

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']

The model clauses in the Appendix to this report have been prepared in conjunction with Clayton Utz for publication as general information only and do not constitute legal, accounting or other professional advice. In receiving a copy of these model clauses you acknowledge and agree that the content in the model clauses is provided for general information purposes only and is current at the time of first publication and you acknowledge and agree that you will make your own independent assessment of the material in the model clauses. You also agree that you will engage and rely on the work of your own advisers in relation to your own, and your organisation's, specific circumstances. To the extent permitted by law, both the University of Sydney and Clayton Utz exclude all liability for any loss or damage arising out of reliance on the content in the model clauses. It should be noted that the content in the model clauses reflects best practice and, whilst supported by the authors, may not be representative of the Clayton Utz partnership as a whole. The contents of this report is current as at 6 March 2024.