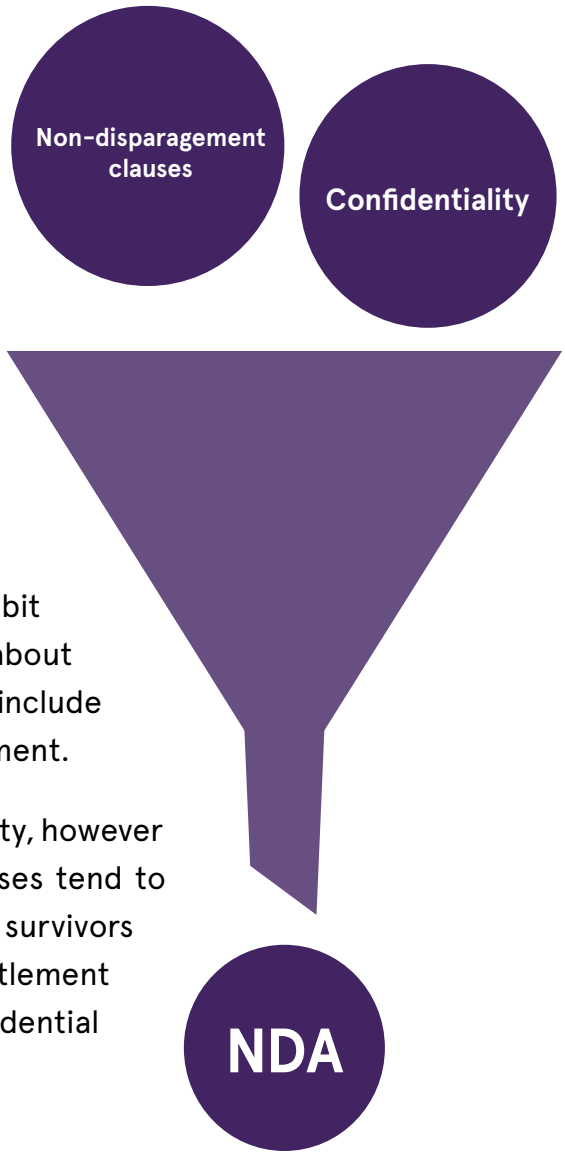
13 Ibid.

14 Deloitte, The economic costs of sexual harassment in the workplace: Final report (March 2019) <https://www.deloitte.com/content/dam/assets-zone1/au/en/docs/services/economics/deloitte-au-economic-costs-sexual-harassment-workplace-240320.pdf>.

1.1. What are confidentiality agreements (Non-Disclosure Agreements)?

When parties settle sexual harassment matters, the terms of these agreements are invariably subject to a 'deed of release' or 'settlement agreement' which releases the respondent(s) from the liability of the conduct alleged by the complainant in consideration of a benefit such as payment of compensation and possible non-financial outcomes such as an apology or an agreement for a perpetrator to undertake anti-discrimination training.

Both applicants and respondents often seek 'standard terms' including 'confidentiality' and 'mutual non-disparagement' in agreements, effectively providing a woven fabric of clauses to form an Australian equivalent of the more internationally used term 'NDA'. This report adopts the widely used term 'NDA', which is in use in the USA, Ireland, UK and Canada. The term NDA is also used in the Respect@Work Report.



Non-disparagement protections prohibit victim survivors from saying negative things about the respondent in the future, which can include speaking about allegations of sexual harassment.

There are many ways to regulate confidentiality, however research indicates that confidentiality clauses tend to be broadly expressed, which means victim survivors are required to keep the details of the settlement and allegations of sexual harassment confidential and without a time limitation.[15]

15 Normann D. Bishara, Kenneth J. Martin, & Randall S. Thomas, 'An empirical analysis of noncompetition clauses and other restrictive postemployment covenants' (2015) 68(1) Vanderbilt Law Review 1, 22.

Respect@Work Report

The extensive Respect@Work Report delivered 55 recommendations to the Federal Government to address sexual harassment in Australia's workplaces. While several recommendations relate to the use of the NDAs, this report focuses on recommendation 38, looking at both its implementation and impact.

Recommendation 38: ***The Commission, in conjunction with the Workplace Sexual Harassment Council, develop a practice note or guideline that identifies best practice principles for the use of NDAs in workplace sexual harassment matters to inform the development of regulation on NDAs.***

The Respect@Work Report found that NDAs can increase the bargaining power of individuals and help them achieve larger settlements, while also offering privacy and providing definitive resolutions.[16] The report also considered systemic issues of transparency, secrecy and the effect on victim survivors when they were stopped from telling their stories. The AHRC heard submissions where harassers remained in the workplace when employers used NDAs,[17] citing Professor Karen O'Connell:

> *While these layers of confidentiality and privacy may suit the harassed as well as the alleged harasser, the flip side is that it makes sexual harassment, an enormous social problem, barely known to the public. Only the tiniest number of cases make it to court and into public scrutiny.*[18]

As a result, while the AHRC actively sought submissions from persons subject to an NDA, they received a 'small number' of responses. The AHRC took the additional step of asking businesses to issue a limited waiver of confidentiality obligations to allow more people to come forward, but only 39 organisations agreed to this waiver.[19] Ultimately, the AHRC, concerned with the power imbalance between employee and employer, found that guidance was urgently needed on NDA use.

As outlined by the AHRC at chapter 5.8 of the Respect@Work Report, NDA use is complex; while it can be highly valuable to both applicants and respondents, its application can also be problematic.

16 Respect@Work (n 2) 557
17 Ibid. 217.
18 Ibid. 414.
19 Ibid. 558.

The Respect@Work NDA guidelines

In the Roadmap for Respect: Preventing and Addressing Sexual harassment in Australian Workplaces, the Government responded to the Respect@Work Report and, among other actions, asked the Respect@Work Council to implement Recommendation 38.[20] On 12 December 2022, the Respect@Work Council published the NDA Guidelines.[21]

The NDA Guidelines are intended to be 'best practice' for practitioners when resolving complaints, with Kate Jenkins writing in her foreword:

> *Adopting the approach put forward in these Guidelines will represent a significant change to corporate practice – by doing away with the long-standing assumption that confidentiality should be the starting point in every case, and moving to a more individualised approach.*[22]

The NDA Guidelines have six central considerations for practitioners and those involved in resolving sexual harassment disputes:

- **Case-by case basis:**
    - Confidentiality clauses should not be a standard term and should be considered against the entirety of the circumstances.
- **Limited scope and duration:**
    - Confidentiality should be limited by including exceptions for disclosures to support people and obligations do not need to be mutual (this is referred to later in this report as asymmetrical).
- **No bar to systemic response:**
    - Organisations should build healthy workplace cultures and should not seek to protect the alleged harasser or the reputation of the organisation if this would enable unsafe or harmful workplace conduct to continue.
- **Accessible and fair:**
    - All clauses in a settlement agreement should be clear, fair, in plain English and, where necessary, translated and/or interpreted.

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20 Australian Government, A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces (Government Response to Respect@Work, 8 April 2021) 8 <https://apo.org.au/sites/default/files/resource-files/2021-04/apo-nid311776.pdf>.

21 AHRC, Guidelines on the Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints (19 December 2022) <https://www.respectatwork.gov.au/sites/default/files/2022-12/Guidelines%20on%20the%20Use%20of%20Confidentiality%20Clauses%20in%20the%20Resolution%20of%20Workplace%20Sexual%20Harassment%20Complaints.pdf>.

22 Ibid. 2.

- **Independent advice:**
    - The complainant should have access to independent support or advice to ensure they fully understand the meaning and impact of the settlement agreement, including any confidentiality clause; and

- **Complainant-focused:**
    - Negotiations should ensure so far as possible the wellbeing and safety of the complainant, and be trauma-informed, culturally sensitive and intersectional.

These NDA Guidelines are intended to improve the process of settling sexual harassment disputes and restrict the use of NDAs to a limited set of circumstances. The NDA Guidelines are not binding and there is no legal or professional obligation on practitioners to utilise them.

How is the drafting of NDAs regulated?

Sexual harassment agreements are largely unregulated. Lawyers play a large role in resolving sexual harassment disputes: the AHRC confirmed that close to 70% of sexual harassment matters finalised in 2021-22 had legal representation.[23] This is much higher than the average rate of legal representation across other grounds of discrimination, which is closer to 30%.[24]

Misusing NDAs may breach solicitor and barrister obligations,[25] however in Australia, the conduct of legal practitioners during negotiations is not commonly addressed as a disciplinary or professional conduct issue. The Office of the NSW Legal Services Commissioner may accept complaints about lawyers seeking unethical or unenforceable clauses in settlement agreements of sexual harassment matters, however, unlike the Solicitors Regulation Authority, the regulatory arm of the Law Society of England and Wales, we are not able to identify the number of complaints from local published data.[26]

Except for published assistance from the Victorian Legal Service Board + Commissioner **(VLSB+C)** (see further below) and the NDA Guidelines, there is little current guidance for lawyers as to their professional obligations when negotiating the

23 Email from Christopher Hills to Sharmilla Bargon, 13 September 2023 ('Christopher Hills, 13 September 2023').

24 Ibid.

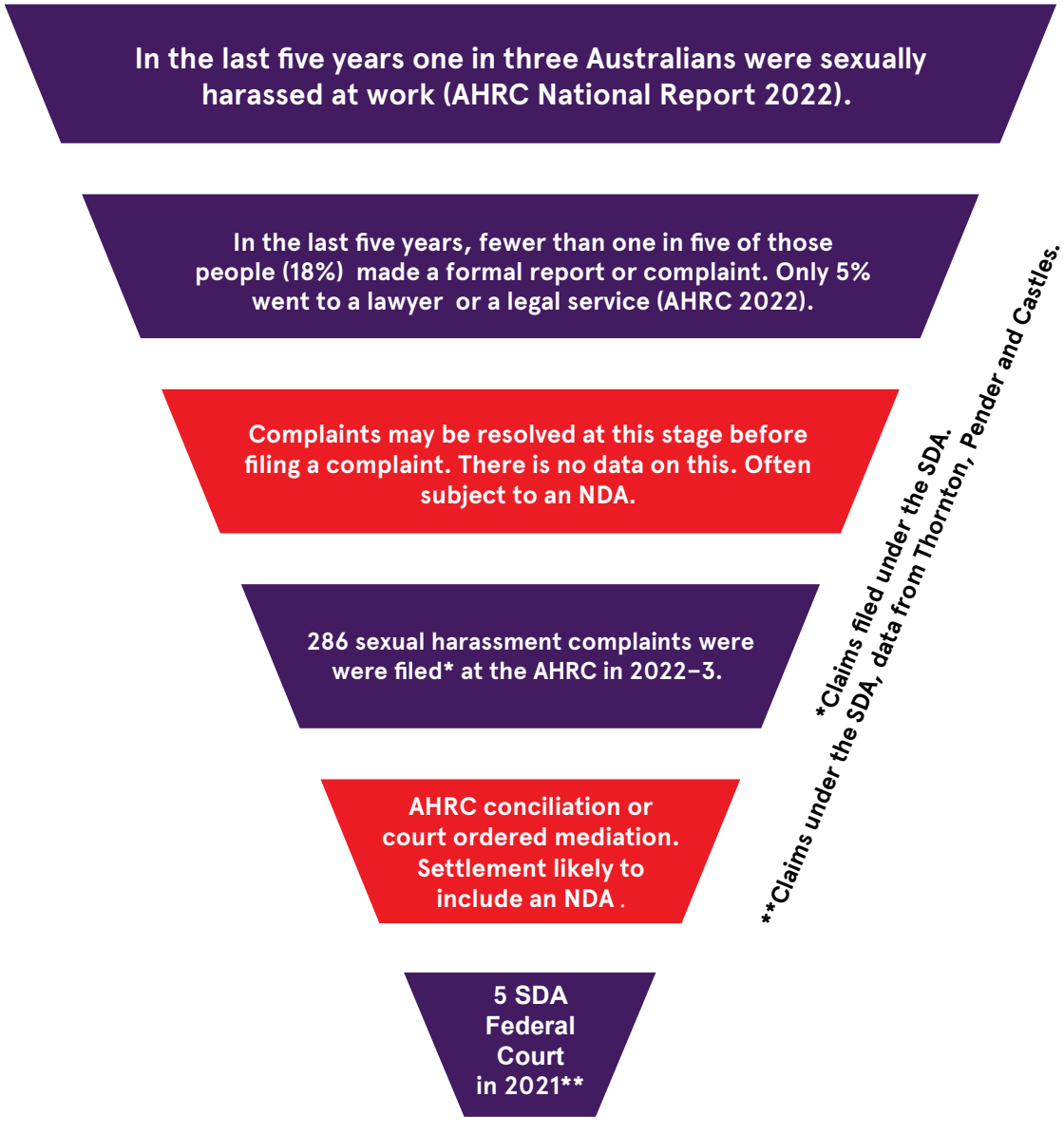
25 Based on the Australian Solicitors Conduct Rules (Solicitors' Conduct Rules), as adopted in South Australia, Queensland, the ACT, NSW and Victoria, and the Legal Profession Uniform Conduct (Barristers) Rules 2015 (Barrister's Conduct Rules), as adopted in NSW and Victoria.

26 Ruth Green, 'Legal Regulators Dragging their Heels on NDA Response' International Bar Association (Web Page) <https://www.ibanet.org/article/0967916C-7FF1-47AB-861F-EBD423099457> ('Green, NDA Response') ; Office of the NSW Legal Services Commissioner, 'Register of Disciplinary Action' (Web Page) <https://portal.olsc.nsw.gov.au/dasearchrl/>; Office of the NSW Legal Services Commissioner, 'Annual Report 2021-2022' (Web Page) 23 and chapter 7 generally <https://www.olsc.nsw.gov.au/Documents/OLSC%20Annual%20Report2021-22.pdf>.

settlement of sexual harassment matters from State and Territory bar associations, law societies or legal practitioner compliance bodies.[27]

The positive duty to eliminate sexual harassment

From 12 December 2023, the AHRC was empowered to enforce employer compliance with the Positive Duty **(the Positive Duty)**[28].Employers now must take reasonable and proportionate measures to eliminate unlawful sex discrimination and sexual harassment.[29] This new obligation marks a shift towards preventing workplace sex discrimination and harassment rather than responding to it after it occurs. [30]



27 For example see Office of the NSW Legal Services Commissioner, 'Fact Sheet 13 – Settlement' (Web Page, July 2015) <https://www.olsc.nsw.gov.au/Documents/OLSC%20Factsheet%2013%20Settlement%20July%202015.pdf>; Legal Practice Board of Western Australia, 'Harassment report' (Online Report, 10 June 2020) <https://www.lpbwa.org.au/General/News/Harassment-Report>.

28 Or person conducting a business of undertaking.

29 SDA (n 4) s 47C.

30 Respect@Work, 'New Positive Duty on Employers to Prevent Workplace Sexual Harassment, Sex Discrimination and

While we do not yet know how the AHRC will enforce the Positive Duty, we are interested how it will interact with sexual harassment settlements which allow perpetrators to continue working in the workplace. Further, it is yet unclear how professional legal obligations will sit with the Positive Duty and the circumstances where it will continue to be appropriate for respondent lawyers to advise their clients to keep employing perpetrators and use strict NDAs, especially where there is good evidence of sexually harassing conduct.

1.2. So, where is all the sexual harassment?

The progression of sexual harassment matters can be conceptualised as an inverted triangle with the incidents of harassment at the top and litigated court outcomes at the bottom. Most harassment complaints at the AHRC settle at conciliation as part of a mandatory conciliation processes.[31] The role of the AHRC is not to decide whether discrimination took place, but to investigate and conciliate a complaint with the parties.[32]

Unless final orders are made by a Court, we have no way of knowing how court cases or workplace or AHRC complaints resolve. This means we know very little about sexual harassment practice in relation to incidents, workplace complaints, AHRC complaints and post-filing, pre-hearing court outcomes. It is a blind spot in our knowledge, and this merits further research and investigation.

Despite the changes occurring at a policy and legislative level, and a significant shift in public perception of sexual harassment from the #MeToo movement, there has not been a significant increase in sexual harassment AHRC complaints being made.[33]

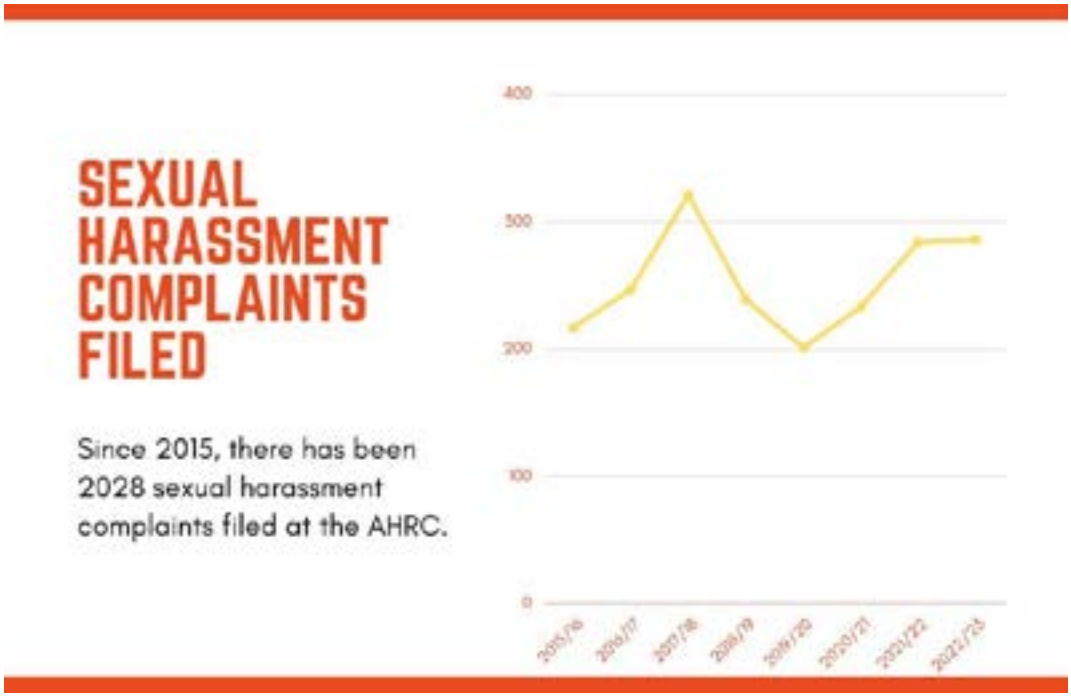
Victimisation (Web Page) <https://www.respectatwork.gov.au/new-positive-duty-employers-prevent-workplace-sexual-harassment-sex-discrimination-and-victimisation>.

31 AHRC, 2020-21 Complaint statistics (2021) 3 <https://humanrights.gov.au/sites/default/files/2022-02/ahrc_ar_2020-2021_complaint_stats.pdf>.

32 Given the timing of this report, we have focused on discrimination remedies, given the limited opportunity for complainants to take advantage of the Fair Work Commission's Sexual Harassment Dispute process or pathway to court.

33 20/21 data shows that only 252 complaints alleging sexual harassment were lodged at the AHRC compared with 262 in 11/12 (AHRC, Appendix 3 – Complaint statistics (2012) <https://humanrights.gov.au/our-work/appendices-3-annual-report-2011-2012-australian-human-rights-commission>), 215 in 12/13 (AHRC, Annual report 2013-2013 (2013) <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2012-2013>), 222 in 13/14 (AHRC Appendix 3: Complaint statistics (2014) <https://humanrights.gov.au/our-work/appendix-3-complaint-statistics>), 212 in 14/15 (AHRC Annual report 2014-2015 (2015) <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2014-2015>), 217 in 15/16 (AHRC 2015-2016 Complaint statistics (2016) <https://humanrights.gov.au/sites/default/files/AHRC%202015%20-%202016%20Complaint%20Statistics.pdf>), 247 in 16/17 (AHRC 2016-2017 Complaint statistics (2017) <https://humanrights.gov.au/sites/default/files/AHRC_Complaints_AR_Stats_Tables%202016-2017.pdf>), 321 in 17/18 (AHRC 2017-2018 Complaint statistics (2018) <https://humanrights.gov.au/sites/default/files/AHRC_Complaints_AR_Stats_Tables_2017-18.pdf>), 252 in 18/19 (AHRC 2018-2019 Complaint statistics (2019) <https://humanrights.gov.au/sites/default/files/2019-10/AHRC_AR_2018-19_Stats_Tables_%28Final%29.pdf>), 231 in 19/20 (AHRC 2019-20 Complaint statistics (2020) <https://humanrights.gov.au/sites/default/files/2020-10/AHRC_AR_2019-20_Complaint_Stats_FINAL.pdf>),

This table does not represent state or territory discrimination bodies' complaints numbers and thus only contains



The AHRC's 2022/2023 data shows that the commission received only 286 complaints alleging sexual harassment and 63 complaints alleging sex-based harassment.[34] In 2011-2012, the AHRC reported 262 complaints of sexual harassment. While there has been some variation in how many complaints have been filed at the AHRC over the last decade, the numbers are not steadily increasing. This does not correlate with the increase in reports of sexual harassment in the workplace in the last 5 years from 21% in 2012 to 33% in 2022.[35] Most critically, the limited number of complaints does not reflect the one in three Australians who experience sexual harassment at work.[36]

It is understandable that many workers do not complain about sexual harassment: the Respect@Work Report provides extensive analysis as to how workplace power dynamics, hierarchies and unequal power relations can create barriers for people to

reference to sexual harassment complaints made pursuant to s 28A of the Sex Discrimination Act 1984 (Cth). The above graph also does not represent matters filed under the sex based harassment amendments (September 2021) of which there were 2021/22: 28, 2022/23: 63.

34 AHRC, 2022-2023 Complaint statistics, <ar_2022-23_complaint_stats_tables.docx (live.com)>.19.

35 Time for Respect (n 1) 201.

36 20/21 data shows that only 252 complaints alleging sexual harassment were lodged at the AHRC compared with 262 in 11/12 (AHRC, Appendix 3 – Complaint statistics (2012) <https://humanrights.gov.au/our-work/appendices-3-annual-report-2011-2012-australian-human-rights-commission>), 215 in 12/13 (AHRC, Annual report 2013-2013 (2013) <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2012-2013>), 222 in 13/14 (AHRC Appendix 3: Complaint statistics (2014) <https://humanrights.gov.au/our-work/appendix-3-complaint-statistics>), 212 in 14/15 (AHRC Annual report 2014-2015 (2015) <https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2014-2015>), 217 in 15/16 (AHRC 2015-2016 Complaint statistics (2016) <https://humanrights.gov.au/sites/default/files/AHRC%202015%20-%202016%20Complaint%20Statistics.pdf>), 247 in 16/17 (AHRC 2016-2017 Complaint statistics (2017) <https://humanrights.gov.au/sites/default/files/AHRC_Complaints_AR_Stats_Tables%202016-2017.pdf>), 321 in 17/18 (AHRC 2017-2018 Complaint statistics (2018) <https://humanrights.gov.au/sites/default/files/AHRC_Complaints_AR_Stats_Tables_2017-18.pdf>), 252 in 18/19 (AHRC 2018-2019 Complaint statistics (2019) <https://humanrights.gov.au/sites/default/files/2019-10/AHRC_AR_2018-19_Stats_Tables_%28Final%29.pdf>), 231 in 19/20 (AHRC 2019-20 Complaint statistics (2020) <https://humanrights.gov.au/sites/default/files/2020-10/AHRC_AR_2019-20_Complaint_Stats_FINAL.pdf>); Time for Respect (n 1).

complain about sexual harassment.[37] The increase in reports of sexual harassment in the workplace over this decade is thought to be because workers are becoming more able to identify sexually harassing behaviours, and also because there has been a shift away from victim blaming and shame: this increase in reporting is not thought to be solely an increase in the incidence of the behaviours themselves. [38]

Litigated court outcomes

Very few AHRC complaints advance to the courts and even fewer progress all the way to final hearing, with Emerita Professor Margaret Thornton describes it as a 'miniscule' amount.[39] The legal process involves two alternative dispute processes: mandatory conciliation at the AHRC; and mediation once proceedings are filed at court. Each year, there are often less than a handful of court outcomes relating to sexual harassment in Australia at the federal level. People commonly do not want to bring legal action because of costs risks, delay, stress, access to justice issues, and the challenge of giving evidence.[40]

The number of sexual harassment cases resulting in a final court decision have steadily decreased since 1986.[41] In 2022, there were only five decisions relating to sexual harassment in the federal jurisdiction, of which most were procedural interlocutory decisions and there were no awards for damages related to sexual harassment.[42] There were just five decisions in 2021[43] , and three in 2020.[44]

37 Respect@Work (n 2) including 181, 190, 197, 224.

38 Time for Respect (n 1) 199.

39 Margaret Thornton, 'Privatising Sexual Harassment' (2023) 45(3) Sydney Law Review 371, 395.

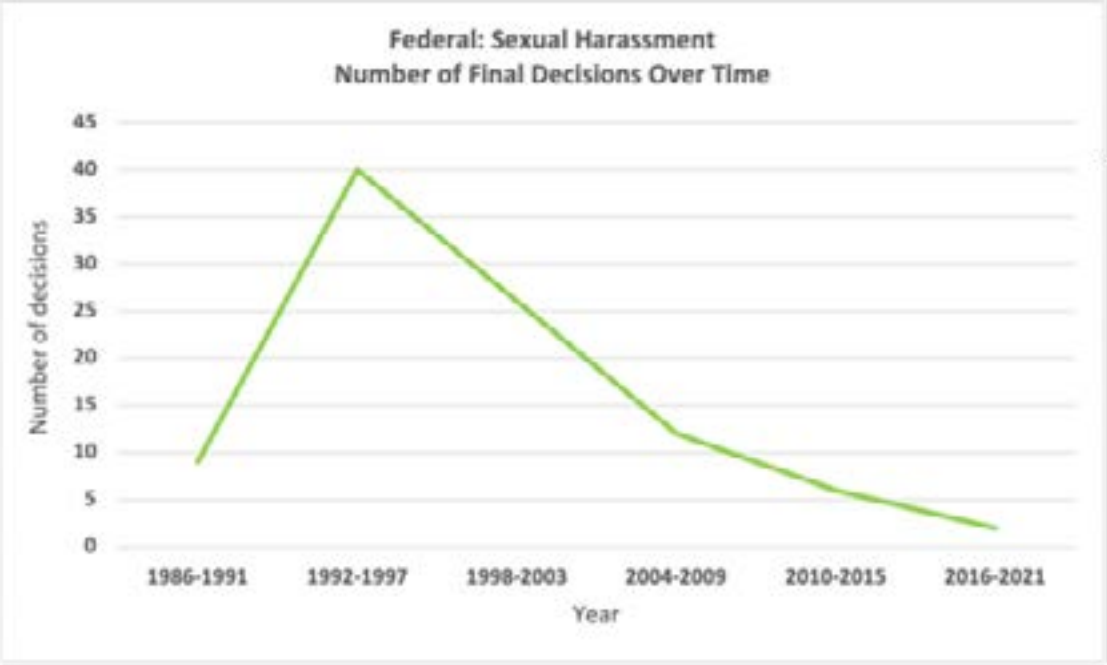
40 Dominique Allen, 'Confidentiality Hides the Prevalence of Sexual Harassment in Australian Workplaces' (2019) 4 Revue de Droit Comparé du Travail et de la Sécurité Sociale 212, 213 <https://journals.openedition.org/rdctss/1437> ('Dominque Allen, Confidentiality Hides the Prevalence of Sexual Harassment in Australian Workplaces').

41 Margaret Thornton, Kieran Pender and Madeleine Castles, 'Damages and Costs in Sexual Harassment Litigation' (Study Conducted for Respect@Work Secretariat, Australian National University, 24 October 2022) ('Thornton, Pender and Castles, Damages and Costs in Sexual Harassment'), 21 [Graph 5] <https://www.ag.gov.au/sites/default/files/2022-12/damages-and-costs-in-sexual-harassment-litigation.pdf>.

42 Ferguson v Tasmanian Cricket Association (trading as Cricket Tasmania) (No 3) [2022] FCA 1269; Meshram v Bing Lee Electrics Pty Ltd [2022] FedCFamC2G 718; Weir v Telstra Corporation Limited [2022] FCA 969; Leach v Burston (No 2) [2022] FCA 178; Leach v Burston [2022] FCA 87 ('Leach v Burston 87').

43 Australian National University, Damages and Costs in Sexual Harassment Litigation: Annexure A: Table of Cases (24 October 2022) 5-6 <https://www.ag.gov.au/sites/default/files/2022-12/annexure-a-tables-of-cases.pdf>.

44 Ibid, 6.



Graph: number 5 taken from Thornton, Pender and Castles[45]

Data from the Australian Human Rights Commission

The AHRC reports that in the 2020-21 period, 70% of the complaints were successfully resolved at the conciliation stage.[46] As noted by other research, these settlement figures do not reflect matters settled prior to filing a complaint.[47] There is no public database or register recording pre-complaint settlements.

In 2021-22, prior to the NDA Guidelines being published, the AHRC finalised 231 sexual harassment complaints.[48] Upon request, the AHRC provided largely unpublished data[49] for use in this report that showed that 94 of these matters had been successfully resolved, meaning that an agreement was reached.[50] For a number of these settlements (26 of 94), the parties did not disclose the terms of settlement to the AHRC however the AHRC was still able to indicate that 82 of the 94 resolved matters — that is, 87% — were "highly likely to have financial compensation and confidentiality as components of the agreements." [51]

45 Thornton, Pender and Castles, Damages and Costs in Sexual Harassment (n 41) 21.

46 Successfully' is not defined but presumed to mean financial compensation. AHRC 412020-21 Complaint statistics (2021) <https://humanrights.gov.au/sites/default/files/2022-02/ahrc_ar_2020-2021_complaint_stats.pdf>.

47 Thornton, Pender and Castles, Damages and Costs in Sexual Harassment (n 41) 76.

48 202 complaints were filed the previous year.

49 Some 2021/22 data is published in the AHRC 2020-21 Complaint statistics (2021) 3. <https://humanrights.gov.au/sites/default/files/2022-02/ahrc_ar_2020-2021_complaint_stats.pdf>.

50 Christopher Hills, 13 September 2023 (n 23) 1. Resolved means an agreement was reached. Finalised can mean withdrawn, discontinued, terminated or administrative closure.

51 Ibid 1.

In 2021-22, all 94 matters that resolved for compensation at the AHRC were subject to a conciliation agreement or deed of release that included terms requiring confidentiality and non-disparagement. [52]

For the 2022/23 period, the AHRC provided data showing that of the 95 successfully resolved complaints relating to sexual harassment in the workplace, 87 of these matters were `highly likely" to have included financial compensation.[53]

The AHRC estimates in 2022/2023:

70 of the 87 matters that resolved with financial compensation "are **likely** to have included a confidentiality clause as a component of the agreements" **(80.45%).**

68 of the 87 that resolved with financial compensation "are **likely** to have included a non-disparagement clause as a component of the agreements" **(78.16%).**[54]

Further, in 2022/2023, 74% of resolved matters were likely to have included a confidentiality clause as a component of the settlement agreement, meaning that the use of confidentiality clauses dropped by 26% from 2021/2022. The NDA Guidelines were introduced in December 2022 and the AHRC adopted the policy of providing parties with both NDA Guidelines and a template settlement agreement without a confidentiality or non-disparagement clause.[55] While these changes were implemented halfway through the 2022/2023 financial year, it appears likely that AHRC practices and uptake of the NDA Guidelines more broadly may account for a portion of the 26% decrease compared to 2021-22 in the use of confidenti clauses in sexual harassment settlements.[56]

52 Christopher Hills, 13 September 2023 (n 23) 1. Their confirmed numbers of matters with financial compensation are 56 sexual harassment matters in the period of 2021-22.

53 Email from Christopher Hills to Sharmilla Bargon and Regina Featherstone, 10 November 2023 (`Christopher Hills, 10 November 2023').

54 Data on the use of non-disparagement clauses prior to 2022-23 was not provided.

55 Christopher Hills, 10 November 2023 (n 53).

56 Ibid. This would mean the AHRC estimates 87 matters are highly likely to have resolved with financial settlement.

2. NDAs: issues and impacts

Ubiquitous

NDAs originated in the business world to protect trade secrets and confidential information.[57] These clauses protect intellectual property or trade secrets to allow a business to continue to derive profit from offering something unique.

This is also how NDAs can operate in the context of sexual harassment. NDAs can operate to protect a secret, being a perpetrator, who is both powerful and profitable, to allow for the continued making of profit. Stakeholders have reported that the use of NDAs was the default way in which matters were resolved.

> *No one denies that there are many scenarios where a legal non-disclosure agreement may be needed or even desirable. Trade secrets may need to be protected, industrial relations in progress may need to be safeguarded and intellectual property may need certain legal protections and guarantees. However, in recent years in Ireland and in other jurisdictions around the world, we have seen a certain creep emerge, where NDAs are now cropping up in scenarios where they were never originally envisaged and where the legal silence that they both cause and effect are actively damaging the public interest and the common good. Openness, transparency and accountability are fundamental principles of a functioning and fair society. They underpin our democratic systems and the code of conduct by which we all engage with each other in public life: Senator Lynn Ruane*[58]

Until the #MeToo movement, confidentiality and NDAs were considered `non-negotiable' in out-of-court settlements for sexual harassment claims.[59] Following the #MeToo movement, the AHRC has confirmed that in Australia sexual harassment matters are routinely settled with NDAs (as above).[60] In a 2018 study in Victoria, a barrister said "no one I know has ever settled on non-confidential terms".[61]

57 Rachel S. Spooner, `The Goldilocks Approach: Finding the "Just Right" Legal Limit on Nondisclosure Agreements in Sexual Harassment Cases' (2020) 37(2) Hofstra Labor & Employment Law Journal 331 (`Spooner, The Goldilocks Approach'), 331.

58 277 Seanad Deb. (14 June 2021) col. 1 (Ir.) (Senator Ruane) (`Seanad Deb.') 3.

59 Minna J. Kotkin, `Reconsidering Confidential Settlements in the #MeToo Era' (2020) 54(3) University of San Francisco Law Review 517, 517.

60 Christopher Hills, 13 September 2023 (n 23); Christopher Hills, 10 November 2023 (n 53).

61 Dominique Allen, Confidentiality Hides the Prevalence of Sexual Harassment in Australian Workplaces (n 40) 214.

2.1. NDA use: Advantages for parties

A common benefit of NDAs espoused by practitioners is to protect a business or individual from negative publicity or reputational damage from complaints of sexual harassment. Emeritus Professor Julie Macfarlane explains that the status of an institution is built around the reputation of its most important members, and therefore if a complaint of sexual harassment is made against an individual whose reputation is 'entangled' with that of the business, the institution may prioritise the preservation of the accused's reputation to shield the organisation as a whole.[62]

For some respondents, reputational harm and damage to the business are perceived to be more significant than the risk of liability (i.e. being required to pay economic or non-economic loss) and paying legal costs.

It is not just businesses that seek NDAs: Applicants too may choose to avoid the stress and possible costs risk of initiating court proceedings. Some victim survivors will of course want confidentiality for the purpose of moving on cleanly with their career and avoiding possible negative repercussions if their complaint is made public. NDA may serve the best interests of both employers and employees.

The use of an NDA becomes concerning when it is adopted as a blanket, standard agreement, and victim survivors are denied true choice in their terms of settlement.

No data, no problem?

The small number of litigated outcomes could indicate success in sexual harassment reform; that so few matters go to court indicates that progress has been made and less people are being sexually harassed.[63] However, ABS and AHRC data on the prevalence of sexual harassment indicates that this is not the case.[64] The continued use of NDAs in sexual harassment complaint settlements means that there is limited existing scholarship on confidentiality obligations, settlements and what we know about sexual harassment in the workplace more broadly.[65]

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62 Julie Macfarlane, Going Public: A Survivors Journey from Grief to Action as cited in Department of Children, Equality, Disability, Integration and Youth, 'The Prevalence and Use of Non-Disclosure Agreements (NDAs) in Discrimination and Sexual Harassment Disputes' Government of Ireland (Web Page, 7 March 2022) ('DCEDIY, The Prevalence and Use of NDAs') 8 <https://www.gov.ie/en/publication/ef5f6-the-prevalence-and-use-of-non-disclosure-agreements-ndas-in-discrimination-and-sexual-harassment-disputes/>.

63 Karen O'Connell, 'The #MeToo Movement in Australia: Silenced by Defamation and Disbelief' in Ann Noel and David Oppenheimer (eds), The Global #Metoo Movement: How Social Media Propelled A Historic Movement and The Law Responded (Full Court Press, 2020) 259 ('Karen O'Connell, The #MeToo Movement in Australia),'345.

64 ABS, 2021-22 (n 9); Time for Respect (n 1).

65 Emily Otte, 'Toxic Secrecy: Non-Disclosure Agreements and #MeToo' (2020) 69(3) Kansas Law Review 545, 554.

Given the prevalence of sexual harassment in Australia, NDAs and their use warrants interrogation. In their book, `How Many More Women? Exposing how the law silences women', Jennifer Robinson and Keina Yoshida write that "if we want to end violence against women, we must be able to speak about it. How many women will be silenced before we make the structural changes we need to empower them to speak?"[66]

There is no complete record which reflects the prevalence or substance of sexual harassment issues and employer responses. The Workplace Gender Equality Agency **(WGEA)** currently collects voluntary data on businesses' sexual harassment policies, training on sexual harassment, data on sexual harassment prevalence and reporting measures businesses take relating to sexual harassment.[67] Businesses will be required to report this data from April 2024 but do not need to report the number and terms of sexual harassment settlements and matters which are subject to NDAs.[68]

The AHRC data referenced above was provided upon our request to facilitate this report. Information provided about NDA use is not published in the annual complaint statistics or elsewhere; nor do the State and Territory anti-discrimination bodies do not record this information for public access. The Respect@Work Report found that most regulatory agencies had not collected, monitored or reported on sexual harassment data.[69]

Australia's National Research Organisation for Women's Safety **(ANROWS)** is conducting a sexual harassment research program from 2021 – 2024, looking at sexual harassment in the retail sector, sexual harassment of LGBTQ people in the workplace and migrant and refugee women's attitudes to sexual harassment in the workplace.[70] Parties may not be able to contribute crucial data to such research if they are prohibited by NDAs. For research organisations like WGEA and ANROWS the use of NDAs in settlements may act as a barrier to collecting critical data.

The way harassment matters are settled is important to understand as it could assist individuals to understand the merits of their claim and to settle for figures which are benchmarked against other settlements.[71] Recently, the Federal Court relied

66 Jennifer Robinson and Keina Yoshida, How Many More Women: Exposing how the Law Silences women (Allen & Unwin 2022) (`Robinson and Yoshida, How Many More Women') 9.

67 Workplace Gender Equality Agency (`WGEA'), 'Reporting Changes 2022-23', Government of Australia (Web Page,2023) <https://www.wgea.gov.au/reporting-guide/ger/changes> WGEA also collects a number of other voluntary pieces of information relating to sexual harassment - relevant employers include Commonwealth public sector organisations and private sector employers with over 100 staff.

68 WGEA, `Get Future Ready: A Guide to Understanding Changes to WGEA's Legislation', Government of Australia (Web Page, 2023) <https://www.wgea.gov.au/about/our-legislation/Closing-the-gender-pay-gap-bill-2023>.

69 AHRC, Respect@Work (n 2) 504.

70 Among other research areas see: ANROWS, `2021-2024 ANROWS Sexual Harassment Research Program' (Web Page) <https://www.anrows.org.au/2021-2024-anrows-sexual-harassment-research-program/#:~:text=ANROWS's%20 2021%E2%80%932024%20Sexual%20Harassment,workplaces%2C%20public%20spaces%20and%20online>.

71 JJulie Macfarlane, `How a Good Idea Became a Bad Idea: Universities and the Use of Non-Disclosure Agreements in

on work done by Emeritus Professor Sara Charlesworth, who was asked to review damages in sexual harassment matters to assess whether damages awards reflect prevailing community standards. Because there were so few reported decisions between 2020 and 2022, she could only review three decisions, finding:

> *The scarcity of sexual harassment decisions in Australia, when combined with decisions being made across potentially nine different state, territory and federal jurisdictions, makes it hard to identify trends or make any definitive conclusion about the extent to which awards of general damages in more recent Australian court and tribunal decisions reflect a shift in community standards and the higher value the community places on the consequences for victims.*[72]

Discouraging complaints

Currently there is little incentive for someone who has been sexually harassed to make a complaint. Court processes are long and taxing. So few cases reach judgment, meaning there is little public visibility on what a successful sexual harassment complaint outcome looks like. While the courts have awarded increasingly high damages in such cases since 2014,[73] reflecting changing community sentiments towards such conduct, these cases are still rare:[74] since the 2019 case *Hill v Hughes*,[75] there had not been a federal court decision awarding damages to a sexual harassment applicant until the late 2023 decision *Taylor v August and Pemberton Pty Ltd*.[76]

The infrequency and limited numbers of sexual harassment court decisions means that outcomes for prospective claimants are uncertain: there are few incentives for complainants to commit to a court process with unknown prospects.

Margaret Thornton argues:

> *The secrecy inherent in the individual complaint-based system, particularly in conciliation and NDAs, to say nothing of sentencing, has played a key role in keeping the substance and extent of sexual harassment out of the public eye.*[77]

Terminations for Sexual Misconduct' (2020) 21(2) Cardozo Journal of Conflict Resolution 361, 361.

72 Taylor v August & Pemberton Pty Ltd [2023] FCA 1313 ('Taylor') [505].

73 Richardson v Oracle Corporation Australia Pty Ltd [2014] FCAFC 82 ('Richardson'); Madeleine Castles, Tom Hvala and Kieran Pender, 'Rethinking Richardson: Sexual Harassment Damages in the #MeToo Era' (2021) 49(2) Federal Law Review 231.

74 Ibid.

75 Hill v Hughes [2019] FCCA 1267.

76 Taylor (n 72).

77 Margaret Thornton, 'Privatising Sexual Harassment' (2023) 45(3) Sydney Law Review 371, 393.

Our anti-discrimination laws and processes have evolved in such a way that the best a victim survivor may hope for is a settlement prior to court subject to an NDA.[78] While some victim survivors actively seeking NDAS, this outcome does not assist others to come forward or contribute to public understanding of the nature of the problem.

Psychological impact of NDAs

The Speak Out Survey conducted by UK organisation Speak Out Revolution found that 95% of people who have signed an NDA experience negative impacts on their mental health related to the NDA and the inability to speak about their experiences.[79] Further, this study found that women of colour are more likely to have signed an NDA than their white counterparts.[80] While we do not have equivalent Australian data regarding NDA use and impact, given the high local rates of sexual harassment against women with disabilities, Aboriginal or Torres Strait Islander persons and LGBTQI women,[81] there is further cause for consideration on how NDA use may disproportionately impact victim survivors with multiple intersections of lived experience.

In 2022, the Continuing Legal Education Society of British Columbia considered the impact of NDAs on those who have signed such agreements, writing:

> *We have heard from clients who signed an NDA 15-25 years ago who talk about how they live in a constant fear they may break it. That they see the harasser have a career that flourished while they struggled to explain why they left working with such a well-known person or employer, and are unable to explain the gap on their resumé having been unable to work due to mental health issues caused by the sexual harassment*[82].

The health risks of keeping secrets are well documented and can lead to post traumatic stress disorders, among other illnesses.[83] Equally the ability to speak

78 Lizzie Barmes, 'Silencing at Work: Sexual Harassment, Workplace Misconduct and NDAs' (2023) 52(1) Industrial Law Journal 68 ('Barmes, Silencing at Work'), 76.

79 Olivia Leahy, 'The Channel 4 News Women are just the Tip of the Iceberg - Have Women of Colour been Disproportionately Silenced via NDAs for Years?' Speak Out Revolution (Web Article) <https://www.speakoutrevolution.co.uk/the-speak-out-blogs/vsllc12tng5vff83uqilxgn7uyrxaj>.

80 Ibid.: 75% of Black African women surveyed have signed NDAs compared to 28% of white British/Irish women who completed the survey.

81 ABS, 2021-22 (n 9).

82 Jennifer Khor et al., 'Challenging Non-Disclosure Agreements (NDAs) and the Harm they Cause: Paving the Way for more Trauma-Informed Approaches', The Continuing Legal Education Society of British Columbia (November 2022) 12 <https://www.cantbuymysilence.com/media/files/1686242268parfittkhor-clebc-paper.pdf>.

83 Bernadette Baum, 'Workplace Sexual Harassment in the "Me Too" Era: The Unforeseen Consequences of Confidential Settlement Agreements' (2019) 31(1) Journal of Business and Behavioural Sciences 4 ('Baum, Workplace Sexual Harassment'), 9.

and putting experiences into words assists in the healing process.[84] The impacts of signing NDAs are real.

NDAs are not a solution to a collective problem

Sexual harassment exists on a spectrum of violence against women; from non-sexual gender-based harassment to sexual assault.[85] Harassment reflects and re-enforces gender hierarchies at work,[86] affecting all employees who either benefit or suffer from its effects. Socio-legal scholar Bernadette Baum explains that "[h]arassing behaviours have been found to stem from a resistance to the presence of women in the working world based on stereotypes surrounding gender norms."[87]

Sexual harassment in the workplace is a cultural problem yet it is treated as an individual issue.[88] Eliminating sexual harassment requires collective response, but resolving an allegation of sexual harassment with an NDA is a decision made by only the parties to the deed. NDAs are one tool in a broader regulatory sexual harassment framework which functions to resolve matters privately, despite sexual harassment being a systemic and public issue.[89] Settlements rarely adequately address or remedy a victim survivor's experience of sexual harassment, nor can the terms of such agreements ensure that the perpetrator will not sexually harass someone again.

The misuse of NDAs is exemplified by former film producer Harvey Weinstein, who, in 2017, told journalists he had settled "less than ten" harassment claims against him.[90] These agreements were not public, so each complainant settled their claim with Harvey Weinstein without knowing about the others. While Harvey Weinstein is now well known for this grotesque systematic pattern of offending, he is not the only person or business who has engaged in this practice.

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84 Ibid 10.

85 JJulie Goldscheid, 'Restorative Me Too, Sexual Harassment and Accountability' (2021) 26(5) Ohio State Journal on Dispute Resolution 689, 702.

86 Barmes, Silencing at Work (n 78) 73.

87 Baum, Workplace Sexual Harassment (n 83) 12.

88 Champions of Change Coalition, Disrupting the System: Preventing and Responding to Sexual Harassment in the Workplace (Report, 2019) ('Champions of Change Coalition, Disrupting the System'), 34 <https://championsofchangecoalition.org/wp-content/uploads/2020/09/Disrupting-the-System_Preventing-and-responding-to-sexual-harassment-in-the-workplace_CCI_web-FINAL.pdf>.

89 Belinda Smith, 'A Regulatory Analysis of the 'Sex Discrimination Act 1984 (Cth): Can it Effect Equality or Only Redress Harm?' in Christopher Arup, et al. (eds) Labour Law and Labour Market Regulation – Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships (Federation Press, 2006) 105 ('Smith, Regulatory Analysis of the Sex Discrimination Act'), 110.

90 TThis practice is referring to sexual harassment claims and does not relate to his later sexual assault convictions or civil suits which occurred post 2017. Nicole Einbinder, 'What Happens if Someone Breaks a Non-Disclosure Agreement' Frontline (Web Article, 2 March 2018) <https://www.pbs.org/wgbh/frontline/article/what-happens-if-someone-breaks-a-non-disclosure-agreement/#:~:text=In%20a%20statement%20to%20FRONTLINE%2C%20Weinstein%20denied%20the,the%20police%20had%20they%20wished%20to%20do%20so.%E2%80%9D>.

While the current legal system has been important in giving rights and avenues for redress to victims, we know this approach hasn't been effective in eradicating sexual harassment. The use of non-disclosure agreements in particular has silenced people impacted, allowed the behaviour to continue and at times, appeared to condone it (Champions of Change Coalition, 2021).

Prior to the Positive Duty, Australian sexual harassment law was focused on individual redress, i.e. a person coming forward with a complaint under the SDA or state law, seeking reparations for the alleged behaviour.[91] In this way, using NDAs to resolve sexual harassment claims has led to anti-discrimination laws having "evolved to prioritise compliance over equality,"[92] or as Professor Belinda Smith writes, individual (private) dispute resolution over public, systemic and preventative solutions.[93] This practice leaves no opportunity to examine the unlawful conduct and how it was permitted to happen, effectively rendering the legal protections "meaningless."[94] In her empirical research with lawyers, Professor Lizzie Barmes found that "the current use of NDAs is critical to the failure of this model of law effectively to combat workplace misconduct and to seeing how it ends up overall supporting established workplace hierarchy."[95]

Tilting the scales

Under the Positive Duty, liability for sexual harassment is no longer solely dependent on a complainant lodging an application with the AHRC.[96] Instead, employers must actively take steps to prevent sexual harassment and hostile working environments. It is unclear how the private right to be protected against harassment, and the public enforcement of the Positive Duty is linked. The AHRC will investigate and use enforcement powers only where compliance action will support cultural change towards safer, respectful and fairer workplaces in Australia:[97] the AHRC will not take compliance action to resolve individual complaints.

Regardless, the Positive Duty is a step towards cultural redress. As recognised by he Champions of Change, the cultural landscape has changed with an emerging

91 Karen O'Connell, The #MeToo Movement in Australia (n 63) 343. Noting other jurisdictions like Victoria have had a positive duty in their state anti-discrimination legislation prior to the Federal Positive Duty. Noting the Positive Duty has been present in some state jurisdictions prior to the Federal jurisdiction's amendments.

92 Julie Goldscheid, '#MeToo, Sexual Harassment and Accountability: Considering the Role of Restorative Approaches' (2021) 36(5) Ohio State Journal on Dispute Resolution 689 ('Goldscheid, #MeToo, Sexual Harassment and Accountability'), 703.

93 Smith, Regulatory Analysis of the Sex Discrimination Act (n 89) 112-113.

94 Barmes (n 78) 73.

95 Barmes (n 78) 99.

96 Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022 (Cth).

97 AHRC, 'The Positive Duty under the Sex Discrimination Act 1984 (Cth)' (Web Page) <https://humanrights.gov.au/our-work/sex-discrimination/positive-duty>

preference for openness and complainant-centred responses over the blanket use of NDAs.[98] They indicate that "the balance in reputational management between transparency and secrecy has tilted significantly towards transparency".[99] Respondent employers may now choose proactive disclosure to mitigate further reputational damage and take steps away from perceived cover-ups.[100]

Shareholders, consumers and employees expect businesses to be accountable to their environmental, social and corporate governance obligations in the handling of sexual harassment complaints and mitigate risks and harms under the Positive Duty.[101] In light of this, the 'take-it-or-leave-it' mentality when pushing for broad or exhaustive NDAs in sexual harassment settlements appears outdated.

Victim survivors wanting to prevent harm

This collective problem is felt most acutely by victim survivors themselves. Preventing harm to others is a significant motivation for victim survivors to make a complaint.[102] These collectivist considerations and moral duties to prevent harm to others are significant concerns for individual victim survivors when considering settlement options. For some victim survivors, the money is only one small factor.

Because of the individual nature of NDAs and their agreement to keep things confidential, there is little heard from victim survivors in this discussion. The Victorian Trades Hall Council **(VTHC)**, as part of their campaign for legislation to end the misuse of NDAs for workplace sexual harassment matters in Victoria run a dedicated NDA experience share line for victim survivors to share their stories. The VTHC shared anonymised experiences victim survivors have had with NDA/confidentiality clauses:[103]

> *I felt if I didn't sign it [confidentiality clause] or attempt to renegotiate, the settlement wouldn't go through and would need to progress with no guarantee of receiving the amount of money I agreed to settle on. The NDA is another form of power and control. It should never be contingent of settling a claim. -* ***Min***

98 Champions of Change Coalition, Disrupting the System (n 88), 41.

99 Ibid.

100 Ibid. 40.

101 Australian Institute of Company Directors, Sexual Harassment in the Workplace (Report, Clayton Utz, 9 August 2021) ('AICD, Sexual Harassment in the Workplace') 1.

102 Respect@Work (n 2), 264.

103 Victorian Trades Hall Council, 'End the Silence – End the Misuse of NDAs' We Are Union (Web Page) <https://www.weareunion.org.au/nda_share>.

No amount of money will ever be worth the ongoing trauma, fear and anxiety I experience regularly with no avenue to ever get closure. Every worker should have the right to confront their harasser and have them held accountable for their actions. It is a crucial part of the healing process. Employers should never have the right to take that away from victim survivors ever. - ***Megan***

My lawyer assessed I had a good chance of winning but I did not feel secure enough to refuse the settlement and I was told that the judge might consider me unreasonable if I did. I am strongly opposed to NDAs. They mean that justice is not seen to be done, precedents are not established and they leave a bad legacy for the survivors who cannot talk freely about their experience. - ***Shelley***

I don't think workplaces should be allowed to continue with using NDAs. It is a way of putting all their dirty laundry under the carpet. Pretending the issues don't exist. If the issues came to light it would be embarrassing for the organisation. It would also make them more accountable for workplace culture and safety. - ***Peta***

I was shocked. In retrospect I wish I'd negotiated for more. It seemed to be a common practice by my employer and they had it all planned. I had severe mental issues including PTSD for a long time afterwards. I felt embarrassed as I could not tell any of my former colleagues why I suddenly left. - ***Celeste***

Disincentivising settlement: 'Take-it-or-leave-it'

There is strong sentiment that respondent employers will not settle matters out-of-court if there is no incentive of confidentiality.[104] Stakeholders submitted to the Respect@Work Report that employers will be "less likely" to enter into a settlement without an NDA.[105]

In pushing for a settlement conditional on complete confidentiality in a 'take-it-or-leave-it' offer at conciliation[106], employers run the risk of proceedings being filed after an unsuccessful conciliation, publicly identifying the company and any individuals as respondents. This presents a new set of risks to employers, not only to confidentiality but to liability and costs.[107] For example, when the previous CEO of David Jones, Mark McInnes, was named as a respondent in sexual harassment proceedings, David Jones experienced a 3% drop in share price.[108]

104 Jonathan Ence, 'I Like You When You Are Silent: The Future of NDAs and Mandatory Arbitration in the Era of #MeToo' 2019(2) Journal of Dispute Resolution 165, 178.

105 Respect@Work (n 2), 560.

106 Marissa Ditkowsky, '#UsToo: The Disparate Impact of and Ineffective Response to Sexual Harassment of Low-wage Workers' (2019) 26(2) UCLA Women's Journal 69, 101.

107 Ibid. 99.

108 Respect@Work (n 2), 79.

While there is limited data, preliminary research indicates overwhelmingly that most claims of sexual assault and sexual harassment are true[109]

Australian courts have increased damages in sexual harassment cases with the average increasing from $21,544 in 2004-2009 to $60,500 in 2016-2021,[110] and a record high award of $268,230 damages in 2023.[111] When considering the prevalence harassment in Australia and courts awarding increasingly high damages, reflective of prevailing community standards[112] there is a strong incentive for employers to settle without strict or exhaustive NDAs.

There is limited judicial discussion of settlement offers nor the consideration of reasonableness when referencing negotiations without confidentiality terms. However, one example is the sexual harassment case *Lucy Orchard v Frayne Higgins*[113] where Ms Orchard was awarded $45,000 in damages.[114] In an appeal, Mr Higgins raised Ms Orchard's negotiation offers being made with 'non-confidentiality' terms which he interpreted as giving Ms Orchard the ability to "publicly harass" him.[115] Mr Higgins tried to rely on the non-confidentiality term in a letter of offer as evidence that Ms Orchard pursued him vexatiously in her original claim.[116] Blow CJ dismissed this argument and found there was "nothing improper about the contents of the letter".[117]

The sentiment that respondent employers will not settle out-of-court without an NDA does not reflect the trajectory of the post #MeToo climate, where women are encouraged to come forward and where damages are substantial. While the litigation journey for sexual harassment claims is still not easy for complainants, the Respect@Work changes and other proposed law reform may make this path easier, for instance with proposals which reduce the risk of an adverse costs order.[118]

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109 Scott Altman, 'Selling Silence: The Morality of Sexual Harassment NDAs' (2022) 39(4) Journal of Applies Philosophy 698, 711.

110 Thornton, Pender and Castles, Damages and Costs in Sexual Harassment (n 41) 1.

111 Including general damages for both sexual harassment and victimisation, aggravated damages, out of pocket expenses, and economic loss: Taylor v August & Pemberton (n 72).

112 Richardson v Oracle (n 73) [109]; Ibid.

113 Lucy Orchard v Frayne Higgins [2020] TASADT 11 ('Orchard v Higgins [2020]')

114 Ibid. [324].

115 Higgins v Orchard [2021] TASSC 44, [11].

116 Ibid.

117 Ibid.

118 Power to Prevent Coalition, 'Joint Statement' (December 2023). <https://www.aph.gov.au/DocumentStore.ashx?id=bd24f7f5-a039-46f8-95e7-73e215b94fda&subId=751295>.

3. Our research

3.1. Measuring success of the Respect@Work Report and #MeToo

Empirical research on laws and guidelines is critical to understanding how laws function in practice.[119] This is a significant problem for sexual harassment law because there is no publicly available data about the use of NDAs in practice, including their content [120] or their prevalence. The Respect@Work Report noted that data is "critical to the success of the redeveloped regulatory model" and most importantly, it "will contribute to long-term planning and policy development by governments to address workplace sexual harassment".[121]

Given there are so few litigated outcomes, with the majority of matters resolving out-of-court and subject to NDAs, it is difficult to know if amendments to sexual harassment laws have been impactful. How will we gauge whether societal attitudes have changed and whether employers take their liability under sexual harassment law seriously? While we may measure the raw data of incidents and assess whether there has been a reduction, there are key points of data missing.

These gaps in knowledge between the government issued NDA Guidelines and legal practice are what we sought to fill, using an empirical study of survey and interviews as outlined below.

3.2. Our methodology

The NDA Guidelines were published in December 2022. In September/October 2023, almost a year after the NDA Guidelines were disseminated for use in practice, we surveyed 145 solicitors, barristers and industrial officers practising in sexual harassment law across Australia on:

- their knowledge of, and engagement with, the NDA Guidelines;
- resolution of sexual harassment matters in practice including challenges and tactics; and
- their attitudes to NDAs and how that informs their practice.[122]

119 Dominique Allen & Alysia Blackham, 'Using Empirical Research to Advance Workplace Equality Law Scholarship: Benefits, Pitfalls and Challenges' (2018) 27(3) Griffith Law Review 337.

120 Respect@Work (n 2) 564.

121 Respect@Work (n 2) 504-5.

122 The University of Sydney ethics approval [2023/603].

Survey participants were divided into 70 respondent legal practitioners and 75 applicant legal practitioners, meaning survey participants completed the survey based on their self-selected experience as either applicant or respondent solicitors. This was done on the basis that the profession is largely bifurcated into applicant or respondent firms. For example, community legal centre participants will be applicant only, because they are designed to meet the legal needs of individuals experiencing disadvantage. Large firms will likely be respondent representatives, assisting businesses navigate and respond to claims of sexual harassment. Barristers more commonly act for both applicants and respondents. They were asked to complete a survey which reflects the majority of their experience. Participants were asked to complete one survey.

While the range of Post Qualification Experience **(PQE)** varied, the majority of participants were very experienced legal representatives with 73% of respondent survey participants and 43% of applicant survey participants having over 10 years PQE. The responses received in our survey are informed by experience both before and since the Respect@Work Report.

At the end of our survey, we asked each participant if they would be willing to participate in an interview. This resulted in 24 applicant solicitors/barristers and seven respondent solicitors/barristers agreeing and providing details to be interviewed. Based on those who responded to our interview requests, we conducted twelve interviews, comprised of ten applicant solicitors/barristers and two respondent solicitor/barristers. The interviews were recorded, transcribed and coded for themes. The qualitative interview responses and themes therefore contains more insight from applicant solicitors/barristers by virtue of their engagement with our interview requests.

Our methodology: defined terms

NDA definitions

There is no definition of an NDA. As we outline in this report, NDAs are confidentiality and non-disparagement terms which can (and should) come in different shapes and sizes per the NDA Guidelines.

In our surveys, we asked practitioners whether they had ever settled matters "without strict confidentiality terms". We provided this may mean "no NDA at all or an asymmetrical release where only the respondent was bound to confidentiality". We learned from 'yes' responses that practitioners considered settlements without strict confidentiality terms to mean a range of outcomes. Responses included things like time capped confidentiality terms, confidentiality around terms only but free to speak to incident and confidentiality which didn't prevent disclosures to medical practitioners etc. We refer to these terms as a **Varied NDA** in our research.

We incorporated this in our qualitative interviews, defining **Strict NDAs** to mean confidentiality and non-disparagement obligations that are not time capped and allows for only disclosures at law (e.g. financial advisors). In effect, a Strict NDA would mean a victim survivor cannot speak to anyone (aside from permitted legal disclosures) in perpetuity. Strict NDAs are used in this report to reflect the definitions provided by survey participants.

Survey Participants

Our survey results refer to applicant legal representatives as **Applicant Lawyers** and respondent legal representatives as **Respondent Lawyers** for cohesiveness and universality but we acknowledge that survey participants were comprised of solicitors, industrial officers, and barristers. Collectively, we refer to participants as **Practitioners.**

Interview

While some Practitioners advised we could use their first names, others chose to be anonymous. When we refer to an interviewee, we differentiate them only by their client base and the order of their interview, either referring to them as "Applicant Lawyer 1", or "Respondent Lawyer 1". Rather than using terms like "Anonymous Lawyer 1 or 2" with some individual names, we use the above naming conventions of Applicant Lawyer 1 for universality and cohesiveness. All interview participants are listed as 'lawyer', noting that some are barristers.

3.3. Our data

Are the NDA Guidelines used in practice?

The NDA Guidelines state that they should be used in the process of negotiating a workplace sexual harassment settlement, to help facilitate settlement in a manner that reduces harm and prevents future sexual harassment.[123] We found:

- Approximately one quarter of Practitioners surveyed had not **read** the NDA Guidelines;[124] and
- Approximately 15% of Practitioners surveyed were not aware that the NDA Guidelines **existed.**[125]

123 Respect at Work Council, Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints (2022) ('The Guidelines') 8.

124 This being 24.6% of applicant solicitor participants and 25.43% of Respondent representatives have not read the Guidelines (n 123).

125 This being 15.72% of respondent solicitor participants and 14.5% of applicant solicitor participants and are not aware of the Guidelines (n 123) at all.

Our research revealed that the NDA Guidelines are not utilised by most Practitioners. Interestingly, Respondent Lawyers are more likely than Applicant Lawyers to provide the NDA Guidelines to the other side. Our data shows that 29.68% of Respondent Lawyers say they have provided the NDA Guidelines to the other side (either legally represented or non-represented), compared to the 15.6% of Applicant Lawyers.

Of all the Practitioners who have provided the NDA Guidelines in at least one matter, 50% said that they do so as a matter of practice in every matter.

This does not amount to the finding that Practitioners do not implement or rely on the NDA Guidelines' direction in their daily practice; it is only to say that, per our survey, providing the NDA Guidelines to the other side as an advocacy strategy is not a standard resolution practice by the majority of Practitioners.

When used, are the NDA Guidelines helpful?

By comparing data provided by the AHRC about sexual harassment matter resolution, there was a drop from 100% of resolved matters in 2021/2022 likely to have included a confidentiality clause as a component of the settlement agreement to 76% of resolved matters in 2022/2023.

Following publication in December 2022, the AHRC standardly provided parties with a copy of the NDA Guidelines and a template settlement agreement without a confidentiality or non-disparagement clause.[126] While this 26% reduction in the likely use of confidentiality agreements is based on just two years of data, it is possible that the changes in AHRC practices contributed to this decrease.

Again, while based on limited data, this figure aligns with findings from our survey that found a little over a quarter of Practitioners say that the NDA Guidelines are useful in resolving matters without a Strict NDA,[127] being 26.31% of Applicant Lawyers and 27.7% of Respondent Lawyers.

However, 57% of those Applicant Lawyers who reached an outcome with a Varied NDA did not use the NDA Guidelines and 15.7% reported them as having a varied benefit (being the third option to allow for a response to consider multiple circumstances where the NDA Guidelines have had varied impacts on removing Strict NDAs).

One Applicant Lawyer expanded on their success:

> *The Respondent sought to include a strict confidentiality clause and we pushed back and provided them the guidelines. The employer agreed to a limited confidentiality*

126 Email Attachment from Christopher Hills to Sharmilla Bargon and Regina Featherstone, 13 September 2023, 2.

127 30.6% of applicant solicitors have achieved settlements without Strict NDA terms.

clause that sunsets after 1 year. The confidentiality clause was also written to allow the Applicant to discuss the matter with support people.[128]

This shows the NDA Guidelines can be effective in helping to remove Strict NDAs but the success of achieving settlements with Varied NDAs may rely more on the advocacy of solicitors.

Are the NDA Guidelines useful in removing NDAs?

We were interested whether the NDA Guidelines had any impact at removing NDAs entirely.

We asked Respondent Lawyers about circumstances where their client had received the NDA Guidelines (either from them or the other party) 29.68% of Respondent Lawyers said they were still instructed to proceed with the NDA. Noting that 67.19% of responses indicated this circumstance had not happened in their practice, only 3.12% said that the NDA Guidelines caused the client instruct to proceed without an NDA.

Strict NDAs are the default resolution term

The NDA Guidelines state that "confidentiality clauses should not be a standard term of workplace sexual harassment and settlement agreements and should be used on a case-by-case basis".[129] Our survey asked Practitioners to indicate whether they have resolved a sexual harassment settlement without a Strict NDA.[130] This question was asked in contemplation of Guideline 2 which recommends limits to scope and duration.

Our research shows that Strict NDAs remain the standard resolution term. We found that 69.3% of Applicant Lawyers and 79.24% of Respondent Lawyers have never reached a sexual harassment settlement without a Strict NDA, being close to three quarters of Practitioners surveyed.

Applicant Lawyers reported more instances of resolving matters with Varied NDAs. We expect this is because Applicant Lawyers are advocating for the needs of their clients which may be informed more by victim-centric objectives to allow for psychosocial support. The following five circumstances were Applicant Lawyers' most common experiences with securing Varied NDAs in settlements:

128 Applicant Lawyers response asking participants to expand on question 14.
129 The Guidelines (n 123) cl. 1.
130 Applicant Lawyer question 14 and Respondent Lawyer question 14.

1. Non-disparagement clauses only (including some participants having carve-outs for non-disparagement) in lieu of any confidentiality terms;
2. Terms and existence of the deed being confidential only;
3. No confidentiality at all;
4. Only identity of the business being strictly confidential; and
5. Carve-out in a clause for victim survivors to speak to medical practitioners and family.

While the use of Strict NDAs remains standard practice, it also means that close to a third of Applicant Lawyers and one fifth of Respondent Lawyers resolved matters with Varied NDAs. This data is useful when considering the perception in the legal community that without a Strict NDA there is no settlement.

We also learned that Practitioners who secure these outcomes do so on multiple occasions. While most Practitioners who have secured Varied NDAs recorded having 1-2 outcomes in the last twelve months, there were examples of Practitioners having recorded multiple settlements with Varied NDAs. This data is broken down with:

- 9.09% of Respondent Lawyers and 26.3% of Applicant Lawyers securing Varied NDAs in two to four matters; and
- 18.18% of Respondent Lawyers and 5.26% of Applicant Lawyers securing Varied NDAs in four to six matters.

This data points to the power of the individual Practitioner on this issue and challenges the idea that settlements are only achieved with Strict NDAs. If lawyers are knowledgeable about the nuances of NDA use, they are able to advocate for a greater range of outcomes. We draw the conclusion that lawyers who are advocating on this issue, do so regularly and implement it into their practice, specifically with Practitioners who have secured a Varied NDA outcome in two or more matters in the last twelve months.

3.4. Legal advice

a. Optional terms:

While Strict NDAs remain the standard confidentiality term in out-of-court settlements, they are not mandated by any law or legal professional obligation. Strict NDAs are a term in a settlement agreement which parties must agree to. In order for clients to agree to terms, they must understand their significance and substance by way of legal advice to make an informed choice in their instructions.

Our data revealed that many Practitioners do not engage in advice on NDAs as optional terms. Close to 30% of Applicant Lawyers (28.9%) and 50% of Respondent Lawyers have not advised a client that there is an option to resolve a sexual harassment settlement without an NDA.[131]

All solicitors in Australia are bound by Solicitors' Conduct Rules, which require "clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter."[132] By failing to provide advice on the options available to clients around NDA use, solicitors may be in breach of these ethical obligations. Pertinently for Respondent Lawyers, it is important to note that there is also an obligation to not take unfair advantage of the obvious error of the other side, if to do so would obtain a benefit for their client which is unsupported in law.[133] While this is largely unexplored, this may become enlivened in circumstances where the other side (self represented or legally represented) appears to be unaware of this issue and the option of variation. Sexual harassment is an area of law more likely than other areas of discrimination to have legal representation,[134] and so lawyers acting in these matters must be mindful of their professional obligations on both sides.

Inadequate advice provision by Applicant Lawyers creates another power imbalance where the victim survivor's agency is weakened. When Applicant Lawyers fail to provide complete advice this reduces an applicant's capacity to make fully-informed decisions. The lawyer assumes a greater decision-making role. This data suggests solicitors and barristers require further education and guidance about their professional obligations relating to advice provision.

b. Advice provision

Of the 71.05% of Applicant Lawyers who do advise clients that NDAs are an optional term and that it is something for parties to agree on, three key reasons supported this:

1. Professional obligations to provide full legal advice so that clients can make an informed decision about a term which is not required at law but has significant consequences;
2. Clients don't want to be 'silenced' and want to talk about their experiences, which is made known to their representative; and

131 Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW) ('Solicitors' Conduct Rules') r 7.1.

132 Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW) ('Solicitors' Conduct Rules') r 7.1.

133 Ibid. r 30.1

134 As previously mentioned in this report, the AHRC estimates 70% of sexual harassment matters finalised in 2021-22 had legal representation, compared to other discrimination grounds having legal representation in 30% of matters. Christopher Hills, 13 September 2023 (n 23).

3. Many clients have a preventative focus at the heart of their resolution goal and are concerned with their own complicity in assisting to conceal a perpetrator's behaviour[135]

Many Practitioners indicated there are challenges in securing a settlement without an NDA or even a Varied NDA with exemptions or carve-outs. However, they told us that the advice around NDA use was provided nonetheless owing to their role as advisor. Applicant Lawyer 4 explained:

> *It's a kind of an old adage but lawyers give advice, clients give instructions. Clients can tell the lawyer what to do and what not to do, but that's informed by the advice of the lawyer, so if a lawyer says 'Strict NDAs like this are standard'... it's more likely a client will say 'well, I just want what's standard.'*

Some Applicant Lawyers told us in interviews how important it was to provide detailed advice to clients in order to manage their expectations about the use of NDAs. Applicant Lawyer 1 told us:

> *We give them advice that our position is that it's reasonable [to request non-traditional NDAs]. We follow their instructions but also we empower them that that's a reasonable way to proceed because it is based on the case law, the guidelines and what we know about the current kind of societal attitudes to these issues. So I think those two are the biggest factors.*

Applicant Lawyer 3 indicated:

> *The way we advise our clients about NDAs is that it is a default in the beginning and we have to do that because we've got to manage their expectations from the beginning about it because it is a battle in reality.*

The 50% of Respondent Lawyers who **have** advised a client (employer or individual) they can settle a matter without an NDA, did so for similar reasons to the Applicant Lawyers in the majority of responses:

1. Professional obligations to provide fulsome legal advice, (noting that many provided advice that this may not be a suitable option); and
2. Best practice for reducing trauma and to prevent silencing complainants.

Respondent Lawyer 1 told us that clients rely heavily on their lawyers for advice, and that it is often the lawyer who is the one saying that they should still insist on using Strict NDAs.[136]

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135 Multiple applicant survey participants in our research spoke of their experiences with clients wanting to prevent conduct from happening to others, and not wanting to play a role in concealing the behaviour.

136 See heading Current attitudes to sexual harassment below.

Respondent Lawyers also spoke to:

3. Reputational risk for the organisation including references to their client's businesses valuing transparency; and
4. Difficulties with enforcement of confidentiality terms in practice against individual complainants/victim survivors.

3.5. What is "standard practice"?

NDAs and confidentiality terms in settlement agreements come in all shapes and sizes, as reflected in our use of the term Varied NDAs. Practitioners often spoke to their experience advising on and using NDAs as 'standard practice' implying a cohesive approach in the profession. However, what we learned is that there are many approaches. For example, some lawyers say the standard practice is a Strict NDA ;[137] others provide that family are exempt from the confidentiality obligations; some say that the standard is to require confidentiality over the terms of settlement only; and some say that confidentiality agreements are no longer permanent and end dates for release are now common.[138]

Our research showed that the approach to terms of sexual harassment agreements used by parties in settlement negotiations was not cohesive among Practitioners.

a. Standard practice – Strict NDA

We heard from many Applicant Lawyers who struggle to obtain any sort of exemption or carve-outs for confidentiality, even for victim survivors to speak to their family or doctors about their experience. Applicant Lawyer 10 told of their most recent settlement negotiations in November 2023 in the AHRC where the respondent in the other side "offered a very low amount of money with a very strict NDA". Another lawyer shared insights in the survey on the challenges in including minor exemptions or carve-outs to confidentiality:

> *At present, NDAs are treated as standard by respondent representatives and my attempts in practice to push back on their use (even in a moderated way – such as a time limited NDA, or an exclusion to permit the applicant to discuss their experiences with close friends) have faced very heavy resistance.*

This is shared by another Applicant Lawyer in the survey who wrote, "at the moment, most respondents think that the standard is full confidentiality". Applicant Lawyer 2 said in interview:

137 See above for definition.
138 Interview 3, Applicant Lawyer.

I think, from my experience, it feels like an uphill battle when we're talking about confidentiality because it often is an education piece that you're doing during the conciliation or doing or during negotiations…if you propose a non-standard clause which is anything but broad confidentiality there's such a lot of pushback from the respondents that it just it feels like you both have to advocate for your client and also educate the respondent simultaneously, which does make conciliations feel a lot harder.

We also heard an Applicant Lawyer's challenges in securing express carve-outs to confidentiality terms for clients to make a statutory claim to receive compensation as a victim of crime. This is a remedy sought under a state redress scheme, not an individual perpetrator. This Applicant Lawyer wrote in the survey, "I have also tried (with varying degrees of success) to obtain broader exemptions to confidentiality to allow an applicant to bring a Victims of Crime compensation claim under state legislation". For clarity, this lawyer is speaking about sexual harassment incident(s) which meet the threshold of a criminal act. This comment shows how deeply Strict NDAs are entrenched and how tightly their use is controlled during negotiations. While it is likely that any term which acts to prevent a victim survivor from making a victims of crime claim is void for public policy grounds (see Chapter 4), having negotiations which display the respondent's intent is intimidating and causes the victim survivor to comply regardless.

b. Standard practice – family/support person carve-outs

NDAs may contain exceptions that enable applicants to disclose certain information to a list of agreed people and organisations. We would refer to this as a Varied NDA. Many lawyers spoke to this being the 'standard term' for NDA use.

A Respondent Lawyer provided the following insight: [139]

As we all know, the matters that go right ordinarily involve a deed (which includes a confidentiality and non-disparagement clause) that expressly permits one or both parties to discuss the matter with individuals who are expressly named in the deed, such as parents, siblings, spouses/partner, counsellor (plus legal/financial/tax advisers). Each of the named individuals is ordinarily required to sign a confidentiality and non-disparagement undertaking in respect of the matter (other than the professionals with other obligations already binding them). The parties obtain legal advice on these matters. It is a part of the agreed outcome negotiated between the parties. This is standard.

139 Email from Respondent Barrister to Regina Featherstone who was unable to meet during the designated qualitative interview times, 12 December 2023, [6].

Applicant Lawyer 4 said:

> *My experience is that the NDA with a carve-out for talking to one's medical practitioners and family is now the standard. I don't really get much push back against carve-outs like that. Sometimes they're already in the standard or in the proposed deed in the first place.*[140]

Respondent Lawyer 2, echoed these experiences by telling us that the standard terms have changed through a natural evolution:

> *The standard term that I would use in my practice and that my colleagues would use, as a matter of course, carves out immediate family. And is viewed to be pretty uncontroversial and the other thing that is increasingly carved out and this is something in my own practices I would always carve-out medical practitioners and counsellors and psychological support.*[141]

The list of agreed people and organisations can be quite long, as reported by Applicant Lawyer 9:

> *Our standard deeds have carve-outs so you can talk to the tax office; you can talk to a legal advisor or a the financial advisor; you can talk to Centrelink if you need to... And we also have carve-outs for them to talk to a designated support person. I suspect people probably do that anyway – we just formalise that so that they can speak to somebody in recognition of the fact that this is a really emotional thing and it has an impact on them and they need to be able to talk to people about it. So that's usually not an issue.*

While these exceptions or Varied NDAs are standard for some, they are not universal. For several Applicant Lawyers, their standard practice is to request these carve-outs in negotiation.[142]

c. Standard practice – confidentiality around terms

Others understood 'standard terms' as being confidentiality around settlement and compensation terms. Applicant Lawyer 1 told us that while she could recall having two Strict NDAs in workplace sexual harassment matters, she has settled approximately twenty matters in the last two years with 'less strict' confidentiality and non-disparagement clauses. She described the agreements as being:

140 Interview 4, Applicant Lawyer acts for both applicants and respondents.

141 Interview 2, Respondent Lawyer.

142 In interview, Applicant Lawyer 8 said they will "push" for their client to speak with family or a psychologist. In a survey response, an applicant participant said "what I often seek is that a carve-out be included to allow an applicant to disclose the details of the matter to a designated family member or support person on the understanding that they will keep the matter confidential". Another wrote "We ALWAYS press to carve-out for therapeutic care and talking to close family".

that the terms of the actual settlement and the date, so what compensation they're getting, what other non-financials they're getting will be kept confidential but otherwise there's no confidentiality obligation. That's the most common settlement approach that we take.[143]

A Respondent Lawyer echoed this sentiment in the survey, "the current practice is to require confidentiality over the terms of the settlement only". While not referencing to this as 'standard', several Respondent Lawyers in the survey confirmed experiences settling matters with non-exhaustive NDAs where confidentiality related only to settlement amount or settlement terms (or sometimes some combination of both) but no broader confidentiality obligations.

Speaking to the difficulties of achieving this settlement type, an applicant survey participant wrote "We generally confine confidentiality terms to the ''terms of the deed'' and avoid applying it to the subject matter leading up to the agreement of possible. This is being more commonly accepted, but still a battle EVERY TIME" (sic).

3.6. Negotiations

Strict NDAs being treated as 'standard' shuts down reaching mutual understanding of issues

Applicant lawyers indicated that assuming a Strict NDA can stifle negotiations. Applicant Lawyer 1 indicated that when they suggest alternatives to Strict NDAs, respondent lawyers will say "that's just a default term" and that this is a closed answer. They went on to say that in a mediation context, it is helpful for both parties to understand how the other values the claim in order to meet in the middle. This understanding informs thinking around compromise and advice provision if Applicant Lawyers' know why a respondent wants confidentiality.

Applicant Lawyer 1 described negotiations about 'default terms' as a "wall rather than an invitation to discuss further"[144]

Paying for confidentiality

Treating Strict NDAs as the default NDA term has consequences for how lawyers value confidentiality and approach settlement negotiations. We learned that despite out-of-court settlements being a negotiation, where two parties must bargain and compromise, confidentiality is underutilised as a bargaining chip.

143 Interview 1, Applicant Lawyer.
144 Interview 1, Applicant Lawyer.

When advised by the other side that an NDA in some form is non-negotiable for settlement, about half of Applicant Lawyers say they have subsequently asked for a higher settlement amount.[145] Our research shows this request is important: as those who ask for a higher settlement amount because confidentiality is a non-negotiable are **more likely than not** to secure a higher figure for their client.[146]

This data speaks to the significant impact of individual lawyer advocacy. By assuming an active role and treating the process as a negotiation where a client's confidentiality is something to be bargained over, Applicant Lawyers can be effective agents in empowering their clients and securing higher settlement figures.

Some lawyers are firm in their opinion that confidentiality equals a higher settlement amount. Applicant Lawyer 7 recounted:

> *One case I've settled, I could have got her $25,000, no NDA, a million dollars with an NDA. Oh, absolutely, that's what they're buying. There's no doubt about that. There's always an extra naught in it before the comma if there's going to be confidentiality.* [147]

We posed this question to Respondent Lawyers in the survey, asking, "while in negotiations to resolve a sexual harassment complaint, have you agreed to pay the applicant a higher damages settlement figure for including an NDA?" and nearly two thirds said no.[148] That means close to one third of Respondent Lawyers had experiences where their client agreed to a higher settlement amount in exchange for confidentiality because the NDA was referenced as a benefit.

As above, the data reveals that only half of Applicant Lawyers negotiate for higher settlement figures when NDAs are a 'non-negotiable' for the other side. This means confidentiality is **not being paid for** in every matter, **nor is it being advocated** for in every matter. It is possible that Strict NDAs are so entrenched as settlement terms in this area that even Applicant Lawyers do not uniformly consider their worth or value as a benefit being conferred on the other party.

There is sentiment among Practitioners that treating confidentiality in this way is unethical. Applicant Lawyer 6 said they had never asked for higher settlement sums in exchange for the inclusion of an NDA:

> *That's not a bargaining chip I have ever put forward. To be quite frank that seems a little bit underhanded. I'm not sure I would ever engage in that unless I had very clear instructions to do so.*

145 50.82%

146 60% of applicant solicitors who asked for higher damages settlement were successful.

147 Interview 7, Applicant Lawyer– acts for both applicants and respondents.

148 65.5%.

As close to one-third of Applicant Lawyers are not providing advice to their clients on whether settlements can be resolved without NDAs, it means many clients are not given an opportunity to instruct to ask for a higher settlement amount in exchange for an NDA. By advising on the options around NDA use and helping clients to value confidentiality, Applicant Lawyers can play a vital role in assisting clients to become active and empowered in their matter, rather than passive participants.

Negotiation tactics

Our research led us to understand a stark difference in negotiation tactics between Applicant Lawyers and Respondent Lawyers. While the above paragraph highlights the underutilisation of confidentiality as a bargaining chip by Applicant Lawyers, we heard of a range of negotiation tactics used by respondent lawyers. Applicant Lawyer 9 describes the other side as often treating it like a game.[149]

Applicant lawyers interviewed outlined a suite of respondent tactics commonly used to decrease settlement sums or eliminate them entirely. Applicant Lawyer 5 explained:

> *Oh hardly any [of the threats are specific to the sexual harassment claim]. I think what it is, is that as soon as you make an allegation of a sexual harassment it's never just about the sexual harassment, the whole history of employment gets pulled into it.*[150]

This raising of ancillary employment issues was discussed by other lawyers. Applicant Lawyer 5 spoke of respondents bringing varied claims against applicants in response to sexual harassment claims, including breaches of the employment contract such as restraint of trade or mismanagement of invoices.

Many of the Applicant Lawyers interviewed[151] indicated that respondent lawyers are increasingly sending applicants threats of defamation after receiving sexual harassment complaints,[152] even if the complaints have been received internally with HR. Another tactic reported was to introduce a `claw back` or liquidated damages indemnity clause, where an applicant is obligated to repay the respondent a specified amount or the entire settlement sum for any form of breach of the deed of settlement.[153] Applicant Lawyer 10 said that respondents failed to raise these in conciliation and then included these in proposed agreements.

149 Interview 9, Applicant Lawyer.
150 Interview 5, Applicant Lawyer.
151 Interviews 1, 2, 4, 5, and 10, Applicant Lawyers.
152 Interview 1, Applicant Lawyer.
153 Interview 10, Applicant Lawyer.

Applicant Lawyer 3 indicated that some respondent lawyers would employ "really small petty things like sending a deed in a PDF form" to discourage applicant changes to the agreement.[154]

Lengthened negotiations and impacts on clients

Another impact of Strict NDAs remaining the standard resolution tool, is that victim survivors can be further traumatised by the negotiation process. Challenging terms can lengthen negotiations and negatively impact applicants. Both Applicant Lawyer 3 and 5 said that it could take months to whittle down a Strict NDA to a Varied NDA.

Applicant Lawyer 1 said:

> *It makes our clients, who are already traumatised, either doubt themselves or become more entrenched in their positions. Both our clients and us as their representatives, tend to spend a lot of time going back and forth just to get what should be a common sense outcome*[155].

This additional fight has a cost: Applicant Lawyer 5 indicated "the issue I have though is a lot of my clients, they're very disadvantaged and they've only got so much fight in them sometimes, so we'll go in there asking for no non-disparagement or no confidentiality clause but really that's one of the first things that they're happy to negotiate on".[156]

Education: inexperience

Several Applicant Lawyers[157] spoke about their frustrations dealing with respondent lawyers may be experienced in other areas but without sufficient exposure or background in the specialist area of sexual harassment practice. Respondent Lawyer 1 said:

> *I actually think part of the challenge [with comprehensively advising clients about NDAs] is often respondent lawyers aren't practising in the areas of sexual harassment or discrimination all the time.*

This inexperience presents in different ways, from reluctance to draft clauses or agreements from scratch to misunderstanding legal aspects of sexual harassment claims.

154 Interview 3, Applicant Lawyer.
155 Interview 1, Applicant Lawyer.
156 Interview 5, Applicant Lawyer.
157 Interviews 1, 2, 5, Applicant Lawyers; Interview 1, Respondent Lawyer 1.

Both Applicant and Respondent Lawyers[158] indicated that inexperience can present as a reluctance for both lawyers on both sides to draft novel content in settlement agreements, meaning that lawyers rely inflexibly on 'standard' template terms.

Applicant Lawyer 9 speculated that respondent lawyers like to control the settlement process and want to avoid being tricked into agreeing to unfavourable terms in settlement agreements drafted by applicant lawyers. This lawyer told us that sometimes corporate employers had policies about implementing Strict NDAs as a firm-wide approach.

Applicant Lawyer 5 commented:

> *Yeah, I think that's really where we're going to see the change, when people stop just using copy, like stop copying and pasting from previous agreements and actually start thinking critically about each term in the agreement, whether or not it should be there or if it should be there, what it actually looks like.*

Applicant Lawyers 1 and 2 both said they were the first people to have raised the possibility of not including a Strict NDA with particular respondent lawyers, and that this could catch the lawyer off-guard, embarrass them and make them more defensive.[159] Applicant Lawyer 1 provided the example where a respondent lawyer told her that it was not possible to claim general damages for hurt, humiliation and distress in workplace sexual harassment matters and the educative role she had to play by sending him one of the most recent cases to help him educate himself because he "just didn't know"[160].

Current attitudes to sexual harassment

Applicant Lawyers commented that the way most practitioners consider confidentiality has changed significantly with time.[161] Applicant Lawyer 1 said that unfortunately, some negotiations in sexual harassment matters are still impacted by outdated victim-blaming attitudes to gendered violence. They speculated that these views may no longer be overt but still impact an employer's approach to the claim, especially for unrepresented small employers.

Respondent Lawyer 1 told us:

> *I think the cultural change that Respect@Work was hoping to drive hasn't happened yet. So instead of seeing sexual harassment complaints as an opportunity to fix a problem that obviously exists in your workplace, I think there's still a view amongst*

158 Interviews 3 and 9, Applicant Lawyers; Interview 1, Respondent Lawyer 1.
159 Interview 1, Applicant Lawyer.
160 Interview 1, Applicant Lawyer.
161 Interview 1, Applicant Lawyer.

a lot of respondents that those claims are from one or two bad apples and we just need to settle them and cover them up rather than actually recognise that, okay, we've got some fundamental problem here that we actually should address because if we've got one complaint, we've probably got others that we don't know about and we'd want to know about them and we want to fix the behaviour. [162]

Another lawyer spoke to current attitudes towards settlement practices saying "Sometimes [negotiations don't] get anywhere at all, dead in the water before it starts, really. I don't think, there's even been much of a shift in the culture or the climate".[163] Applicant Lawyer 5 shared their perspective, "a lot of the time you're trying to, you know, rewire somebody's thinking and pull apart decades of practice where they think this is just 'standard'."

Respondent Lawyer 1 spoke about how slow progress affects victim survivors:

We haven't quite got to a point yet where it is okay to talk about being sexually harassed and not worry that there will be some blowback or a perception that somehow you couldn't handle it. I think there's still that desire from some applicants to still want confidentiality to protect them in their career.

Other lawyers identify the start of a cultural shift towards sexual harassment in the workplace. Applicant Lawyer 5 told us of some "brilliant respondents" who consider the guidance from the Respect@Work Report:

I think the major change that we've had is when you have conciliators or commissioners on board that don't see NDAs as these broad strict NDAs...as just a given. It makes the process a lot a lot easier and I think when you go into these negotiations, and you see no terms as a given and you're having the backing from the jurisdiction to say that... it's really opened up the possibilities.

NDA benefits

Applicant Lawyers told us that sometimes they will want NDAs for their clients, both Strict and Varied NDAs. Applicant Lawyer 7 sums it up well by saying "not all NDAs are bad".[164]

The advantage of NDAs is seen by Applicant Lawyer 2's experience with culturally and linguistically diverse victim survivors:

I've heard from many of my clients that they just feel like they're being gagged or silenced and that's not something that they want. That is for most of my clients, however, there is a subset of my clients who are culturally and linguistically diverse

162 Interview 1, Respondent Lawyer.

163 Interview 7, Applicant Lawyer.

164 Interview 7, Applicant Lawyer – acts for both applicants and respondents.

and they desperately want full confidentiality and ...I have never asked why that is, but my assumption...is that it's taboo to talk about in their cultures and they don't want to, and they want to leave everything at the conciliation and not talk about it further.

Applicant Lawyer 4 told us:

We like having no disparagement protecting our client. Particularly because... often things go a bit sour at the end of an employment situation and then they want to go out and get a new job. So it's quite helpful for people not to be able to talk about them in a negative way because it prevents them from interfering with their opportunity to get another job.[165]

Conversely, many applicants struggle to accept NDAs due to a perceived injustice[166]. When respondents insist on an NDA, Applicant Lawyer 9 indicated:

It can be really challenging trying to explain those things to ...women who feel as though they have been either sexually discriminated against or sexually harassed. They feel a broader responsibility, to other people in the workforce generally and in that workplace and so often they feel a bit more like, 'well, I want to prevent this from happening to other people and I'm just being silenced.'

Several Applicant Lawyers[167] told us that a compelling reason to accept an NDA was to facilitate speedy resolution of a sexual harassment claim. In order to preserve their mental health, applicants often accepted an NDA and settled a matter to avoid the stress of a hearing, being a witness and delayed outcome.

Both Applicant and Respondent Lawyers[168] said in interview that businesses asked for NDAs to manage reputational risk and/or protect information. A central concern for respondent lawyers is to make sure that information, especially information about unconfirmed allegations of sexual harassment, will not be misused.[169] Respondent Lawyer 2 said this was their main concern and they need to prevent against "communications, email, chats, social media and other communications which are harmful to everyone who's involved." They said that "there will be concerns that without a confidentiality agreement which gives reassurance to both sides that everyone's actually just going to walk away and stop throwing grenades at each other, and that the harm to both sides will not continue."

165 Interview 9, Applicant Lawyer.
166 Interviews 4, Applicant Lawyer.
167 Interviews 4, 7 and 8, Applicant Lawyers.
168 Interviews 1, 2, 3, 4, 5, 6, 7,8, 9,10 Applicant Lawyers, Interviews 1 and 2, Respondent Lawyers.
169 Interviews 6, Applicant Lawyers - acts for both applicants and respondents.

Respondent Lawyer 2 spoke to both protecting the business and protecting the applicant:

> *In some of those cases the immediate confidentiality is all more important because what we're trying to do is to bring quiet to what is often made a very noisy situation which has actually been harmful to the applicant and in a lot of cases we're emphasising confidentiality for the protection of the applicant and their psychological well-being.*

Applicant Lawyer 7 who told us in interview they act for both applicants and respondents[170] indicated that respondents want to maintain confidentiality because of "a continuing denial by the harasser or his desperate desire, in short form, that the wife doesn't find out".

Respondent Lawyers also recognised the benefits of early settlement subject to an NDA to get closure. Respondent Lawyer 2 told us that "one of the key motivators in trying to settle claims is that there gets to be a little bit of peace. A little bit of distance, everyone can move on with their lives."

Do Respondent Lawyers think NDAs are good and Applicant Lawyers think NDAs are bad?

No. There is a strong antipathy to Strict NDAs by many Practitioners but there was broader support for what we call Varied NDAs that cater to the needs of victim survivors.

There is a general feeling among Applicant Lawyers that sexual harassment settlement practice has evolved beyond Strict NDAs and their application is concerning and problematic.[171] Applicant Lawyers still wanted to request confidentiality but on their own varied terms. We were told by Applicant Lawyer 8 that without NDAs, there will be no settlement. The issue present is the type of NDA and who sets its terms. As our research has indicated, there are many Practitioners who achieve settlements[172] with Varied NDAs.

Equally, it was clear that not all Respondent Lawyers are minded to seek stringent NDAs for clients. Many Respondent Lawyers shared their personal values around trauma-informed advocacy, transparency and giving voice to peoples' experiences which informs their legal advice.[173] One Respondent Lawyer wrote in our survey "in principle, I object to these matters being hid[den] from the healthy gaze of the

170 Interview 7, Applicant Lawyer – acts for both applicants and respondents.
171 Examples include interviews 1, 2, 3, Applicant Lawyers.
172 Applicant Lawyer 8.
173 Respondent survey response to question 6.

public – because so much is going on that is hidden and therefore ignored"[174].

The Respondent Lawyers interviewed wanted to maintain confidentiality for their clients but the way they did this varied significantly. Lawyer 6 who acts for both applicants and respondents had only used strict-NDAs,[175] while Respondent Lawyer 2 frequently sought NDAs with non-traditional terms, or what we have called Varied NDAs. This lawyer spoke about the continuous evolution of the obligations, such as time-capping providing future release to confidentiality after 1-2 years.[176] Respondent Lawyer 2 of the value of NDAs for applicants and respondents alike, and again used time-limited NDAs.[177]

4. Interrogating the NDA

NDAs place legally binding obligations on parties who agree to their terms. All parties have an obligation to negotiate any settlement in good faith and only agree to terms they intend to be bound by. In this sense, the legitimacy of these clauses is critical as they may be the key to reaching an out-of-court settlement. Employers and individual respondents alike may agree to a financial settlement only if they can be guaranteed that the person alleging sexual harassment will keep the terms of the settlement confidential.[178]

4.1. Enforceability

In an academic context, we may understand that our obligations at law are premised on the enforceability of that obligation.[179] However, for a client victim survivor who agrees to a term in a contract, regardless of its legality or enforceability, is likely to act in accordance with its terms. This is suggested in the Respect@Work Report, where, despite the AHRC having companies provide a limited waiver of obligations, very few victim survivors came forward.[180] While confidentiality provisions in commercial settlements are certainly enforceable, are confidentiality clauses in sexual harassment settlements in 2024 enforceable in Australia?

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174 Respondent survey response to question 6.

175 Interview 6, Applicant Lawyer – acts for both applicants and respondents.

176 Interview 2, Respondent Lawyer.

177 Interview 2, Respondent Lawyer.

178 This is also known as the 'expectation interest'.

179 G E Dal Pont, Law of Confidentiality (LexisNexis, 2nd ed, 2020) ('Dal Pont, Law of Confidentiality') 259; see also Lord Wright's comments in Fender v St. John-Mildmay [1937] UKHL J06218-1, [40] – [41] that courts "should use extreme reserve in holding such a contract to be void as against public policy, and only do so when the contract is incontestably and on any view inimical to the public interest" as referenced in A v Hayden (1984) 156 CLR 532 ('A v Hayden') [20].

180 Respect@Work (n 2) 32.

Breach of settlement terms

Settlement agreements are contracts governed by common law. The primary remedy for a breach of contract is damages.[181] While this is more straight forward for commercial disputes which result in economic loss, it is difficult to determine what damages would be suitable for a breach of confidentiality in a sexual harassment settlement. What has the complying contracting party lost when a confidentiality term has been breached?[182] A Respondent Lawyer explained that this is why they advise their clients that NDAs optional, saying "practically, there is often little enforcement of confidentiality provisions to cover the events at issue in any event and, increasingly, employers, industry associations and HR practitioners recognise that there is little utility in blanket confidentiality obligations." [183]

At interview, Respondent Lawyer 2 explained that she would write to the other side and ask for them to stop the breach of confidentiality but unless there has been actual loss, there's no merit in commencing legal proceedings to seek the enforcement.[184] She said:

> *Because of the need to...point to loss and damage, I can't think of a single circumstance in which - and I'm not just talking about my own practices - I can't think of any cases in which a respondent has sued an applicant for a breach of a deed in respect of confidentiality, particularly in a claim such as this because it is so difficult to be able to point to what the loss is.*[185]

Claims for a breach of confidentiality may also be pursued in equity, including seeking an injunction or equitable compensation.[186] To that end, the UK Court of Appeal has provided guidance on the validity of NDA terms. In 2018 Topshop owner Sir Philip Green was successful in securing an interim injunction against the Daily Telegraph who wished to publish a #MeToo story which contained information subject to an NDA.[187] The UK Court of Appeal said that where NDAs are not procured via unethical vices like bullying, harassment or undue pressure, there is an important public interest in the observance of duties of confidence'[188]. While this is a matter

181 Katy Barnett and Sirko Harder, Remedies in Australian Private Law (Cambridge University Press, 2014) (`Barnett and Harder, Remedies in Australian Private Law') 101. `Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed' Robinson v Harman (1848) 1 Ex 850; 855; 154 ER 363, 365. Loss can be broken down into expectation loss (loss of profit relating to the breach) and reliance loss arising from the reliance the defendant would perform the obligations. Barnett and Harder, Remedies in Australian Private Law (n 180) 101 and 112.

182 Loss can be broken down into expectation loss (loss of profit relating to the breach) and reliance loss arising from the reliance the defendant would perform the obligations. Barnett and Harder, Remedies in Australian Private Law (n 181) 101 and 112.

183 Respondent Survey response to question 6.

184 Interview with Respondent Lawyer 2.

185 Interview with Respondent Lawyer 2.

186 Dal Pont, Law of Confidentiality (n 179) 258.

187 Robinson and Yoshida, How Many More Women (n 66) 231.

188 ABC and ors v Telegraph Media Group Ltd [2018] EWCA Civ 2329 at [21], [43] and [47].

which involves UK law and the public interest (and not a breach of contract case against an alleged victim survivor), it provides guidance on the significance on the validity of NDA terms. It also points to the significance of adequate legal advice and the impact that has on the validity of NDA terms.

Public Policy

To determine a breach, a court would be required to determine whether the terms of the contract are valid. Terms can be void for a number of reasons,[189] including if the terms are against public policy.[190] Courts are reluctant to interfere with parties' right to freedom to contract[191] and so the threshold is significant. For example, it would be against public policy to prevent the reporting of a serious criminal offence[192]. It is also a criminal offence to prevent the reporting of a serious indictable offence and some sexual harassment meets the threshold of a crime when amounting to assault.[193] Other policy considerations include how something may benefit the "public good[194]" and the public interest in pursuing the administration of justice, in particular the enforcement of the criminal law.[195] However, it has not always been the case that public policy related only to criminal laws. Marriage separation deeds and de facto contracts were once considered unenforceable as against public policy.[196]

If a term is against public policy, it is void and therefore unenforceable. The Respect@Work Report explicitly flags that some NDA clauses may be contrary to public policy.[197] It goes beyond the scope of this report to conclude whether confidentiality terms in sexual harassment settlements would be enforceable at law or equity. However, there may be scope for courts to consider terms being void on public policy grounds if the terms do not meet the requirements of human rights legislation[198] in light of the new Positive Duty. This is reminded in the Victorian Legal Services Board+ Commissioner's note on NDA as discussed below.

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189 Undue influence, duress, unconscionable conducted are explored further in Madeleine Causbrook, 'The Road to Reform: Lessons from International Jurisdictions for Legislative Regulation of Non-Disclosure Agreements in Workplace Sexual Harassment Matters in Australia' (2023) 36(1) Australian Journal of Labour Law 30, 34.

190 A v Hayden (n 179) 11.

191 Vasundhara Prasad, 'If Anyone Is Listening, #MeToo: Breaking the Culture of Silence around Sexual Abuse through Regulating Non-disclosure Agreements and Secret Settlements' (2018) 59(7) Boston College Law Review 2507 (Prasad, 'If Anyone is Listening'), 2513.

192 Wood v Secretary of the Department of Transport (on behalf of the Government of New South Wales) [2021] NSWSC 1248.

193 Crimes Act 1900 (NSW) s 316(1) – this offence is present across other state and territories in Australia.

194 Collins v Blantern (1765) 2 Wils. KB 341; 95 ER 847, 350.

195 A v Hayden (n 179) 10 – enforcement of criminal law is critical in the administration of justice.

196 Macauley, Angus, 'Contracts Against Public Policy: Contracts for Meretricious Sexual Services' (2018) 40(4) Sydney Law Review 527.

197 Respect@Work (n 2) 564.

198 Richard Stone and James Devenney, The Modern Law of Contract (Taylor & Francis Group, 2013) 405.

Practicalities of pursuing a breach of an NDA

The realities of enforcing confidentiality terms are expressed by a respondent lawyer in our survey saying "practically, there is often little enforcement of confidentiality provisions to cover the events at issue"[199]. In considering this point, we were unable to find any Australian case law on claims of breach of deed or confidence relating to sexual harassment settlements. Similarly, the Continuing Legal Education Society of British Columbia (Canada) writes that the enforceability of NDAs in sexual harassment has not been tested in Canadian jurisprudence.[200]

The fear of breaching an NDA is real, regardless of whether the respondent would pursue remedies for a breach. A letter alleging breach of confidentiality is likely to cause significant distress and potential re-traumatisation. It is not the fear of enforcement that modulates applicant behaviour, but just the inclusion of the NDA itself.

The Positive Duty, and current employers' work health and safety obligations, raise questions as to how a court will interpret confidentiality terms if breached. It may be that the courts will follow the notion that when victim survivors are allowed to speak out, harm may be prevented by warning other individuals of the circumstances.[201] For example, how would a court consider enforcing confidentiality terms of a settlement document where the allegations of sexual harassment are serious and where the perpetrator has been able to stay in employment (potentially causing harm to other people)? [202]

199 Respondent Solicitor Survey, 2023.

200 Dalya Israel et al. Challenging Non-Disclosure Agreements (NDAs) and the Harm they Cause: Paving the Way for more Trauma-Informed Approaches (The Continuing Legal Education Society of British Columbia, November 2022), 15 < https://online.cle.bc.ca/CoursesOnDemand/ContentByContributor?contributorId=36262> citing Brandon Kain and Douglas T. Yoshida, 'The Doctrine of Public Policy in Canadian Contract Law' in Todd L. Archibald and Randall Scott Echlin (eds), Annual Review of Civil Litigation (Toronto, Thomson Carswell, 2007) 1, 18-28.

201 Prasad, 'If Anyone Is Listening' (n 191) 2509.

202 While in the context of the US on the issue of freedom of speech and freedom to contract, Jeffrey Steven Gordon says that "in the wake of the NDA crisis, courts should actually weigh competing interests rather than merely cite that freedom of contract trumps free speech" in Jeffrey Steven Gordon, 'Silence for Sale' (2020) 71(4) Alabama Law Review 1109, 1184.

4.2. Can a victim survivor actually agree to confidentiality?

a. Workers' compensation

It is unlawful to contract out of workers' compensation liabilities via a deed of settlement.[203] A standard term in a deed of release/settlement will typically contain reference to the fact that the complainant is able to make a workers' compensation claim.

This carve-out exposes a limitation to confidentiality. A respondent survey participant who commented that there are "difficulties in carving out confidentiality for workers' comp claims". Practically, a complainant is not able to maintain strict confidentiality relating to the allegations of sexual harassment, if they also pursue their right to workers' compensation for a psychiatric injury, for example, which involves multiple disclosures of the incident(s). These disclosures may be made to doctors and psychiatrists and will likely involve communicating with friends and loved ones about the workers' compensation process, which in turn may reveal aspects of the incident(s) of sexual harassment. With sexual harassment increasingly being seen as a psychological health hazard, these intersections are becoming more material.[204]

Further, it can be difficult for complainants to ascertain where one part of a legal claim ends and another begins when it is centred around the same facts of alleged sexual harassment. This confusion presented in the case of Leach v Commonwealth of Australia where the complainant misunderstood a release for workers' compensation when settling an unfair dismissal complaint and incorrectly thought she was able to bring a separate sexual harassment complaint. [205]

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203 Workplace Injury Management and Workers Compensation Act 1998 (NSW) s 234.

204 Recommendations 35-37 of Respect@Work (n 2) look at greater training and awareness with sexual harassment being considered as a work, health and safety issue/worker's compensation issue. For example, under Victorian WHS law, two associated companies have been convicted and fined $290,000 following sexual harassment of multiple staff: WorkSafe, 'Hospital Cafe Boss Fined after Sexual Harassment' WorkSafe Victoria (Web Article, 27 October 2023) <https://www.worksafe.vic.gov.au/news/2023-10/hospital-cafe-boss-fined-after-sexual-harassment?utm_content=buffer4c50d&utm_medium=social&utm_source=linkedin.com&utm_campaign=buffer>.

205 Leach v Commonwealth of Australia [2021] FCA 158, 96.

b. Whistleblowing

The Human Rights Law Centre defines a whistleblower as "typically an employee, contractor or other worker who has access to information regarding wrongdoing, that is not otherwise known to the public, who discloses that information.... Typically, whistleblowing involves disclosing incidents where law or processes have been breached, which may include human rights abuses, fraud, corruption, maladministration, harassment, threats to health and safety or environmental wrongdoing."[206]

Incidents of workplace sexual harassment may be raised through the appropriate internal whistleblowing reporting channels. If the incident is not a personal work-related grievance but relates to "an improper state of affairs", it has been considered that there may be scope for ASIC-regulated entities to treat sexual harassment reports as protected disclosures.[207] Public Interest Disclosures for federally covered workers includes conduct which contravenes a law of the Commonwealth, state or territory and conduct which results in a danger to the health or safety of others.[208] In these instances, a disclosure of sexual harassment may be protected meaning a complainant cannot have any contractual remedies enforced against them for making the disclosure. [209]

206 Human Rights Law Centre, 'Are you a Whistleblower' (n.d.) <https://www.hrlc.org.au/whistleblower-project>.

207 Corporations Act 2001 (Cth) ('Corporations Act') s 1317AA(4); Clayton Utz identifies ASIC's guidance on this being `intentionally broad' when considering `an improper state of affairs' AICD, Sexual Harassment in the Workplace (n 101) 3.

208 Public Interest Disclosure Act 2013 (Cth) ('PIDA') s 29(c).

209 Ibid. s 10(1)(a);(b); Corporations Act (n 206) s 1317AB(1)(b). In the UK any terms or agreement which relate to preventing a worker from making a disclosure are void under s 43J of the Employment Rights Act 1996 (UK).

5. The other NDA: defamation concerns notices

5.1. Respect@Work Report and defamation

The Respect@Work Report identifies a key issue with NDA reform; our defamation laws discourage victim survivors from coming forward and making complaints.[210] High profile cases including those of Geoffrey Rush and Craig McLachlan have had a chilling effect on the #MeToo movement in Australia, warning victim survivors to stay silent, at the "same time".[211]

The tort of defamation is meant to shield a person if their reputation has been attacked or diminished via the publication of defamatory information. It considers the balance between reputation and free speech.[212] Dr David Rolph comments that this balance tilts in favour of reputation.[213] For a cause of action under Australian defamation law to occur, there must be:

1. Material published (this can be electronic, written, spoken to at least one other person etc); [214]
2. Identification of a plaintiff (directly or indirectly);
3. The material must be defamatory; [215] and
4. Serious harm to the plaintiff's reputation.[216]

If a victim survivor speaks to even one person and passes on information of a defamatory nature, such as a sexual harassment allegation, that constitutes publication of material.[217] There is a risk if a victim survivor speaks to a friend, partner or psychologist that they could be defaming someone.

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210 Respect@Work (n 2) 33.

211 Karen O'Connell, 'The #MeToo Movement in Australia' (n 63) 347.

212 David Rolph, Defamation Law (Thomson Reuters, 1st ed, 2016) (Rolph, Defamation Law) [2.20].

213 David Rolph, 'Splendid Isolation? Australia as a Destination for 'Libel Tourism' (2012) 19 Australian International Law Journal 79, 84.

214 The burden of proof rests with the plaintiff to prove the material has been published David Rolph, 'A Serious Harm Threshold for Australian Defamation Law' (2022) 51 Australian Bar Review 185. There is no difference at law between slander and libel Defamation Act 2005 (NSW) ('Defamation Act') s 7(1

215 Rolph, Defamation Law (n 212) [6.10].

216 Defamation Act (n 214) s 10A(1) introduced on 1 July 2021. Newman v Whittington [2022] NSWSC 249, [43] recently endorsed 'serious harm' threshold in Lachaux v Independent Print Ltd and another [2019] UKSC 27 that a plaintiff must prove that the harm caused by the defamatory publication was, or will, be serious. All jurisdictions but WA and NT have implemented the 'serious harm' threshold.

217 Sophie Dawson, 'Sexual Assault Complaints and Defamation Law Reform' (July/August 2023) 177 Precedent, 32.

Australia's defamation laws have also been described as a `sword'[218]. This is reflected in our research with multiple Applicant Lawyers providing insights on the rising trends of their clients receiving vexatious defamation concerns notices when sexual harassment is raised with the employer.[219] A concerns notice is a letter to the person who made the defamatory comments which informs them of the defamatory imputations and the harm which it has caused.[220] For clarity, these concerns notices are often being provided when victim survivors are still making internal employment complaints. Not one of the lawyers interviewed for this report spoke about a concerns notice being issued in the context of their clients making comment to media publications.

Applicant Lawyer 2 told us:

> *They issued a notice that they were going to bring proceedings for defamation. That was a particularly litigious, respondent lawyer...*
>
> *My client complained about sexual harassment just to the employer and they slapped her with a defamation notice...That was another tactic that they used to try and silence.*

Victim survivors are worried about being pursued for defamation if they make a complaint: the risks are real and significant.[221] The average award for non-economic loss for defamation is $239,856 (federally), four times higher than the average award for non-economic loss in sexual harassment.[222] Lydia (not her real name), a client of Victoria Legal Aid describes her experience: `I felt that the threat of defamation, on top of everything else, was enough to scare me out of proceeding with a complaint'[223].

A defamation concerns notice has become a new means of achieving silence. While not an NDA, responding to a concerns requires an Offer of Amends which is a written agreement to make amends to prevent the matter from proceeding to litigation. It can involve the promise to tell anyone who has received the information that it is defamatory, monetary compensation for the damage suffered, an apology and withdrawal of the imputations of concern. The threat of defamation proceedings may be enough to force victim survivors to provide a written Offer of Amends and agree to withdraw their complaints.[224]

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218 Amanda Mason, `Defamation law and the Me Too Movement in Australia' (2020) 23 Media and Arts Law Review 325, 337.

219 Interview Applicant Lawyers 1, 2, 4, 5 and 10.

220 Defamation Act (n 214) s 12A(1).

221 Examples where applicants in sexual harassment matters have been issued notice of concerns letters include: Orchard v Higgins [2020] (n 113); Wearne v Dib [2022] QIRC 454; Leach v Burston 87 (n 42).

222 Rolph, Defamation Law (n 212) [9.40]; Thornton, Pender and Castles, Damages and Costs in Sexual Harassment (n 41).

223 Victoria Legal Aid, `Our Submission on Defamation Law's Chilling Effect on Victims of Sexual Harassment' (21 June 2021) <https://www.legalaid.vic.gov.au/our-submission-defamation-laws-chilling-effect-victims-sexual-harassment>.

224 Defamation Act (n 214) s 15(1)(a).

Defamation concerns notices can have a chilling and silencing effect, ending complaints even before applications are filed at anti-discrimination bodies.

It may mean that victim survivors agree to silence in exchange for nothing but the withdrawal of the threat of further proceedings. Using the language of Robinson and Yoshida, how many more women have been silenced and will continue to be silenced by way of vexatious defamation concerns notices or threats?

Justice Connect is an organisation which helps people and community groups connect with free legal help. They have identified sexual assault/harassment and defamation as a concern and priority for their service:

> *Over time, a concerning trend has emerged where individuals expressing concerns, filing complaints, or discussing experiences of sexual harassment or assault have faced intimidation through threats of expensive defamation proceedings.*
>
> *Between 2018 and 2023, Justice Connect received 35 requests for assistance related to defamation issues. Of these, 6 requests were related to survivors of sexual harassment or assault seeking pro bono legal assistance. Examples of the legal advice sought included responding to a Concerns Notice for disclosing abuse within a family, representation in defamation proceedings after making a complaint about harassment or assault to a supervisory body, and advice on the risk of defamation proceedings before publicly discussing sexual abuse.*
>
> *Although Justice Connect is usually unable to assist with defamation proceedings, these types of matters are deemed to be in the public interest and Justice Connect sought to connect these individuals with pro bono legal advice and representation. Addressing this trend is a priority for Justice Connect and its referral partners and Justice Connect continues to look for ways to support this cohort of individuals. For example, in addition to our referral work in this area, Justice Connect is working with referrals partners to develop self-help resources for individuals regarding the risks of defamation when reporting sexual harassment.* [225]

225 Email from Justice Connect to Regina Featherstone and Sharmilla Bargon, 26 January 2024.

Defamation Defences

There may be defences available to the victim survivor (who becomes the defendant in these circumstances) but they are only available after proceedings have been initiated.[226] Defending proceedings are costly and stressful. Regardless of the merit of the claim, being served with a concerns notice or a letter of demand can be extremely impactful to anyone, let alone a person who has experienced a traumatic incident. It is likely that few matters would progress to the stage of defence, as the victim survivor would abandon any pursuit of the sexual harassment claim.

The following outlines the most relevant defences to proceedings filed against individuals for publishing incidents of workplace sexual harassment:

Qualified privilege

The defence of qualified privilege may apply if the recipient had an interest in receiving the information.[227] Initially, this defence related to protecting free speech[228], but it also can apply to allegations of unlawful conduct in the workplace reported to a manager or HR.[229] So in circumstances as described by our applicant lawyers, victim survivors could defend defamation proceedings under qualified privilege. This would be on the basis they reported the allegation to their workplace, who have an obvious interest under both a work health and safety perspective and anti-discrimination laws in receiving this information. As long as the disclosure was not made maliciously, then the defence may apply in the context of workplace sexual harassment.

Solicitors sending these concerns notices would know that this defence applies but are complicit in this standover tactic by sending the notice anyway. While solicitors must act on client instructions, their paramount duty is to the court and the administration of justice.[230] This should inform their advice and action when issuing concerns notices.

Truth defence

The truth defence requires the victim survivor to prove that the imputations are substantially true.[231] This is challenging to do when sexual harassment often occurs without witnesses.

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226 Justification, contextual truth, absolute privilege, publication of public documents, fair report of proceedings of public concern, public interest, qualified privilege, scientific or academic peer review, honest opinion and Innocent dissemination. Defamation Act (n 214) ss 25–32.

227 Ibid. s 30(1)(a).

228 David Rolph, 'Freedom of Speech and Defamation Law' (2022) 96 Australian Law Journal 761, 768.

229 Dillon v Cush [2010] NSWCA 165.

230 Solicitors' Conduct Rules (n 132) r 3.1.

231 Defamation Act (n 214) s 26(1)(a).

Absolute privilege

Absolute privilege is a complete immunity from a defamation claim, meaning there can be no action for defamation.[232] Currently, it does not apply to publications of sexual harassment disclosures in the workplace.

Reform on this issue

In October 2022, the Victorian Government, in its Review of the Model Defamation Provisions Stage 2 Part B – Policy Option (Consultation Paper) sought feedback on whether the defence of absolute privilege should be extended to disclosures of sexual assault to police and sexual harassment to employers and other bodies.[233] The Consultation Paper recognises that defamation risks have a 'chilling effect' on victim survivors coming forward[234] and that a potential avenue to remedy this is by offering a more complete defence. However, recommendation 4 of the Consultation Paper states there is no clear support for extending absolute privilege to reports to employers.[235]

However, there is an alternative. Public interest sexual harassment complaints made via whistleblowing mechanisms will receive qualified privilege over the disclosure under the *Corporations Act 2001* (Cth)[236] and absolute privilege under the *Public Interest Disclosure Act 2013* (Cth).[237]

The Consultation Paper suggests that a more appropriate measure for reform is the implementation of the recommendations in the Respect@Work Report.[238] This sits somewhat unhelpfully next to the Respect@Work recommendation that defamation laws should be amended to assist these issues around underreporting and NDA reform.[239] Currently, at the time of publication, there has been no reform on this point.

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232 DDepartment of Justice and Community Safety (Victoria), Review of the Model Defamation Provisions:Stage 2 Part B – Policy Options (Consultation Paper, August 2022) ('Consultation Paper') 1.

233 D Ibid.

234 Ibid. 10.

235 Ibid. 37-38

236 Corporations Act (n 207) s 1317AB(2)(a).

237 PIDA (n 208) s 10(2)(a).

238 Consultation Paper (n 232) 39, [3.6].

239 Respect@Work (n 2) 569.

Legislation against weaponised defamation suits

California has addressed the issue of weaponised defamation proceedings with a bill to prevent defamation claims as retaliatory conduct to sexual harassment complaints.[240] While there are already strong Strategic Lawsuits Against Public Participation laws in place to prevent weaponised defamation suits, this new bill will expressly prevent defamation claims for genuine sexual harassment disclosures by 'privileging' the communication and excluding it from the class of available defamation actions.[241]

Defamation and victimisation

In the absence of reform to prevent weaponised defamation action, one largely unexplored avenue may lie already in the SDA. The victimisation provisions under s 94(1) of the SDA make it unlawful for a person to commit an act of victimisation against another person by way of threatening or subjecting a person to detriment because a person has made an allegation another person has contravened Part II or Part IIA of the SDA.[242]

In *Leach v Burston*[243] , Halley J of the Federal Court held that Mr Burston sending Ms Leach a defamation concerns notice satisfied the basis of a victimisation claim in relation to her sexual harassment proceedings.[244] Halley J further noted that whether Mr Burston held a genuine intention to commence defamation proceedings against Ms Leach was likely to be a "significant factually contested issue"[245]. In a Tasmanian case, aggravated damages were awarded to the applicant on the basis that a concerns notice was sent after sexual harassment claims were made in the workplace, although service of the concerns notice was held not to be victimisation in the circumstances.[246] The authorities do not all go the same way: in a Queensland case, a claim for victimisation was not made out as the concerns notice "clearly states that the correspondence is not intended to affect the complaint"[247], despite the applicant giving evidence that she understood the purpose of the letter to be "an instant scare tactic".[248]

240 Privileged Communications: Incident of Sexual Assault, Harassment, or Discrimination, AB 933, 118th Congress (2023) ('AB 933').

241 AB 933.

242 SDA (n 4) s 94(1); s 94(2)(g);(h).

243 Leach v Burston 87 (n 42).

244 Ibid. 216; Mr Burston filed an interlocutory strike out application relating to Ms Leach's sexual harassment proceedings in an attempt to either dismiss or have aspects of Ms Leach's claim struck out, including the claim that Mr Burston committed an act of victimisation by sending a defamation concerns notice.

245 Ibid. at 217; The sexual harassment proceedings were discontinued in April 2022 and so no finding was made on this point.

246 Orchard v Higgins [2020] (n 113) 323.

247 Wearne v Dib [2022] QIRC 454, [184].

248 Ibid. 112.

This area remains largely untested and is by no means easily solved. Litigation is stressful and complex. Potential defences or pleading legal mechanisms like a victimisation provisions are meaningless if an individual has no means, limited access to legal representation and is unable to raise allegations in the first place. It is worth noting that damages awarded in sexual harassment judgments are substantially lower than those in defamation cases.[249] In this way, victimisation as a response tactic to defamation threats and proceedings is limited in utility if a defamation judgment is awarded against a victim survivor.

249 Thornton, Pender and Castles, Damages and Costs in Sexual Harassment, (n 41), 92.

6. Addressing the issues: ways to regulate NDA use

The misuse of NDAs has been found to be problematic internationally, with a wide range of stakeholders deciding to take action to change the way confidentiality is treated in sexual harassment matters. This issue is being reframed as a legal professional conduct issue as well as a significant environmental, social and corporate governance obligation.

Our research showed that the NDA Guidelines have had limited effect in addressing the misuse of NDAs. Other forms of regulation, such as professional legal obligations or publicly available template drafting for Varied NDA, may provide for greater reform on this issue.

6.1. Legal professional obligations

Misusing NDAs may breach solicitor and barrister obligations.[250] Until recently, in Australia, the conduct of lawyers in negotiations has not been explicitly framed as a disciplinary or professional conduct issue.

In the United Kingdom, it was observed that unenforceable NDAs are widely used to deter disclosure of discrimination and harassment.[251] To change these practices, it was recommended that further deterrent action would be needed than simply making NDA clauses unenforceable if they do not meet legal requirements. It was proposed that the drafting and use of NDAs that can reasonably be regarded as potentially unenforceable should be clearly understood to be a professional disciplinary offence for lawyers advising on such agreements.[252]

Victorian Legal Service Board + Commissioner advice

In September 2023 the VLSB+C released advice for lawyers on the use of confidentiality clauses to resolve workplace sexual harassment complaints.[253]

250 Based on the Australian Solicitors Conduct Rules (Solicitors' Conduct Rules), as adopted in South Australia, Queensland, the ACT, NSW and Victoria, and the Legal Profession Uniform Conduct (Barristers) Rules 2015 (Barrister's Conduct Rules), as adopted in NSW and Victoria.

251 House of Commons Women and Equalities Committee, The Use of Non-Disclosure Agreements in Discrimination Cases: Government Response to the Committee's Ninth Report of Session 2017–19 (House of Commons Paper No 215, Second Special Report of Session 2019, 23 October 2019) ('HCWEC, Government Response') 15.

252 Ibid.

253 Victorian Legal Services Board +Commissioner ('VLSB+C'), 'Advice for Lawyers on the Use of Confidentiality Clauses to Resolve Workplace Sexual Harassment Complaints', LSBC VIC (Web Page Advice, 27 September 2023) ('VLSB+C Advice') <https://lsbc.vic.gov.au/lawyers/practising-law/sexual-harassment/advice-lawyers-using-confidentiality-clauses-resolve>.

Misleading conduct

The VLSB+C provided advice to lawyers that they must be mindful of their professional duties if they are employing NDAs to prevent any of the following: reporting to law enforcement agencies; making disclosures which are protected by law (see above); or seeking medical or psychological treatment or legal advice about the terms of the agreement.[254] This may also include reporting to statutory compliance bodies (see above). An NDA drafted to prevent such conduct may be so unfair, misleading or intimidatory that the responsible lawyer's integrity or professional independence[255] could be brought into question, or their conduct could be considered likely to bring the profession into disrepute[256].

Perpetuate wrongs

At this stage it is unclear how the Positive Duty will sit with settlement practices that, effectively, keep perpetrators in a workplace. While this was not considered by the VLSB+C, it is possible that professional legal obligations such as the paramount duty to the court and the administration of justice[257] or the requirement to act in a way does not diminish public confidence in the administration of justice[258] will be enlivened during negotiations and the use of NDA would be questionable when considered in the context of advising an employer about their duty to eliminate sexual harassment in the workplace. This would benefit from further investigation when the bounds of the Positive Duty have been further explored.

Best interests

When finalising sexual harassment matters, solicitor and barrister obligations to act in the best interest of their client[259] do not override the duty to act with independence and integrity[260]. A lawyer is required to fully explore the consequences of confidentiality clauses for their particular client and their individual circumstances.[261]

254 Ibid

255 contrary to Solicitors' Conduct Rules (n 132) r 4.1.4.

256 contrary to Ibid. r 5 of the Solicitors' Rules and Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) ('Barristers Conduct Rules') r 8; VLSB+C Advice (n 253) 2.

257 Ibid. r 4(a); Solicitors' Conduct Rules (n 132) r 3.

258 Ibid. r 8; Solicitors' Conduct Rules (n 132) r 5.

259 Ibid. r 35; Solicitor Conduct Rules (n 132) r 4.1.1.

260 Solicitor Conduct Rules (n 132) r 4.1.4 and r 17.1.

261 Ibid. r 7; Barristers Conduct Rules r 8; VLSB+C Advice (n 253) 2-3.

VLSB+C advice for lawyers

You should consider whether a confidentiality clause is in fact in your client's best interests. This requires careful consideration of what their best interests are, in both the long and short term. A confidentiality clause may be useful in the short term in protecting an employer from reputational damage associated with an allegation of sexual harassment by one of their employees.

However, the same clause may operate against their long term best interests when:

there is a risk that the same employee will sexually harass another person, that risk eventuates, and the matter subsequently becomes widely known (potentially exposing the employer to far greater reputational damage than would have been the case without the confidentiality clause), and/or

the clause prevents the employer from responding to systemic issues and providing a safer workplace (for example, if senior leaders and Board members are not made aware of sexual harassment complaints being settled in this way). [262]

Penalty clauses

While the VLSB+C advice does not address the use of penalty clauses in sexual harassment settlement agreements, the Equality and Human Rights Commission **(EHRC)** issued guidance for parties not to use penalty clauses in drafting discrimination settlement agreements in England, Scotland, and Wales.[263] Both in these countries and in Australia, if a practitioner includes an indemnity clause in a settlement agreement that would penalise a party for breach in such a way that is not a genuine pre-estimate of the damage that could be suffered by the other party, it will be held to be void as a penalty. The EHRC expressly directs that penalty clauses must not be used. Applicant lawyers interviewed said that requests to include such burdensome indemnity clauses were relatively common[264], with one interviewee expressing their view that such threats would be `quite untoward'[265]. In Australia, drafting such an obligation could breach legal professional obligations: a penalty clause may grossly exceed the legitimate assertion of a client's rights or entitlements and could mislead or intimidate another person [266].

262 VLSB+C Advice (n 253).

263 Equality and Human Rights Commission ('EHRC'), The Use of Confidentiality Agreements in Discrimination Cases (Guidance Paper, October 2019) ('EHRC, Use of Confidentiality Agreements').

264 Interview 10, Applicant Lawyer.

265 Interview 6, Applicant Lawyer – acts for both applicants and respondents.

266 Solicitors' Conduct Rules r 34.1.1 and Barrister's Conduct Rules rr 8 and 49.

There is limited Australian judicial consideration on this point and with the publication of the VSLC+B advice framing the conduct of lawyers' during negotiation as a conduct issue, this issue demands further study.

SRA warning notice and impact: a case study

In March 2018, the Solicitors Regulation Authority **(SRA)**, the regulatory arm of the Law Society of England and Wales, published a notice warning for solicitors that NDAs should not be used to influence, prevent, impede, or deter, a person from reporting potential misconduct to the police or regulators, or making disclosures protected at law **(the Warning Notice)**.[267] The Warning Notice does not ban the use of the NDAs but provides a 'reminder of key issues and risks' that solicitors should be aware of when dealing with NDAs, including SRA expectations that practitioners not apply inappropriate pressure, employ aggressive negotiating tactics, or include unenforceable or oppressive clauses when drafting NDAs.[268]

The Warning Notice has teeth: a practitioner who uses an NDA improperly or breaches the SRA principles and standards is at risk of disciplinary action. The SRA has limited powers to impose sanctions but can refer and has referred several reports relating to the improper drafting or use of NDAs to the Solicitors Disciplinary Tribunal[269]. In 2018, the Warning Notice was released there was a significant increase in reporting of sexual harassment or misconduct within law firms, including reports involving lawyers using NDAs to conceal sexual harassment.[270]

In August 2023, the SRA evaluated the use and impact of the Warning Notice by surveying 150 firms and interviewing practitioners and published their findings.[271] The SRA found that while around two-thirds (64%) of fee-earners were aware of the existence of the Warning Notice, knowledge of the issues it covered was low with solicitors misunderstanding when the Warning Notice applied. There was little evidence of ongoing NDA-specific training, policies or controls to maintain compliance with the Warning Notice.[272]

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267 Solicitor Regulation Authority, 'Warning Notice: Use of Non Disclosure Agreements (NDAs)' (Web Page, 12 November 2020) <https://www.sra.org.uk/solicitors/guidance/non-disclosure-agreements-ndas/>.

268 Ibid., see 'Duty not to take unfair advantage'.

269 DCEDIY, The Prevalence and Use of (n 62) 19.

270 Green, NDA Response (n 26).

271 Solicitor Regulation Authority, 'Thematic Review: The Use of Non Disclosure Agreements in Workplace Complaints' (Web Page, 14 August 2023) ('SRA, Thematic Review') <https://www.sra.org.uk/sra/research-publications/thematic-review-nda/?blaid=4946418>.

272 Ibid. see 'Controls and Competence'.

While considering different issues, the SRA evaluation and our survey revealed some similar outcomes. While three quarters of the participants in our research had read the NDA Guidelines, this did not translate directly into advice to their clients. We found that 29% of applicant survey participants and 50% of respondent survey participants have never advised a client that there is an option to resolve a sexual harassment settlement without an NDA. So while the awareness of the NDA Guidelines is high, its impact on advice and negotiations is low.

Only a quarter of firms evaluated by the SRA (24%) had ever questioned a client on whether inclusion of an NDA was appropriate when asked to prepare one.

The SRA found there to be "a fundamental imbalance of power in how NDAs are drafted. Employers will generally dictate the terms of any agreement, sometimes before or without an employee engaging legal advice of their own." They found that the majority of firms visited (84%) used templates to draft NDAs, which often do not take account of the individual circumstances of a given case. The SRA found agreements and templates which expressly omitted permitted disclosures, restrictive non-derogatory clauses and inappropriate clawback or penalty clauses.

In many [SRA] interviews, solicitors told us that because NDA clauses are standard features in online precedents they are never actively considered.[273]

Similarly, in our interviews, both Applicant and Respondent lawyer indicated that the use of 'standard' or template NDA was both common and a concern. Applicant Lawyer 5 told us "When you're talking to respondent lawyers they sometimes come in with the presumption that...a Strict NDA would just necessarily apply. So you're, instead of coming from like a neutral standpoint, you're already at loggerheads, one thinking that you know, this is just the norm and us trying to change that".

Despite express caution against such conduct in the Warning Notice, employers in England and Wales typically set short time limits of around seven days for an employee to sign an agreement. Related to this, there was limited evidence that employee clients had received clear advice about the NDA and that in most cases documents were rarely amended or negotiated from the employee side.[274]

The SRA expressed concerns about practitioner complacency about the scope and relevance of NDAs. It reminded fee-earners there is no such thing as a 'standard case' for the individual involved, and to remain aware of the need to proactively

273 SRA, Thematic Review (n 271) 'Drafting NDAs: What we Found'.

274 Ibid. see 'Advice to an Employee when Signing an NDA'

consider whether an NDA is appropriate and if so, how this may need tailoring to the specific facts of the case or individual involved. [275]

Following its 2023 review, the SRA committed to continuing to raise awareness among the legal profession about their obligations, the Warning Notice and the need to challenge unacceptable NDAs or behaviours.[276]

6.2. Legal profession guidance

The place of 'ethical leadership'

While guides and practice notes like the NDA Guidelines may not be legally actionable if breached, they can help lawyers understand the bounds of acceptable conduct, especially as standards change over time. Guidance and direction provided by Law Societies, Bar Associations, and legal professional regulators about the use of NDAs in settling sexual harassment matters range from positions steadfastly supporting current practice to progressive ethical leadership advocating reform. There is tension between understanding professional legal duties narrowly, accounting only for the interests of the client[277], and those broader collectivist legal obligations to prevent harm being perpetrated[278]. This debate is apparent in the range of legal guidance provided by legal professional bodies internationally.

In February 2023 there was overwhelming support (94%) in a vote at the Canadian Bar Association AGM calling for the fair and proper use of NDAs for victims of workplace harassment, abuse and discrimination, and to discourage the use of NDAs to silence victims.[279] The Association also committed to advocate and lobby for government to act on the misuse of NDAs. The association hopes the resolution will inspire companies to review HR practices and policies around NDAs within their organisations. Professor Macfarlane commented that while this resolution is not law, it removes an obstacle from the government and the opposition of the legal profession and sends a strong message.[280]

275 Ibid. see 'Conclusion'.

276 Ibid. see 'Next Steps'.

277 For example see Solicitors' Conduct Rules (n 132) r 4.1.1 and Barrister's Conduct Rules (n 256) r 35.

278 Ibid. r 3 and Barrister's Conduct Rules (n 256) cl 4(a).

279 Marie-Yosie Saint-Cyr, 'Call for a Ban on NDAs in Certain Cases' First Reference Talks (Web Page, 1 March 2023) <https://blog.firstreference.com/call-ban-ndas-certain-cases/>.

280 Ibid.

In contrast, in December 2019, the Law Society of England and Wales issued a practice note about drafting NDA clauses in an employment law context.[281] Critics cited this practice note as "more concerned with asserting the legitimacy of using NDAs than it does about dealing effectively with the risks" and demonstrates "why the profession cannot be allowed to sort such issues on its own".[282]

In May 2023, the Legal Services Board, the oversight regulator of legal services in England and Wales, flagged concerns about the misuse of NDAs to conceal wrongdoings and called for evidence on the role that lawyers' ethical conduct can have in the misuse of NDAs and how regulation might help address conduct by supporting lawyers to better meet with professional ethical obligations[283]. Not all stakeholders agreed with the answer to this approach, or indeed its premise: the General Council of the Bar of England and Wales declined to respond to the call for evidence on the basis that the request did not reflect the "many good reasons why NDAs are utilised by parties on both sides of litigation" and expressed concerns that limiting the use of NDAs may drive parties towards litigation.[284] It is the position of that Bar Council that NDA use should not be determined by any means other than legislation, and it is not the place of regulators to attempt to control or regulate lawyers involved in assisting their clients in the lawful use of NDAs.[285]

Template wording for NDA clause drafting

In 2019, there was wide consultation in the United Kingdom about the recommendation by the Women and Equalities Committee that standard, plain English NDAs should be legislated for use in settlement agreements for discrimination matters, setting out the meaning, effect and limits of confidentiality clauses.[286]

Consultation respondents provided feedback that a specific set of words for drafting an NDA would provide clarity and reduce room for abuse. Campaign organisations

281 The Law Society of England and Wales, 'The Use of Non-Disclosure Agreements in Employment Contracts' (Web Page, 12 December 2019) <https://www.lawsociety.org.uk/topics/employment/non-disclosure-agreements-and-confidentiality-clauses-in-an-employment-law-context> see 'Reporting Illegal Activity'

282 Dan Bindman, '"No Ethical Leadership": Law Society Blasted over NDA Guidance' Legal Futures (Web Page, 15 March 2019) <https://www.legalfutures.co.uk/latest-news/no-ethical-leadership-law-society-blasted-over-nda-guidance>.

283 Legal Services Board, 'Legal Services Board Launches Call for Evidence on the Misuse of NDAs and the Role of Lawyers" (Web Page, 2 May 2023) <https://legalservicesboard.org.uk/news/legal-services-board-launches-call-for-evidence-on-the-misuse-of-ndas-and-the-role-of-lawyers>.

284 The General Council of the Bar of England and Wales, 'Bar Council Response to the Legal Services Board's Call for Evidence on the Misuse of Non-Disclosure Agreements" (Media Release, 14 July 2023) <https://www.barcouncil.org.uk/uploads/assets/a4fb239d-1b28-4f52-baa79f38784b67d9/BCEW-response-to-LSB-call-for-evidence-on-the-misuse-of-NDAs-July-2023.pdf>.

285 Ibid. [10].

286 Department for Business, Energy and Industrial Strategy, Confidentiality Clauses: Response to the Government Consultation on Proposals to Prevent Misuse in Situations of Workplace Harassment or Discrimination (Report, July 2019) ('DBEIS, Confidentiality Clauses') 11; House of Commons Women and Equalities Committee, The Use of Non-Disclosure Agreements in Discrimination Cases (House of Commons Paper No 1720, Ninth Report of Session 2017–19, 5 June 2019) ('HCWEC, Use of NDAs') 37.

also advocated for the benefits of specific wording, as it would reduce any legal ambiguity. Employment lawyers commented that the use of standard settlement agreements and clauses "tweaked to fit the individual circumstances" would "reduce legal fees massively" by reducing the amount of time needed to go through agreements.[287]

Our interviewees similarly called for template wording. Respondent Lawyer 1 said:

> *I also think it was a bit of a missed opportunity with the Respect@Work guidelines that standard or suggested clauses [weren't] actually developed. Because while the guidelines are good, they kind of still say, well, 'these are all the things you should consider' but then there weren't template or guideline clauses in the guidelines that a lawyer could actually look at to see what it might look like. So I think lawyers fall back on what they're used to and what their boilerplate clauses provide which usually is much more in line with the traditional non-disclosure agreement.*

In the UK, consultation respondents raised concerns were raised that legislating specific wording for NDAs would require frequent updates and could be constricting, considering the different types of settlement agreements.[288] It was suggested by legal professionals and employers that guidance rather than legislation would provide the correct level of flexibility for drafting professionals.[289]

Acknowledging these concerns about standard wording, the UK government committed instead to legislate the following drafting requirements:

- 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.[290]

The government indicated it would work with the SRA, the Equality and Human Rights Commission, and the Advisory, Conciliation and Arbitration Services to produce suitable guidance for solicitors and legal professionals responsible for drafting settlement agreements (see further below)[291].

287 Ibid.; House of Commons Women and Equality Committee, 'Oral Evidence: the Use of Non-Disclosure Agreements in Discrimination Cases, HC 1720' House of Commons (Web Page, 19 December 2018) Q48 <https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/the-use-of-nondisclosure-agreements-in-discrimination-cases/oral/94564.html>.

288 DBEIS, Confidentiality Clauses (n 286) 11,;

289 Ibid.

290 Ibid.

291 DBEIS, Confidentiality Clauses (n 286) 12.

6.3. The role of Discrimination Bodies

Equality Commission for Northern Ireland

The Equality Commission for Northern Ireland **(ECNI)** is responsible for providing information, guidance and advice to employers and individuals about their statutory discrimination obligations and protections[292]. If a case is significant, the ECNI can provide legal advice or fund a complainant to take their case to court or a tribunal.[293] The ECNI supported 63 cases in the 2022–23 financial year.[294]

Publication of data

For each matter it supports, in accordance with ECNI policy, it publishes party names, case facts and settlement information in a searchable database on its website.[295] ECNI publishes these data for deterrence purposes and to promote awareness of the legislation to encourage other complainants to come forward. As part of these public settlement terms, an employer may be required to meet with the ECNI to demonstrate an improvement in discrimination practices and procedures. Any negative publicity can be minimised by the employer's being able to demonstrate it is working with the ECNI to ensure that the situation does not arise again[296]. Through this process the complainant receives compensation, while the ECNI negotiates a benefit for a wider group than just this individual and `delivers equality on the ground'[297].

By comparison, the Respect@Work Report[298] identified little consistency in the collection, monitoring and reporting of data on sexual harassment by Australian anti-discrimination and other regulatory agencies. With limited exceptions, these bodies do not standardly publish data about the terms negotiated when a complaint is settled. The only information released about discrimination complaints are typically case studies published in annual reports and it publishes `conciliation case studies' on its website, being anonymised samples of the type of complaints it receives.[299]

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292 Equality Commission for Northern Ireland (`ECNI'), Policy for the Provision of Legal Advice and Assistance (Policy Document, August 2018) 4, cited in Dominique Allen, Addressing Discrimination Through Individual Enforcement: A Case Study of Victoria (Monash Business School, August 2019) (`Allen, Addressing Discrimination') 23.

293 ECNI, Policy for the Provision of Legal Advice and Assistance (Policy Document, March 2022) [4.2].

294 ECNI, Annual Report and Accounts 2022-23 (Annual Report, July 2023) 18.

295 See ECNI, `Case Decisions & Settlements' (Web Page, 2023) <https://www.equalityni.org/cases>.

296 Dominique Allen, `Strategic Enforcement of Anti-Discrimination Law: A New Role for Australia's Equality Commissions' (2010) 36(3) Monash University Law Review 103, 123.

297 Ibid. 130

298 Respect@Work (n 2) 17

299 AHRC, Conciliation Register (Web Page) <https://humanrights.gov.au/complaints/conciliation-register>; Victorian Equal Opportunity and Human Rights Commission, Conciliation Case Studies (Web Page) <https://www.humanrightscommission.vic.gov.au/discrimination/making-a-complaint/case-studies> cited in Allen, Addressing Discrimination (n 292) 9.

The Equality and Human Rights Commission

The EHRC is Great Britain's national equality body with responsibility for the promotion and enforcement of equality and non-discrimination laws in England, Scotland[300] and Wales. In October 2019 the EHRC released `The use of confidentiality agreements in discrimination[301] cases', guidelines designed to facilitate the legitimate use of NDAs and to protect against employers using them to cover up the worst instances of discrimination. The guidelines set the bounds of lawful conduct in resolving disputes, providing examples of how to manage this. Workers are allowed to make protected disclosures in certain instances of whistleblowing.[302] Notwithstanding these protected disclosures, the guidelines provide express, definitive, and directive recommendations about NDA drafting principles, of relevance beyond the UK context.

EHRC guidelines: Clauses requiring the worker to pay compensation that is out of all proportion to the damage caused to the employer by the breach, will be considered to be a penalty clause and unenforceable. Penalty clauses must not be used. [303]

The Advisory, Conciliation and Arbitration Service

The Advisory, Conciliation and Arbitration Service **(ACAS)** is a UK body designed to improve working life for everyone in Britain. ACAS provides employment law advice and conciliation and dispute resolution services.[304] In February 2020, ACAS release guidelines about NDA use, similar to the EHRC guidelines, setting out when it is inappropriate and unlawful for parties to use NDAs in settlement agreements, in ACAS settlements and in employment contracts.[305]

300 Together with the Scottish Human Rights Commission.

301 EHRC, Use of Confidentiality Agreements (n 263).

302 Ibid. 28; Employment Rights Act 1996 (UK) ss 43A-43L.

303 Ibid. 36;

304 Advisory, Conciliation and Arbitration Service ('ACAS'), 'ACAS Strategy 2021-2025' (Corporate Report, 1 June 2021) <https://www.acas.org.uk/about-us/acas-strategy-for-2021-to-2025/html#our-purpose>.

305 ACAS, Guidance: Non-disclosure Agreements, (Guide, February 2020) ('ACAS, Guidance').

Guideline comparison

The NDA Guidelines[306] recommend that parties assume six principles when considering whether to include confidentiality clauses. The guidance provided can be distinguished from various UK guides that set out "dos and don't's" for employers.[307] Differently, the NDA Guidelines provide non-directive guidance of a general nature and do not indicate whether particular provisions are inappropriate to include in a NDA.

ACAS	EHRC	Respect@Work
In many cases, it will not be necessary, appropriate or good employment practice to use a confidentiality clause in the agreement.[308]	If an employer uses a template settlement agreement, confidentiality clauses should not be included in the template as standard but added to it only as required.[309]	Consider the need for a confidentiality clause on a case by case basis.[310]
All confidentiality clauses should take into account that employers or workers may, in certain circumstances, need or want to share details of the agreement with:... [311]	The wording of the confidentiality agreement should allow the worker to have discussions with the following people and organisations:...	Confidentiality clauses may contain exceptions that enable the person who made the allegation to be able to disclose information about their experience or the settlement agreement to a list of agreed people and organisations where the parties agree that disclosure is appropriate.

Table 1: comparing international guidance on the use of NDAs

306 The Guidelines (n 123).

307 EHRC, `Calling Time on NDAs in Discrimination Cases', (News Article, 17 October 2019) <www.equalityhumanrights.com/en/our-work/news/calling-time-ndas-discriminationcases>.

308 ACAS, Guidance (n 305) 6.

309 EHRC, Use of Confidentiality Agreements (n 263) 36.

310 The Guidelines (n 123) Principle 1.

311 ACAS, Guidance (n 305) 8.

6.4. Corporate Social Responsibility

Champions of Change

The Champions of Change Coalition is an advocacy body aimed at achieving gender equity and building respectful and inclusive workplaces by empowering business leaders and CEOs, male and female, to lead and enable action in this space[312]. They recommend ways for member organisations to encourage staff and legal advisors to adopt the NDA Guidelines as a resource when settling sexual harassment matters. The coalition makes several tangible proposals to increase corporate transparency.[313]

> ***"What we've learnt is that the reputational damage to your organisation – in trying to keep sexual harassment secret – is far worse than putting your hand up and saying 'we've had a case and this is what we've done about it'", James Fazzino, Convenor, Champions of Change Coalition.***

Building on the NDA Guidelines and taking one step further, the coalition give the directive that CEOs should take a clear leadership stance that NDAs will not be entered into unless it is the informed choice of the person impacted and that all NDAs will be signed off by the CEO or equivalent.[314]

Australian Council of Superannuation Investors

The Australian Council of Superannuation Investors engages with members on financially material environmental, social and governance issues and periodically release guidance about its expectations that directors are aware of NDA practices, why NDAs are being signed and which party requested the NDA.[315]

University pledge

Activism at universities has played a significant role in shaping the debate about the use of NDAs in sexual harassment matters.

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312 Amanda Watt, 'Transforming NDAs to Prevent Sexual Harassment' Minter Ellison (Web Page, 1 February 2021) <https://www.minterellison.com/articles/transforming-ndas-to-prevent-sexual-harassment>; Champions of Change Coalition, Disrupting the System (n 88) 34; Champions of Change Coalition, Sexual Harassment and the Use of NDAs: Building Trust Through Care, Accountability and Transparency (Report, 2022) ('Champions of Change Coalition, Sexual Harassment').

313 Champions of Change Coalition, Sexual Harassment (n 312) 3 and 5; Champions of Change Coalition, Disrupting the System (n 88) 39-49

314 Ibid.

315 Australian Council of Superannuation Investors ('ACSI'), Governance Guidelines: A Guide to Investor Expectations of Listed Australian Companies (Guidelines, December 2021).

The highly effective advocacy of Professor Macfarlane and her campaign with Zelda Perkins, 'Can't Buy My Silence[316] , began after her personal experiences at the University of Windsor, Canada, when she spoke out about an ex-colleague's harassment and misconduct after the University had exited him subject to an NDA. This ex-colleague was able to move to another law school and he successfully sued her for defamation.

The Can't Buy My Silence campaign has been instrumental in the creation and introduction of many news bills and laws governing NDAs in Ireland, Victoria Australia, some States in the USA and in Canada (addressed in more detail below), and had bearing on higher education institutions voluntarily committing not to use NDAs.

In 2018, University College in London, committed to no longer using NDAs in settlement agreements with individuals who have complained of sexual misconduct, harassment or bullying.[317] In 2021 then Minister for Higher Education, Michelle Donelan wrote to vice chancellors urging them to tackle sexual harassment and abuse on campus[318], and in 2022, six university vice-chancellors[319] pledged not to use NDAs in dealing with complaints of sexual misconduct, bullying and other forms of harassment.[320] The genesis of the Higher Education **(Freedom of Speech) Act**[321] (UK Uni NDA Act) is attributed by some to this vice-chancellor pledge. [322]

Public service and best practice

When the elimination of sexual harassment is viewed as a collective societal problem, there is an understandable reluctance for public money to be used to pay for settlements of sexual harassment matters, often subject to NDAs, both in universities and the public service more generally. While some public agencies, such as Victoria Legal Aid, have policies of not using NDAs or confidentiality and non-disparagement clauses as the default resolution outcome to resolve sexual harassment complaints"[323], this approach is not widespread in every public state sector organisation.

316 Can't Buy My Silence, 'About' (Web Page) https://www.cantbuymysilence.com/about ('Can't Buy My Silence').

317 Katie Gibbons, 'Sexual Harassment Victims Force University College London to End Gagging Orders' The Times (Web Page, 28 July 2018) <https://www.thetimes.co.uk/article/sex-harassment-victims-force-university-college-london-to-end-gagging-orders-h9v9v279f>.

318 Department for Education, 'Universities Pledge to End Use of Non-Disclosure Agreements' (Press Release, 18 January 2022) <https://www.gov.uk/government/news/universities-pledge-to-end-use-of-non-disclosure-agreements> ('Department for Education, Universities Pledge').

319 Buckinghamshire New University; the University of Cambridge; the University of Exeter; Goldsmiths, University of London; Keele University; and University College London.

320 Department for Education, Universities Pledge (n 318).

321 Higher Education (Freedom of Speech) Act 2023 (UK) ('Higher Education Act 2023').

322 Catriona Watt, 'Higher Education (Freedom of Speech) Act' Law Society Gazette (Web Page, 4 August 2023) <https://www.lawgazette.co.uk/practice-points/higher-education-freedom-of-speech-act/5116900.article>.

323 Email from the Office of the CEO, Victoria Legal Aid to Sharmilla Bargon, 1 March 2024.

In February 2022, the Australian Public Service (APS) Commissioner issued a circular which directed Federal Agency Heads to consult with or report to the Commissioner before agreeing to an NDA for sexual harassment settlements.[324] There is no data available on how often these requests are made or entered into on the APS website.

Relevantly, Senate Estimates in 2022 revealed the settlement between the Federal Government and the victim survivors in Dyson Heydon KC's sexual harassment complaints were subject to NDAs.[325] When asked about these NDAs, in speaking for the High Court, Ms Lynch indicated "the settlement of that matter was a matter for government, the court handed the matter to its insurer Comcover, and didn't have any direct role in the settlement of the matter or in the non-disclosure decision[326]." There is cause to question the utility of the APS' Commissioner's directive, if the resolution practice is to send the matter to the insurer for resolution.

NDAs and compensation paid with public money are being used to settle the sexual harassment complaints of public servants. We know that during the Respect@ Work national workplace sexual harassment inquiry consultations, public servants subject to NDAs who wished to give evidence were required to take the extra step of applying for a waiver of that agreement in order to give evidence.[327] We have no exposure whether the Federal Government as an employer, is applying best practice harassment resolution principles set out in the NDA Guidelines.[328]

Corporate pledge

A number of Australian large corporations, such as Telstra, have issued public statements indicating that they will no longer ask employees affected by sexual harassment in the workplace to sign NDAs.[329]

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324 Australian Public Service Commission, Circular 2022/2: Commencement of the Australian Public Service Commissioner's Directions 2022 (Directions, 1 February 2022).

325 Commonwealth, Parliamentary Debates, Legal and Constitutional Affairs Legislation Committee, 15 February 2022, 87 (Ms Lynch).

326 Ibid.

327 Sally Whyte, 'Public Servants must Clear Extra Hurdle to Speak to Sex Harassment Inquiry' The Sydney Morning Herald (Web Article, 25 January 2019) <https://www.smh.com.au/politics/federal/public-servants-must-clear-extra-hurdle-to-speak-to-sex-harassment-inquiry-20190124-p50tbz.html>.

328 Public Service Regulation 2023 (Cth) r 2.1.

329 Euan Black, 'Telstra Ditches NDAs Related to Sexual Harassment', Australian Financial Review (Web Article, 1 December 2022) <https://www.afr.com/work-and-careers/workplace/telstra-ditches-ndas-related-to-sexual-harassment-20221201-p5c2vj>.

7. Addressing the issues: legislation

7.1. International Models

NDAs can be helpful when used appropriately but problematic when misused. Legislative regulation of NDAs dealing with harassment is a recent development. Since 2021, buoyed by Julie Macfarlane and Zelda Perkin's advocacy campaign, Can't Buy My Silence[330] , legislation is variously being considered, debated, reviewed, and passed in Ireland, Canada, the United Kingdom, the United States of America and Victoria, Australia.

Our research has pointed to the limited utility and effectiveness of the NDA Guidelines and further reform may be needed, legislative or otherwise.

Irish Senator Lynn Ruane tried to use non-legislative ways to resolve problematic use of NDAs in the private sector before arriving at this conclusion:

> *There is nothing I can do to reach into the private sector. Legislation is so important because it will apply across the board, not just to a particular sector. That is why legislation, rather than policy, is so important in this area. It will not impact very legitimate NDAs. It will relate only to a crime being covered up"*[331]

The below canvasses the international legislative developments in this area.

Key features of NDA laws

Internationally, steps are being taken to modulate use of NDAs, introduce nuance and move away from the use of "standard terms". These reforms vary in scope from complete bans[332] to a wide range of limitations regulating aspects of NDA use. International legislatures have addressed local concerns by balancing the interests of complainants, employers, perpetrators and third parties using different measures, often sharing the following key aims:

- *True complainant choice: acknowledging the power differential between employers, perpetrators and victim survivors, measures are taken to ensure that NDAs are not used when resolving sexual harassment matters except when*

330 Can't Buy My Silence (n 316).

331 (Seanad Deb. (n 58) 8.

332 Including Illinois USA, Hawaii USA, Nevada USA, New Jersey USA, Louisiana USA, United Kingdom.

requested by a complainant.[333] This must be a true choice that is deliberate, voluntary and informed. An example of a measures to effect this is the option or offer of independent legal advice, provided in accordance with best NDA practice as set out by government guidelines.[334] Undue attempts to influence complainants to include NDAs are prohibited. Critical to giving complainants true choice is ensuring that they understand the obligation being negotiated, with many jurisdictions proposing and requiring that NDAs are drafted in plain English[335].

- *Applicant Lawyer 5 told us: when we have respondent lawyers who come from huge law firms that are really business minded and they're great advocates for the respondents, when they come and send us an agreement that's like 20 pages and we're cutting it down to 3 to make sure that our client understands each clause, that's a little bit of a battle...and I think people are understanding the benefit in doing it now. It's just really important, so people actually know what they're signing up to.*

Another measure is to give complainants the opportunity to waive confidentiality in the future.[336]

- *Support: measure provide that a victim survivor can disclose in order to rely on their support networks, such as family and friends, or professional supports such as therapists to allow them to better process the trauma of the harassment. This form of disclosure has been protected broadly by limiting the use of pre-dispute NDAs, and by express carve-outs in post-dispute NDAs.[337] As discussed above, many Australian practitioners now consider these carve-outs to be standard.*

- *Prevention: sexual harassment is reframed as a preventative issue for employers, as has happened in Australia with the introduction of the Positive Duty. As well, restrictions are imposed on NDAs that impact the health or safety of other employees and public interest more generally for a range of unlawful conduct including sexual assault, sexual harassment, harassment more broadly, and discrimination at work and sometimes more broadly, such as in accommodation or services.[338] A common measure to achieve this is to prohibit confidentiality*

333 Including Ireland, Prince Edward Island CA, Nova Scotia CA, British Columbia CA, Ontario CA, Manitoba CA, Federal Canada, New Mexico USA, California USA, New York USA, Oregon USA, Rhode Island USA, Victoria AUS.

334 Ireland

335 Including Ireland, Prince Edward Island CA, Nova Scotia CA, British-Columbia CA, Manitoba CA, Ontario CA, New York USA.

336 Including Ireland, Prince Edward Island CA, Nova Scotia CA, British-Columbia CA, Manitoba CA, Ontario CA.

337 Including Federal USA, Hawaii USA, Maine USA, Pennsylvania USA, Tennessee USA, Vermont USA, Virginia USA, Washington USA.

338 Including sexual harassment and discrimination: Ireland, New Mexico USA; harassment and discrimination: Prince Edward Island CA, Nova Scotia CA, British Columbia CA, Manitoba CA (recommendations to include abuse) California USA, New Jersey USA; sexual abuse at universities: Ontario CA, United Kingdom; harassment, violence or discrimination: Federal Canada. ,

on disclosures of unlawful conduct. Complainants are allowed to disclose to law enforcement and report, testify or give evidence in legal proceedings.[339] *Certain whistleblower disclosures are also protected*[340] *and employers are prohibited from retaliating against complainants for reporting misconduct.*[341]

- *Impact on complainant: steps have been taken to minimise the breadth of any confidentiality obligation on complainants.*[342]*The use of NDAs is restricted and only permitted where only the following are confidential: complainant identity, the underlying facts of a complaint, settlement amount.*[343] *NDAs must also be of a set and limited duration.*[344] *Complainants are able to disclose details of their complaint and exit from a workplace to prospective employers.*[345]

- *Change management: to ensure compliance of NDA regulation, a range of consequences are employed, from an inappropriate clause being held void, attracting civil*[346] *and criminal liability.*[347]

7.2. Ireland

After realising how widespread the use of NDAs were, how much public money had been used to pay for settlements, and the problematic "pass the trash" process of moving on repeat perpetrators to other workplace, especially in universities[348], in mid-2021 Senator Ruane introduced a bill **(the Irish NDA Bill)**[349] to restrict and regulate the use of NDAs that relate to sexual harassment and discrimination in the workplace.

The Irish NDA Bill bans NDAs unless an NDA is the 'expressed wish and preference[350]' of the relevant employee or victim of sexual harassment or discrimination, also called the 'victim's exception'. If a victim does want an NDA, the Irish NDA Bill sets out several robust conditions that would be needed for such an NDA to be enforceable. The principles behind these requirements form the basis for multiple bills proposed in Canada, the United Kingdom, and Victoria, Australia, and so we have extracted the operative provisions here:

339 Including Arizona USA, New Mexico USA.
340 Including Ireland, United Kingdom.
341 Including United Kingdom, New Mexico USA, Hawaii USA.
342 Including Louisiana USA, New Mexico USA.
343 Including Prince Edward Island CA, Nova Scotia CA, British Columbia CA, Manitoba CA, Ontario CA bill, New Mexico USA.
344 Including Ireland, Prince Edward Island CA, Nova Scotia CA, British Columbia CA, Manitoba CA, Ontario CA.
345 Including Ireland, Prince Edward Island CA, Nova Scotia CA, British Columbia CA, Manitoba CA.
346 Including Prince Edward Island CA, Nova Scotia CA, British Columbia CA, Manitoba CA bill, Ontario CA bill, United Kingdom.
347 Including Ireland.
348 Seanad Deb. (n 58) 11.
349 Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021 (Ir.) ('Employment Equality (Amendment) Bill').
350 Ibid. cl 2 and14B(2).

1. The victim must have been offered independent legal advice provided at the expense of the employer;
2. There must have been no undue attempts to influence the victim to include a confidentiality clause;
3. The agreement shall not adversely affect the health or safety of a third party not involved in the making of the NDA or the public interest more generally;
4. The agreement must include an opportunity for the victim to waive confidentiality in the future if he or she so chooses; and
5. The agreement must be of a set and limited duration.[351]

Any NDAs signed after the Irish NDA Bill becomes law that were not made in accordance with the Irish NDA Bill would be null and void and it would be an offence to enter into such a contract. NDAs that were signed before the enactment of the Irish NDA Bill would only be enforceable if they had been made in accordance with the Irish NDA Bill.

Even NDAs that are legally signed under the Irish NDA Bill cannot apply to certain protected disclosures, such as whistleblowing,[352] or to any communications relating to the harassment between the victim and certain people, including the Garda (police), a lawyer a therapist or prospective employer. The Irish NDA Bill requires that agreements made must be written in plain English. The Minister would make regulations for a standard form for such agreements and issue guidelines on the use of NDAs for employers, employees and the legal profession.

In July 2023 the Government released a report indicating there was significant support for progressing the Irish NDA Bill[353], and noting that any future legislation to regulate NDAs must include a review clause to detect negative repercussions by monitoring whether there has been a reduction in the number of settlements[354] . It is expected that amendments to the Irish NDA Bill will be proposed, addressing the use of NDAs in discrimination and harassment cases.

351 Employment Equality (Amendment) Bill (n 349) cl 2 and14B(3)(a)-(e).

352 Seanad Deb. (n 58) 4.

353 Department of Children, Equality, Disability, Integration and Youth, 'Minister O'Gorman Publishes Report on the Submissions to the Public Consultation on the Review of the Equality Acts' Government of Ireland (Press Release, 12 July 2023) <https://www.gov.ie/en/press-release/cafb4-minister-ogorman-publishes-report-on-the-submissions-to-the-public-consultation-on-the-review-of-the-equality-acts/>.

354 Department of Children, Equality, Disability, Integration and Youth, The Equality Acts Review: Summary of the Submissions Received to the 2021 Public Consultation on the Review of the Equality Acts (Report, 12 July 2023).

7.3. Canada

Prince Edward Island

In November 2021, the Non-Disclosure Agreement Act **(PEI NDA Act)**[355] was enacted in Prince Edward Island, making it the first Canadian province to regulate the content and use of non-disclosure agreements. The PEI NDA Act was modelled on the Irish NDA Bill, and similarly bans NDAs that relate to harassment and discrimination, unless the victim requests the NDA.

The PEI NDA Act has a slightly broader reach than the Irish NDA Bill, and restricts NDA use relating to harassment and discrimination, and not just sexual harassment. The PEI NDA Act targets inappropriate behaviour in the workplace, but applies more generally, such as to discrimination in accommodation or property sales[356]. Unless the NDA meets the operative provisions that we outline above, it will be null and void, and non-compliance with the provisions may attract a fine of between $2,000 and $10,000.

The victim must be provided with a reasonable opportunity to receive independent[357] legal advice, but unlike the Irish NDA Bill, this does not need to be paid for by the employer, or respondent. The victim is allowed to make protected disclosures to an greater list of support people and law enforcement[358] and there is a further exception to allow disclosure of some information about the harassment or discrimination as artistic expression[359]. It will be possible for settlement amounts under a NDA to remain confidential[360], which is not provided for in the Irish NDA Bill.

Unlike the Irish NDA Bill, the PEI NDA Act does not make provision for the relevant Minister to make delegated legislation for standard form NDAs or guidelines.[361]

355 Non-Disclosure Agreements Act, RSPEI 1988, c N-3.02 ('NDA Act, RSPEI').
356 Human Rights Act, RSPEI 1988, c H-12, ss 2 and 4.
357 NDA Act, RSPEI (n 355) s 3(a).
358 Ibid. s 6(c).
359 Ibid. s 6(b).
360 Ibid. s 10.
361 Ibid. ss 10 and 11; Employment Equality (Amendment) Bill (n 349) cl 2,14B(3)(a)-(e).

Nova Scotia, British Columbia, Ontario and Manitoba

Nova Scotia[362], British Columbia[363], Manitoba[364] and Ontario[365] all have non-disclosure bills being considered at different stages[366] , modelled on the Irish NDA Bill and the PEI NDA Act. The structure of the conditions is largely similar, with some minor variations.[367]

In June 2023, the Manitoba Law Reform Commission issued a report expressing concerns that the Manitoban bills would dramatically reduce pre-trial settlement of disputes involving allegations of misconduct.[368]

Ontario introduced legislation on 8 December 2022 which regulates NDA use by placing limitations on the way public post-secondary institutions use NDAs.[369]

Federal Canada

Following changes in NDA use in public universities in Ontario, reform is being proposed in the Canadian federal sphere to stop public money from being used to pay for settlements for discrimination in the federal public sector, parliamentary bodies and federally funded agencies[370]. On 9 May 2023, the Can't Buy Silence Act **(the Federal NDA Act)**[371] was introduced proposing to amend other acts to restrict the use of public money in settling claims of harassment and violence and discrimination subject to NDAs, and further, to prevent the litigation and enforcement of NDAs against complainants.[372] The Federal NDA Act is not as far-reaching as the Irish NDA Bill and PEI NDA Act and does not impose all of the same conditions required for a valid NDA.[373]

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362 Bill M 144, Non-Disclosure Agreements Act, 1st session, 64th General Assembly, 2022, Nova Scotia, 2022

363 Bill M 215, Non-Disclosure Agreements Act, 4th session, 42nd Parliament, 2023, British Columbia ('Bill M 215').

364 Bill M 225, Non-Disclosure Agreements Act, 4th session, 42nd Legislature, 2022, Manitoba; Bill M 215, Non-Disclosure Agreements Act, 5th session, 42nd Legislature, 2023, Manitoba.

365 Bill M 124, Stopping the Misuse of Non-disclosure Agreements Act, 1st session, 43nd Legislature, 2023, Ontario ('Bill M 124').

366 The first reading of the Bill for Nova Scotia was on 7 April 2022, 9 March 2023 for British Columbia and 6 June 2023 for Ontario. Two similar Bills were introduced in Manitoba , the first in April 2022 but both died on the Order Papers and did not become law.

367 E.g. if an NDA fails to meet all the conditions of the British Columbia and Ontario NDA Bills, in addition to individuals facing fines, a breaching organization faces a fine between $10,000 and $50,000: Bill M 215 (n 363) cl 8(2); Bill M 124 (n 365) cl 8(2).

368 Manitoba Law Reform Commission, The Use of Non-Disclosure Agreements in The Settlement of Misconduct Claims (Final Report, June 2023) ('Manitoba Law Reform Commission') 80.

369 With the exception of the requirement that the NDA not adversely affect the health or safety of a third party or the public interest, Bill 26, An Act to Amend Various Acts in Respect of Post-Secondary Education, 1st Session, 43rd Legislature, Ontario, 2022, cl 6.

370 Julie Macfarlane 'Groundbreaking Bill Would Ban the Use of Public Money for Secret Settlements' Can't Buy My Silence (Press Release, 9 May 2023).

371 Bill S-261, An Act Respecting Non-Disclosure Agreements, 1st Session, 44th Parliament, 2022-2023 ('Bill S-261').

372 Bill S-261 (n 371).

373 For an NDA to be enforceable, there is no requirement to show there has been no undue attempts to influence a victim to enter into the NDA; that the NDA will not adversely affect the health or safety of a third party or the public interest; that the NDA include an opportunity for the complainant to waive their confidentiality requirements in the future; or that the

7.4. United Kingdom

Universities' attempts at regulating academic conduct has been the staging ground for the development of wildly contrasting regulation of the use of NDAs in sexual harassment matters. The UK Uni NDA Act became law in the United Kingdom on 11 May 2023.[374] The UK Uni NDA Act was introduced primarily to preserve the freedom of speech of academic staff, students and others and to protect these individuals from 'no platforming', or censorship[375]. The ban on NDA use appears to be a secondary outcome to secure freedom of speech and does not mirror the developments in Ireland and Canada.

The UK Uni NDA Act prohibits higher education providers from entering into NDAs about complaints of misconduct for students, staff, members and visiting speakers[376]. Misconduct includes sexual abuse, sexual harassment or sexual misconduct, bullying or harassment[377]. An NDA not made in accordance with the UK Uni NDA Act will be void and, further and significantly, if a higher education provider fails to comply with their duties to protect freedom of speech and academic freedom, victims may bring a civil claim for breach: this would also apparently include a university making an NDA not in accordance with the UK Uni NDA Act.

The UK Uni NDA Act is not directly responsive to the government's commitment to NDA reform made in 2019.[378] At that time, the United Kingdom government engaged in extensive consultation on the use of NDAs in covering up unlawful discrimination and harassment complaints, and made 45 recommendations to 'strike the right balance between continuing to allow the legitimate use of NDAs and preventing their misuse.[379] The subtlety and nuance of these proposals navigating a legally complex area is not reflected in the blanket ban on NDAs enacted in the UK Uni NDA Act. This Act does not provide for a 'victim exception' or other protected disclosures: it is a blanket ban on the use of NDAs in dealing with complaints of sexual misconduct, abuse, bullying, harassment or discrimination.

NDA be of a set and limited duration: Manitoba Law Reform Commission (n 368) 24.

374 Higher Education Act 2023 (n 321).

375 United Kingdom, Parliamentary Debates, House of Commons, 12 July 2021, vol 699, col 46.

376 Higher Education (Freedom of Speech) Act 2023 (UK) s 2.

377 Ibid. ss 11 and 12.

378 HCWEC, Government Response.

379 HCWEC, Use of NDAs 1.

7.5. Federal USA

On 7 December 2022, the Speak Out Act was passed[380], the first federal law restricting the use of NDAs in the USA. The Speak Out Act regulates the use of both non-disparagement and non-disclosure agreements, and limits the judicial enforceability of pre-dispute agreements relating to disputes involving sexual assault and sexual harassment, but notably not disputes involving other forms of unlawful conduct, such as workplace discrimination. Unlike the Irish NDA Bill and PEI NDA Act, the focus is on pre-dispute agreements and not on those NDAs that have been agreed to after a dispute has occurred. Over half of US workers are thought to be covered by such agreements, with new employees often required to sign NDAs before starting in a role[381].

A number of individual states have moved to pass laws which explicitly bar the enforcement of confidentiality provisions in workplace sexual harassment settlements, and which regulate NDAs generally, including the following:

State	Regulation of Non-Disclosure Agreements as of June 2022
Arizona	Prohibits the use of an NDA to prevent a victim from testifying in a criminal proceeding.
California	Prohibits a provision in a settlement, including agreements relating to separation, that bars disclosure of information relating to any type of workplace harassment, discrimination or retaliation, but it requires that a formal legal complaint is made (a complaint to an employer would not be sufficient) in order to be invoked. If disclosure is restricted, specified wording required.[382]
Hawai'i	Prohibits employer from requiring employee to enter into an NDA concerning sexual assault or harassment at work as a condition of employment, and prevents employers from retaliating against employees for reporting such misconduct[383]. Prohibits use of NDA if NDA prevents a employee disclosing or discussing sexual assault or harassment.[384]

380 Speak Out Act, Pub L No 117-224, §4524, 2022 Stat 19401

381 Natarajan Balasubramanian, Evan Starr and Shotaro Yamaguchi, `Bundling Employment Restrictions and Value Appropriation from Employees' (2023) SSRN <https://dx.doi. org/10.2139/ssrn.3814403>.

382 California Government Code § 12964.5, SB 331 (2021) Legislative Counsel's Digest.

383 A Bill for An Act Relating to Employment Practices, HB 2054, HD1 SD1, 30th Leg., Reg. Sess. (Haw. 2020).

384 A Bill for An Act Relating to Employment Practices, HB 2495, HD1 SD1, 31st Leg., Reg. Sess. (Haw. 2022).

State	Regulation of Non-Disclosure Agreements as of June 2022
Illinois	Bans all non-disclosure and non-disparagement clauses in agreements between employers and employees.
Louisiana	Prohibits the use of an NDA and payment of public funds to settlement terms for state agencies if the NDA prevents the employee from disclosing the underlying facts of the claim.[385]
Maryland	Does not include NDAs specifically but they are likely to be included in the voiding of any provision in an employment contract that waives any substantive right to a future claim of sexual harassment.
Maine	Prohibits employer from requiring employee to enter into a contract of employment waiving rights to report or discuss unlawful employment discrimination at work. Prohibits the use of NDAs in settlement, separation, or severance agreements that limit victims from reporting, to testify or provide evidence to federal or state agencies or courts and prevent the disclosure of information relating to discrimination if the agreement expressly provides for separate monetary consideration for the NDA.[386]
Nevada	Banned NDAs from settlement agreements if the NDA restricts a complainant from disclosing information concerning a sexual offense.
New Jersey	Prohibits enforcement of all NDAs relating to discrimination or harassment after 18th of March 2019.
New Mexico	Prohibits private employer from requiring employee to sign an NDA or otherwise prevent disclosure concerning sexual harassment, discrimination, or retaliation at work. Confidentiality permitted for settlement amount, and victim details and facts about the claim if requested. Victims allowed to make permitted disclosure for judicial, administrative, or other proceedings as required by law.[387]

385 An Act to Amend and Reenact R.S. 42:342(B) and R.S. 44:4.1(B)(28) SB 182, 2019 Reg. Sess. (La. 2019).

386 An Act Concerning Nondisclosure Agreements in Employment, LD 965, H.P. 711 (Me. 2022).>

387 An Act Relating to Employment Law; Providing that Nondisclosure Agreements in Sexual Harassment, Discrimination o Retaliation Cases are Unenforceable, HB 21, 2020 Reg. Sess. (N.M. 2020) https://www.nmlegis.gov/Sessions/20%20 Regular/final/HB0021.pdf.

State	Regulation of Non-Disclosure Agreements as of June 2022
New York	Requires that an NDA only be used if it is a complainant's preference[388]
Oregon	Prohibits any NDA that prevents disclosure of sexual assault unless the complainant requests it.
Pennsylvania	Prohibits employer from requiring employee to enter into NDA concerning sexual harassment as a condition of employment. Employee may voluntarily enter into NDA.[389]
Rhode Island	Prohibits employers from requiring employees to sign an NDA or otherwise prevent disclosure concerning alleged violations of civil rights or alleged unlawful conduct.[390]
Tennessee	States that an employer may not require an employee enter into an NDA concerning sexual harassment as a condition of employment after 15th May 2018.
Vermont	Bans employers from asking employees to waive their rights concerning sexual harassment, with the legislation covering not just employees but everyone hired to perform work or services.
Virginia	Prohibits employment agreements that conceal details relating to a claim of sexual assault, though the legislation does not address sexual harassment
Washington	Prohibits employers from requiring employees to sign an NDA to conceal sexual assault or harassment

Table 2 comparative table of legislative NDA reform in the USA adapted from R.S.Spooner[391]

Due to the nature of NDAs, it is challenging to assess the efficacy of such reforms. One study in 2021 measured the impacts of laws in California, Illinois, and New Jersey that removed these pre-dispute NDAs by looking at Glassdoor employer reviews from both before and after the legal reforms.[392] Broad NDAs were found to prevent workers from sharing their bad experiences at work, but not their good ones. Further, these kinds of NDAs made it harder for better employers to stand out and harder for workers to avoid bad employers.[393]

388 NY Gen Oblig Law § 5-336 (2022).

389 An Act Providing for Nondisclosure Agreements Relating to Sexual Harassment, HR 938, 2021-2022, (2021).

390 <An Act Relating to Labor and Labor Relations – Fair Employment Practices, S 342, LC001065 (2023).

391 Adapted from a comparative table of legislative NDA reform in the USA compiled in DCEDIY, The Prevalence and Use of (n 62) 21 based on the work of Spooner, The Goldilocks Approach (n 57); National Women's Law Center, `State Workplace Anti-Harassment Laws Enacted since #Metoo went Viral' (Web Page, 19 October 2023) <https://nwlc.org/resource/state-workplace-anti-harassment-laws-enacted-since-metoo-went-viral/>.

392 Jason Sockin, Aaron Sojourner and Evan Starr, 'Non-Disclosure Agreements and Externalities from Silence' (2023) Upjohn Institute Working Paper 22-3650 ('Sockin, Sojourner and Starr') <https://ssrn.com/abstract=3900285>.

393 Sockin, Sojourner and Starr (n 392) 45.

7.6. Victoria, Australia

In 2021, the Victorian Government established a Ministerial Taskforce on Workplace Sexual harassment to develop reforms that will better prevent and respond to sexual harassment in workplaces[394]. The taskforce recommended the government introduce legislative amendments to restrict the use of NDAs in resolving sexual harassment matters in Victoria, using the Irish NDA Bill and lessons from other jurisdictions. In July 2022 the government accepted the recommendation in principle, noting the complexity of NDAs and the need for significant further work on appropriate options for restricting NDAs before any legislative amendments were made. At the time of publication of this report, there have been limited public developments since the government's response to the taskforce. The Victorian Trades Hall Council is advocating for legislative reform on this issue.[395]

394 Minister for Workplace Safety, Ministerial Taskforce on Workplace Sexual Harassment: Victorian Government's Response to the Recommendations on How to Better Prevent and Respond to Sexual Harassment in Workplaces (Report, 11 July 2022) <https://www.vic.gov.au/ministerial-taskforce-workplace-sexual-harassment>.

395 We Are Union, 'End the Silence! Let us Speak! End NDA Gagging', (Web Page, 3 February 2023) <https://www.weareunion.org.au/no_more_workplace_cover_ups>.

8. Conclusion

Sexual harassment is a gender violence issue. It affects one in three workers and women at higher rates. Even so, there is much we do not know and cannot know about prevalence and how these complaints are settled. This makes it very difficult to create change and offer adequate protections.

Because so much information about sexual harassment rests under confidentiality agreements and is not publicly understood, we cannot know how seriously employers assess liability and responsibility. We do not know how many settlements have been made and the amounts victim survivors exchange for silence.

Recognising the potential misuse of NDAs, the Respect@Work Council introduced the NDA Guidelines to help legal practitioners navigate resolution away from blanket confidentiality in pursuit of a victim-centric approach. Our research was conducted almost a year after the NDA Guidelines were published to better understand what is happening in practice and whether the NDA Guidelines have been an effective response to an identified problem.

Ten months on, our data shows that these principles are not utilised effectively in resolution practices. We have learnt that Strict NDAs remain a default resolution term for sexual harassment matters in Australia.

However, there is engagement with the principles in the NDA Guidelines but there is no uniformity in NDA approach by the profession. Some practitioners report that they have never settled a matter for anything less than complete confidentiality, while others consider it standard to include exceptions to speak to support people, or for confidentiality to relate only to settlement terms. Others tell us they must fight to achieve any variation to strict and broad NDAs.

Our research points to the significance of the individual representative's advocacy, but acknowledges advocacy's limit when historical practices are entrenched in the broader profession. When used properly, NDAs can be a useful tool to reach

out-of-court settlements. However, we now know that many victim survivors and respondent clients do not receive advice on the scope of NDAs, signing terms they did not know were optional. This raises concerns as to whether such terms are enforceable, and whether such conduct meets legal professional standards.

It is our hope that this report can be used to continue the discussion about confidentiality and highlight the need for the more judicious application of NDAs, which over time may contribute to a greater culture of transparency and support victim survivors' healing. This report is the foundation for further examination of NDA use in the profession and invites regular review to better understand practice over time.

Appendix to Let's Talk About Confidentiality Report: Model confidentiality clauses

These model confidentiality clauses are designed to assist with the resolution of workplace sexual harassment complaints and accompany the USYD Social Justice Practitioner-In-Residence 'Let's Talk About Confidentiality' report dated 6 March 2024. These model clauses have been prepared in conjunction with Clayton Utz.

A confidentiality clause is a term in a settlement agreement that requires certain details to be kept confidential as part of reaching a settlement.

The model clauses below can be adapted when preparing a settlement agreement to resolve a sexual harassment complaint. These confidentiality clauses, or any others, should not automatically be included in a settlement agreement. We suggest you consider these model clauses in conjunction with the Respect@Work Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints 2022 **(Guidelines)** to see what terms are most applicable in your resolution. The VLSB+C Advice for lawyers: Using confidentiality clauses to resolve workplace sexual harassment complaints may assist to help lawyers consider their professional and ethical obligations.

The model clauses below are intended to provide guidance and will need to be tailored to the circumstances of each case. Settlement agreements are legally binding and all parties should consider obtaining legal advice on the terms, including any confidentiality clauses. These clauses are not static. Like all areas of law, they will evolve as best practice continues to emerge and we intend on publishing periodic updates to these clauses.

Clause bank

1. Confidentiality

Drafting note: When drafting settlement agreements in sexual harassment matters, lawyers need to consider their obligation to act in their client's best interests as well as their duty to act with integrity and professional independence. Confidentiality provisions can assist to protect the complainant's privacy surrounding the matter and may help to provide closure but they can also make complainants feel silenced. In the short term, settlement agreements can be used to resolve matters confidentially, protect the complainant, the business, its reputation and/or the perpetrator but, in the long term, may increase the risk of further sexual harassment by perpetrators and contribute to a culture of silence and inaction around sexual harassment.
Confidentiality clauses should not automatically be included as a standard term of a settlement agreement and should instead be used on a case-by-case basis, in line with adopting a trauma-informed and complainant-centric approach to the resolution of sexual harassment complaints. Some issues to consider include:[396]

1. Is a confidentiality clause necessary in the matter, and if so, why?
2. Has the complainant requested a confidentiality clause?
3. Has the complainant had an opportunity to understand what a confidentiality clause is and its implications and alternatives?
4. Is a confidentiality clause necessary to protect the identity of some / all of the parties involved (e.g. witnesses)?

Instead of a blanket confidentiality clause, consider the following options:

Option 1. No confidentiality clause.

Option 2. Confidentiality clause prescribing certain matters as confidential and otherwise allowing broader disclosure.

Option 3. Confidentiality clause with certain permitted exceptions.

With each option, Parties may use an agreed statement to be made by the employer

396 These questions are drawn from the Guidelines, page 11.

or jointly by the parties regarding the matter.

The complainant is referred to as the 'Person' in the clauses below.

If Option 1 is chosen, the complainant should be made aware that disclosing matters relating to their complaint may give rise to other legal risks, such as defamation risks, where matters are disclosed that may harm the perpetrator/s or another person's reputation.

If Option 2 or Option 3 is chosen, the parties will need to discuss and agree on the scope of the confidentiality clause, including what matters can be disclosed and what matters are confidential.

Option 1 – No confidentiality obligations

1.1 No clause.

Optional agreed statement

1.1 The Parties agree that a statement in terms consistent with the form set out in this clause may be made by [either of the Parties / the Person] to [other persons inside/other people outside the Organisation].

1.2 [Agreed Statement] **(Agreed Statement)**

Drafting note: An agreed statement outlines what the parties are prepared to say about the matter on an agreed basis. It is necessary to tailor the statement to the facts and circumstances of a particular matter or dispute. For example, the statement could include an acknowledgement of the fact an allegation was made and was investigated, and any steps an Organisation is taking to improve its sexual harassment response and prevention framework.

Where there are no confidentiality obligations, a statement inconsistent with the Agreed Statement will not breach the settlement agreement.

Option 2 – Confidentiality clause with limited disclosure on an unrestricted basis, with optional agreed statement:

1.1 The Parties agree [either of the Parties / the Person] will not to disclose to any other person, [Optional: for a period of X years/X months/until the end of employment]:

any settlement amount paid to the Person under this agreement;

Consider whether subclauses beyond (a) are necessary.

a. the terms of this agreement;

b. all negotiations leading to the signing of this agreement;

c. the existence of this agreement;

Further subclauses where complainant wants to speak about their experience without disclosing they complained about the Conduct, the identity of the perpetrator or the dispute itself.

d. the fact that the Person is a complainant;

e. the perpetrator of the Conduct; and/or

f. the circumstances of a dispute between the Parties to the extent that they identify the Person,

but that no confidentiality obligations otherwise apply and that they may disclose the Conduct and [insert anything else that may be disclosed] to any other person.

1.2 [Use if parties have agreed to limit the period of confidentiality] The Parties agree to extend the period of operation of subclause 1.1 on the subsequent request of the Person.

1.3 [Optional agreed statement clause (as above)]

Option 3 – Confidentiality clause with certain permitted exceptions

1.1 Subject to clauses [reference permitted exceptions clauses at 2.1 and 3.1 below], the Parties agree [either of the Parties / the Person] will not to disclose to any other person [Optional: for a period of X years/X months/end of employment]:

a. any settlement amount paid to the Person under this agreement;

Consider whether subclauses beyond (a) are necessary.

b. the terms of this agreement;

c. all [matters, discussions and negotiations] leading to the signing of this agreement;

d. the existence of this agreement;

Further subclauses where complainant wants to speak about their experience without disclosing they complained about the Conduct, the identity of the perpetrator, or the dispute itself

e. the fact that the Person is a complainant;

f. the perpetrator of the Conduct; and/or

g. the circumstances of a dispute between the Parties to the extent that they identify the Person.

1.2 [Use if parties have agreed to limit the period of confidentiality] The Parties agree to extend the period of operation of subclause 1.1 on the subsequent request of the Person.

1.3 [Optional agreed statement clause (as above)]

2. Permitted disclosure in certain circumstances by all Parties

2.1 Clause [reference to clause 1.1 above] does not apply where the relevant disclosure is:

Essential inclusions

a. for the purpose of obtaining legal advice;

b. required by law or any legally binding order of any court, government, semi-government authority, administrator or judicial body;

c. permitted by the express terms of this agreement;

d. permitted by the express prior written agreement from the other party;

e. necessary to enforce the terms of the agreement;

f. of information that is available to the public generally (except as a result of a breach of this agreement by the relevant Party seeking to make the disclosure);

g. for the purpose of reporting an offence to a law enforcement agency;

Best practice inclusions

h. by the Person for the purpose of the Person seeking employment from a prospective employer and to the extent of advising the prospective employer, as applicable, that they raised a complaint of sexual harassment with their former employer and/or that they left their former employ in connection with the matters raised in their sexual harassment complaint;

i. for the purpose of providing evidence to Parliament or a Parliamentary Committee or law reform enquiry;

j. for the purpose of co-operating with a regulator, or a criminal investigation or prosecution, whether or not the process is compulsory;

i. by the Organisation to an officer, employee, contractor or agent of the Organisation who is required to be aware of the relevant information in order to discharge their duties and responsibilities, including without limitation for the purposes of:

   i. reporting internally and/or to the board of directors or a board subcommittee;

ii. monitoring reports of sexual harassment over time including routine surveys and data capturing to understand any emerging risks or systemic issues; or

iii. developing de-identified case-studies to inform organisational learning about sexual harassment and providing a safe workplace;

j. by the Organisation to the Workplace Gender Equality Agency;

k. by the Organisation for the purpose of notifying an insurer or its auditors;

l. by the Organisation for the purpose disclosing the identity of the perpetrator where there is a legitimate public or stakeholder interest;

m. to defend against any claims made against the relevant Party, where this agreement or the circumstances surrounding this agreement are relevant to the claim;

n. disclosing information in respect of a workers compensation claim under the Safety, Rehabilitation and Compensation Act 1988 (Cth) (or equivalent) or under applicable superannuation legislation;

o. contained within data or information reported by the Organisation to a government or statutory agency or authority in a manner that protects the identity of the Person;

p. [other]

Drafting note: Any of the above disclosures to permitted third parties are also subject to that person being made aware of the confidentiality obligations contained in the settlement agreement.

In the suggested list below, (a) to (g) are the essential persons the Person should be permitted to disclose to, and those from (h) onwards are optional best practice inclusions, which can be retained or removed as appropriate.

3. Permitted disclosure to certain people by the Person

3.1 Clause [reference to clause 1.1 above] does not prevent the Person from expressly disclosing the matters set out in clause [reference to clause 1.1 above and specify particular sub-clauses as applicable] to:

a. the police;

b. a lawyer for the purpose of obtaining legal advice;

c. a tax advisor for the purpose of obtaining tax advice or financial advisor for assistance with financial affairs;

d. a spouse, partner or immediate family member of the Person, provided the person to whom the disclosure is made agrees to comply with the obligation of confidentiality at clause [insert reference to clause in the form of clause 1.1 above] prior to the disclosure;

e. a treating medical professional for the purpose of obtaining medical treatment;

f. a treating mental health professional for the purpose of obtaining mental health treatment;

g. the Australian Human Rights Commission or State or Territory discrimination body;

h. a workers' compensation authority;

i. a workers' compensation insurer;

j. an authorised representative of a registered employee association or trade union, provided the representative agrees to comply with the obligation of confidentiality at clause [insert reference to clause in the form of clause 1.1 above] prior to the disclosure; and/or

k. [list of names of individuals and support persons

4. Post-employment confidentiality obligations

4.1 You agree that the terms of your employment that survive its termination will continue to operate in accordance with their terms (including, but not limited to, confidentiality). However, for clarity, your continuing confidentiality obligations in your employment contract do not stop you from making disclosures in accordance with [references to clauses 2.1 and 3.1 above].

5. Definitions

5.1 In this agreement:

a. Conduct means [brief description of the nature of the substantiated conduct found to have occurred.]

b. Organisation means [name / description of company which employs / engages the Person].

c. Person means the person who made the allegation/s regarding the Conduct, being [description / name of person and their capacity, e.g. ` employee of X' or `contractor to X']