



# Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints – Fact Sheet for Lawyers

This fact sheet complements the *Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints*.

## Rethinking the use of confidentiality clauses in workplace sexual harassment settlements

Confidentiality clauses should not be seen as a standard term of workplace sexual harassment settlement agreements and should be used on a case-by-case basis.

Confidentiality clauses that require silence over transparency can have long-term impacts on the mental health and wellbeing of complainants. They may also enable harassers to continue their behaviour and compromise employers' ability to prevent sexual harassment in the workplace.

There are regulatory, ethical and reputational risks to consider when dealing with confidentiality in the settlement of sexual harassment complaints.

## Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints

When you are advising your clients on workplace sexual harassment settlement agreements, you should consider the *Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints*. These Guidelines set out an approach to negotiating a settlement agreement to resolve an allegation of workplace sexual harassment, which aims to ensure the appropriate use of confidentiality clauses. The approach involves the following principles:

1. Consider the need for a confidentiality clause on a case-by-case basis.
2. The scope and duration of the confidentiality clause should be as limited as possible.
3. Confidentiality clauses should not prevent organisations from responding to systemic issues and providing a safer workplace.



4. All clauses in a settlement agreement should be clear, fair, in plain English and, where necessary, translated and/or interpreted.
5. The person who made the allegation 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.
6. Negotiations about the terms of a settlement agreement should ensure so far as possible the wellbeing and safety of the person who made the allegation, and be trauma-informed, culturally sensitive and intersectional.

## Questions to consider

- Have I been trained in trauma-informed practice in relation to sexual harassment complaints?
- Have I advised my client about the *Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints*?
- Is a confidentiality clause necessary in this matter, and if so, why?
- How will a confidentiality clause affect the safety and wellbeing of the person who made the allegation and any witnesses?
- Does and should the confidentiality clause allow the person who made the allegation to talk to their family members, medical or mental health practitioners, regulators or external authorities, law enforcement or others about the workplace sexual harassment complaint?
- Should the confidentiality clause end after an agreed period of time?
- If you are advising an employer/organisation, will a confidentiality clause be inconsistent with their statutory duties (such as under the *Fair Work Act 2009* (Cth), discrimination law and work health and safety law), or limit the organisation's ability to collect data on or report on allegations of sexual harassment?
- Is the settlement agreement clear, balanced and easy to understand for all parties?
- Have all parties been given time and appropriate referrals to support services (including legal advice) to understand their rights and obligations under the settlement agreement?



## Who can I contact for more information or support?

*For information about workplace sexual harassment including support services*

- [Respect@Work website](#)

*Where to seek help (sexual harassment and sexual assault support services, legal services, mental health services and advocacy support)*

- [Respect@Work website](#)

*For complaints and more information about workplace rights and entitlements*

- [Fair Work Commission website](#)
- [Australian Human Rights Commission website](#)
- [Fair Work Ombudsman website](#)

*Guide to external pathways to address sexual harassment (support services, anti-discrimination and human rights bodies, workplace relations bodies, and work health and safety regulators)*

- [Guide to external pathways](#)

*The Law Society in your relevant jurisdiction may be able to provide additional advice on legal ethics and professional obligations.*