



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

2022



**Australian  
Human Rights  
Commission**



## Foreword



The elimination of workplace sexual harassment is essential to improving the safety, diversity and productivity of our workplaces, and has been a key focus of my work as Australia's Sex Discrimination Commissioner.

The *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces Report* (Respect@Work Report) highlighted the prevalence, nature and reporting of sexual harassment in Australian workplaces, and recommended that a multifaceted and whole-of-community response to tackling workplace sexual harassment be implemented – providing employers with guidance they need, and victims the support and redress they deserve. Changing the way we approach the use of non-disclosure agreements (NDAs) or confidentiality clauses in settlement agreements relating to sexual harassment complaints is an important step.

Through submissions to the National Inquiry, the Australian Human Rights Commission (Commission) heard how confidentiality obligations can be harmful and counter-productive to the elimination of sexual harassment; by silencing victims, concealing the behaviour of alleged harassers, and inhibiting oversight by leaders and boards through preventing fulsome and transparent upward reporting. Conversely, the Commission also heard that when navigated appropriately, confidentiality provisions can enhance victim-centricity of the response, for example by providing anonymity and privacy where that is the victim's choice, as well as enabling greater flexibility for the parties to reach a resolution that is faster and less formal than litigation.

Recognising the advantages and disadvantages that need to be balanced, the Respect@Work Report did not recommend a blanket ban of the use of confidentiality clauses, but rather, the development of national guidelines for individuals, businesses and organisations – to highlight the best practice approach when considering whether, and how, to use confidentiality clauses in sexual harassment settlement agreements.

The *Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints* (the Guidelines) will help ensure that the manner in which private settlements of sexual harassment cases are approached appropriately considers the reduction of harm to individuals and the prevention of future sexual harassment. 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.



I encourage practitioners in the field to understand the reasons for, and benefits of, this change – and to embrace it accordingly. Similar reform is being seen in other jurisdictions, and it is incumbent on Australia to continue to show leadership and commitment to act.

I thank the Attorney-General’s Department for assistance in developing these Guidelines, which have been developed in consultation with the Fair Work Commission, and with the support of the Australian Human Rights Commission, the Respect@Work Council and a range of other stakeholders. I commend these Guidelines to you.

**Kate Jenkins**

**Sex Discrimination Commissioner, Australian Human Rights Commission  
Chair of the Respect@Work Council**



## Terms in the Guidelines

**Alleged harasser** – ‘Alleged harasser’ refers to anyone who is alleged or reported to have committed an act of sexual harassment.

**Confidentiality clause** – A confidentiality clause is a section within a workplace sexual harassment settlement agreement that requires particular details to be kept confidential as part of reaching the settlement. Confidentiality clauses are sometimes referred to as NDAs.

**Intersectional** – Examining how different forms of inequality interact to create complex experiences of discrimination. This can be by understanding how one person’s diversity – their gender, race, ability, sexuality, age, class or immigration status – makes their experience different to someone else’s.

**Organisation** – ‘Organisation’ refers to the workplace party responding to a sexual harassment complaint, such as an employer.

**Non-disclosure agreements** – Confidentiality clauses, and settlement agreements containing confidentiality clauses, are sometimes referred to as NDAs, including in the Respect@Work Report. These Guidelines will use confidentiality clause rather than NDA as the preferred term. This is because the term “NDA” implies that the primary purpose of the overarching settlement agreement is to limit disclosure of information. This is not often the case – settlement agreements cover a range of matters beyond confidentiality.

**Person who made the allegation** – The term ‘person who made the allegation’ is used in these Guidelines to mean an individual who has made an allegation about workplace sexual harassment. This may include an individual who refers to themselves as a ‘victim’, ‘complainant’ or ‘claimant’ in relation to sexual harassment.

**Sexual harassment** – Sexual harassment is any unwelcome sexual advance, unwelcome request for sexual favours or unwelcome conduct of a sexual nature in circumstances where a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

Sexual harassment is unlawful under the *Sex Discrimination Act 1984* (Cth) in different areas of public life, including employment, service delivery, accommodation and education. Some types of sexual harassment may also be criminal offences.



The Respect@Work Report set out a list of behaviours that are likely to constitute sexual harassment, which included:

1. unwelcome touching, hugging, cornering or kissing
2. inappropriate staring or leering that made you feel intimidated
3. sexual gestures, indecent exposure or inappropriate display of the body
4. sexually suggestive comments or jokes that made you feel offended
5. sexually explicit pictures, posters or gifts that made you feel offended
6. repeated or inappropriate invitations to go out on dates
7. intrusive questions about your private life or physical appearance that made you feel offended
8. inappropriate physical contact
9. being followed or watched or having someone loitering nearby
10. requests or pressure for sex or other sexual acts
11. actual or attempted rape or sexual assault
12. indecent phone calls, including someone leaving a sexually explicit message on voicemail or an answering machine
13. sexually explicit comments made in emails, SMS messages or on social media
14. repeated or inappropriate advances on email, social networking websites or internet chat rooms
15. sharing or threatening to share intimate images or film of you without your consent
16. any other unwelcome conduct of a sexual nature that occurred online or via some form of technology.

**Workplace sexual harassment settlement agreement** – A workplace sexual harassment settlement agreement (settlement agreement) is a legally enforceable arrangement made to resolve or settle a sexual harassment complaint. The parties to a settlement agreement will usually include the person who made the complaint and the organisation responding to it, and may also include the alleged harasser. The settlement agreement will set out the actions each party will take to resolve and close the complaint.



## Introduction

As part of the Respect@Work National Inquiry, the Australian Human Rights Commission (Commission) heard concerns about how confidentiality clauses in workplace sexual harassment settlement agreements (settlement agreements) can be used to intimidate and silence victims, conceal the behaviour of alleged harassers, and inhibit oversight by leaders (including managers and executives) and boards who, in some cases, may not be aware that complaints have been raised if they were settled confidentially. This has, in turn, enabled alleged harassers to remain in the same workplace or move within industries and continue to engage in sexual harassment.

The Commission also recognises that confidentiality clauses can have benefits for the person who made the allegation and other parties and as such, should not be subject to a blanket ban. Instead, the Respect@Work Report recommended that the Commission develop guidance for the use of confidentiality clauses in workplace sexual harassment matters (recommendation 38).<sup>\*</sup> These Guidelines are the product of that recommendation.

These Guidelines outline a recommended approach to guide the use of confidentiality clauses in settlement agreements. Adopting this approach will help contribute to improving the way confidentiality clauses are used in relation to workplace sexual harassment complaints. It will also help support individuals and employers to meet their obligations under the *Fair Work Act 2009* (Cth) and discrimination laws, including the *Sex Discrimination Act 1984* (Cth), as well as Work Health and Safety (WHS) obligations by, for example, reducing the risk of repeated instances of workplace sexual harassment occurring, and helping to identify and control hazards that contribute to the risk of workplace sexual harassment.

These Guidelines are not legal advice. People who have experienced sexual harassment or made a workplace sexual harassment complaint and employers and others responding to complaints of workplace sexual harassment may wish to seek independent advice about how to best resolve the matter.

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<sup>\*</sup> Respect@Work: Sexual Harassment National Inquiry Report (2020), p563



## What are confidentiality clauses?

A confidentiality clause refers to a section within a settlement agreement that requires particular details to be kept confidential as part of reaching a settlement.

Historically, it has been common for settlement agreements to contain a confidentiality clause which binds all parties to maintain confidentiality on the complaint and the settlement process. However, there is no legal requirement for confidentiality to be a term of settlement agreements.

A confidentiality clause may be requested by the person who made the allegation who may not want details disclosed. As the National Inquiry heard, many confidentiality clauses are requested by the employer as part of a negotiated resolution, which means the person who made the allegation will agree to give up their right to take further action, and to keep confidential information about the sexual harassment complaint in exchange for an agreed outcome. This may include a payment, an apology, or another action the employer will take, such as introducing or improving sexual harassment training in the organisation.

Settlement agreements containing confidentiality clauses can be helpful because they can allow parties to resolve a complaint quickly and without requiring a full commission, tribunal or court proceeding. This can give the person who made the allegation greater control over the resolution of their dispute. It can also reduce legal and other costs.

## What can't confidentiality clauses do?

Confidentiality clauses cannot prevent the disclosure of information in all circumstances, even if they claim to do so. There are some legal reasons why a confidentiality clause will not prevent a person from disclosing information. For example, a confidentiality clause will not prevent a person from:

- disclosing information because they are compelled to provide the information by law or by Parliament or a Parliamentary Committee;
- disclosing information to a law enforcement agency where the person is under an obligation to report an offence;
- making a protected disclosure under the *Public Interest Disclosure Act 2013* (Cth) or other applicable 'whistle-blower' legislation; or
- answering a subpoena, summons or other compulsory court process.



## Who are the Guidelines for?

These Guidelines can assist a person who made the allegation of sexual harassment, as well as employers, alleged harassers, employer organisations, unions, legal practitioners, mediators, insurers and anyone else involved in the process of resolving a workplace sexual harassment complaint.

## How should the Guidelines be used?

These Guidelines may be used throughout the process of negotiating a workplace sexual harassment settlement agreement that contains a confidentiality clause. Read the Guidelines before the process begins, and refer back to them if necessary.

While these Guidelines focus on the use of confidentiality clauses in settlement agreements (and the process for negotiating a settlement agreement containing a confidentiality clause), they may also help inform the development of organisational responses to sexual harassment complaints more broadly, including investigations in response to a complaint. As such, organisations are encouraged to consider how the recommended approach could apply to their internal complaint management processes.

## A note on non-disparagement clauses

Another common feature of settlement agreements is a non-disparagement clause. This usually requires the parties to the settlement agreement to not say things about each other that are critical, dismissive or disrespectful. A non-disparagement clause is different to a confidentiality clause but can have a similar effect because it limits what the parties to the agreement can say.

It is important to consider whether a non-disparagement clause is necessary, and how it will operate with any confidentiality clause in a settlement agreement. While these guidelines apply to confidentiality clauses, organisations are also encouraged to consider how the recommended approach could apply to their use of non-disparagement clauses.





## Recommended approach to the use of confidentiality clauses

Confidentiality clauses should not be seen as standard terms in workplace sexual harassment settlement agreements. When resolving an allegation of workplace sexual harassment, organisations should aim to promote openness and transparency to ensure they are able to take steps to address and prevent sexual harassment.

Based on the findings of the Respect@Work Report, the following approach should inform the use of confidentiality clauses in all workplace sexual harassment settlement agreements:

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.

These Guidelines are directed towards confidentiality obligations contained in legally binding settlement agreements. Nothing in this document prevents the parties choosing to keep details of the complaint or settlement confidential, including the person who has made the allegation.



## Checklist before finalising a settlement agreement that contains a confidentiality clause

The safety and wellbeing of the person who made the allegation should be a central consideration in all discussions about confidentiality clauses in settlement agreements. The person who made the allegation should be fully informed at every stage of the process so that they have an opportunity to decide what is in their best interests. To ensure the person who made the allegation is aware of the settlement agreement process and what a confidentiality clause means, they should be provided with:

- a copy of these Guidelines and the *Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints - Fact Sheet for Individuals*
- where possible, a copy of any proposed settlement agreement drafted in an accessible format, including plain language
- information about how to access legal services including Legal Aid Commissions, Aboriginal and Torres Strait Islander Legal Services, community legal centres or other sources where they may be able to access free legal advice
- information about how to access support and counselling services, including union representatives where appropriate
- adequate time to read, understand and sign the settlement agreement.



## 1. Consider the need for a confidentiality clause on a case-by-case basis

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

Parties and representatives should treat all workplace sexual harassment complaints on a case-by-case basis. Not all sexual harassment complaints are the same and confidentiality will not always be helpful, appropriate or in the best interests of the parties to the complaint.

The need for, and approach to, confidentiality should vary depending on the individual situation, and all confidentiality clauses should be tailored to reflect the circumstances of each case. Competing interests should be fairly and carefully balanced, with particular consideration given to the wellbeing and safety of the person who made the allegation.

*Some questions to consider:*

- Is a confidentiality clause necessary in this matter, and if so, why?
- Has the person who made the allegation requested a confidentiality clause?
- Has the person who made the allegation had an opportunity to understand what a confidentiality clause is and what are its implications and alternatives? This may include having a translator and/or interpreter to assist.
- Is a confidentiality clause necessary to protect the identity of some of the parties involved, such as witnesses?



## 2. The scope and duration of a confidentiality clause should be as limited as possible

If parties to a settlement agreement agree to include a confidentiality clause in a settlement agreement, the clause should be as limited as possible in both scope and duration. This section outlines some key matters to consider when determining the appropriate scope and duration of a confidentiality clause.

The person who made the allegation should have access to independent legal advice and/or support to assist them in this process (further detail **below**).

### Exceptions allowing disclosure

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. These people and organisations may include: close family members, law enforcement officials, legal professionals, regulators and external authorities, financial advisers, union representatives, a prospective employer, workers compensation insurer, counsellors or medical and mental health professionals. Confidentiality clauses should not prevent the person who has made the allegation from seeking professional support and advice or talking to their close family members about their experience.

Where a confidentiality clause has exceptions, it may be appropriate to include conditions on the disclosure to those people. For example, disclosure will only be made to another person if that person has first agreed to treat the information as confidential, or that information will be disclosed for the purpose of obtaining advice (such as tax advice).

### Other confidentiality requirements

If the person has existing confidentiality obligations, for example in their employment contract or as part of a misconduct investigation or process, the organisation should consider whether these need to be waived, varied or otherwise dealt with so that any settlement agreement or confidentiality clause has meaningful operation.



## **Include an end date and/or a waiver**

Confidentiality clauses do not need to be permanent.

Parties should consider whether a confidentiality clause should no longer apply after certain events or an agreed period of time have passed. This may accommodate the changing circumstances of a person who does not want information about the underlying incident to be released early on but may decide to speak about their experience in the future.

## **Future incidents and taking action in event of breaches of the settlement agreement**

A confidentiality clause should not prevent a person who made an allegation from exercising their right to make an allegation of workplace sexual harassment about future conduct or taking action for non-compliance with a settlement agreement.

## **Confidentiality clauses do not need to be mutual**

In some cases, an organisation may consider that it does not want to disclose information about the complaint or settlement whilst permitting the person who made the allegation to talk about these aspects in some capacity. For example, a confidentiality clause might permit the person who made the allegation to talk about their experience whilst keeping other details such as the settlement sum or the identity of witnesses confidential.

*Some questions to consider:*

- Should some information be able to be shared while other information is kept private?
- Does the person who made the allegation want to talk to their family members, a counsellor, medical or mental health practitioners, regulators or others about the workplace sexual harassment complaint?
- What is an appropriate end date for the confidentiality clause? Might the person who made the allegation want to talk about the allegation at a later stage?
- If a confidentiality clause is requested, does it ensure the safety and wellbeing of the person who made the allegation?



### 3. Confidentiality clauses should not prevent organisations from responding to systemic issues and providing a safer workplace

Organisations should strive to build healthy workplace cultures and eliminate workplace sexual harassment, and have a duty to comply with their legal obligations. Confidentiality clauses that limit or prevent discussion about addressing sexual harassment in the workplace are inconsistent with this objective. If the person who made the allegation requests confidentiality to protect their privacy, the organisation should support the request and work with the person on how the incident could be disclosed or reported in an appropriate way (such as with de-identified information) for the purpose of addressing systemic issues and providing a safer workplace.

Confidentiality clauses 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. Where possible, they should also not prevent a person who has made an allegation from participating in internal or external surveys, reviews or investigations that deal with culture and systemic issues. By adopting strategies for the appropriate disclosure of information about the incidence of sexual harassment in workplaces and how the organisation responds to complaints, an organisation can position itself as a promoter of a safe workplace culture that takes its responsibility to address sexual harassment seriously.

Organisations must also comply with their obligations under the *Fair Work Act 2009* (Cth) and discrimination laws, including the *Sex Discrimination Act 1984* (Cth), as well as WHS laws.

When considering the use of a confidentiality clause, organisations should ensure that it does not prevent them from:

- communicating with the person who made the allegation about what the organisation intends to do to prevent repeat conduct and promote a healthy workplace culture (if the person wants this);
- where possible, allowing people who have made allegations to participate in organisational surveys, reviews or investigations that deal with culture and systemic issues (whether internal or external) should they wish to;
- reporting data and de-identified information on the incidence of sexual harassment in the workplace to management, boards and relevant authorities;
- dealing with systemic issues, repeat offenders or repeated conduct, and providing a safer workplace;



- communicating with staff about sexual harassment as a workplace health and safety issue, and asking questions and seeking feedback about ways to improve preventative measures and other initiatives; and
- regularly reviewing and updating dispute processes concerning allegations of sexual harassment and other processes that might help stop and prevent harmful behaviour.

Organisations should also take a proactive approach to considering their use of confidentiality clauses in settlement agreements more generally, including:

- developing protocols, policies and procedures to guide how confidentiality clauses are used during settlement agreements; and
- creating a leadership/board communication strategy to ensure that confidentiality clauses do not prevent oversight by leaders (including managers and executive) and boards.

## Data and reporting

Confidentiality clauses should not prevent the employer from disclosing aggregate or de-identified information, especially where there is a public interest, and for the purposes of data collection, to relevant authorities including WHS regulators, the Australian Human Rights Commission, and statutory authorities such as the Workplace Gender Equality Agency.

There may be other circumstances where a party is required to disclose information subject to a confidentiality clause, such as in a law enforcement context.

## Confidentiality clauses and future employment references

Resolving an allegation of sexual harassment does not end with the signing of a settlement agreement – with or without a confidentiality clause. When a confidentiality clause is used, an organisation should also consider how the confidentiality clause affects their ability to provide an accurate future employment reference. Parties should not enter an agreement that requires them to provide a misleading employment reference.

*Some questions to consider:*

- Will a confidentiality clause help or hinder organisational efforts to prevent and address workplace sexual harassment?
- Are there aspects of the workplace sexual harassment complaint or allegation that should be made public – for example, to demonstrate the organisation’s commitment to taking measures in response?



- Is the organisation managing the use of confidentiality clauses in a way that allows it to address existing or emerging cultural or systemic issues relating to sexual harassment, including repeated conduct?
- Will a confidentiality clause be inconsistent with any of the organisation's statutory duties (such as under the *Fair Work Act 2009* (Cth), discrimination law and WHS law)?
- Does the confidentiality clause limit the organisation's ability to collect data on or report on allegations of sexual harassment?

### Resources:

- The [Respect@Work website](#) provides comprehensive resources to help individuals and organisations understand, prevent, and respond to workplace sexual harassment.
- Safe Work Australia has a [suite of information](#) to support organisations to manage the WHS risks of workplace sexual harassment.
- Comcare has developed [Regulatory Guidance for Employers on their Work Health and Safety Responsibilities](#).





## 4. All clauses in a settlement agreement should be clear, fair, in plain English and, where necessary, translated and/or interpreted

It is important that everyone involved in negotiating a settlement agreement understands what the agreement, including any confidentiality clause, means, and what their responsibilities are. Any discussion or communication about the settlement agreement and the confidentiality clauses should be communicated clearly and written in plain language. This may involve the use of translators and/or interpreters and other supports and resources to ensure that people genuinely understand the information that is provided.

### Draft in plain language

Any settlement agreement that contains a confidentiality clause should be drafted using accessible, plain language that is understood by all parties involved.

The confidentiality clause itself should clearly state what information can and cannot be disclosed, what exceptions are permitted (see example list above), how long the clause is in effect for, and any legal rights and responsibilities the confidentiality clause cannot or will not remove.

### Ensure all documents are accessible

Organisations should be aware of and proactively accommodate the accessibility needs of the individuals involved in a workplace sexual harassment complaint. This includes assessing whether interpreting or translating services, accessible materials, or other supports are required, and ensuring that all communication is in plain language.

*Some questions to consider:*

- Is the language of the settlement agreement clear, balanced and easy to understand?
- Does the confidentiality clause set out the expectations and responsibilities for all parties?
- Is the duration and scope of the settlement agreement clear ([See \[2\] above for more information on this](#))?
- Could more be done to ensure that the parties know what the confidentiality clause means for them?
- Does the document need to be translated, or made available in Easy English, braille or any other format?



## 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

Discussions about the use of confidentiality clauses should ensure so far as possible the wellbeing and safety of the person who made the allegation, and that they are adequately supported to participate fully and safely in the process. If the person who made the allegation does not feel heard in the process of resolving their allegation of workplace sexual harassment, their sense of control, healing and ongoing wellbeing may be compromised.

Independent legal advice can support the person who made the allegation to make informed decisions during the negotiation of or agreement to a settlement agreement, including any confidentiality clause. The [‘Where to find help’ section on page 24](#) contains resources for obtaining independent legal advice.

Similarly, access to counselling services can ensure that the person who made the allegation is psychologically safe and supported throughout the negotiation and agreement process. Organisations should ensure that the person who made the allegation is aware of available resources and has ample time to access them ahead of and during settlement agreement negotiations.

### Manage power imbalances

Organisations and their legal representatives should be mindful of power imbalances when negotiating settlement agreements.

Power imbalances may result from different work roles, age differences, a person’s visa or migration status and other circumstances that may put a person at a disadvantage. When negotiating a settlement agreement, power imbalances can also arise when one person has access to more resources than another, or where there is no access to independent advice or a lack of awareness of legal rights. There is further information on how to consider the diverse needs of all people involved when negotiating a settlement agreement below.

Power imbalances can include, or result in, using undue influence or pressure to secure agreement to a confidentiality clause. No one should organise or take, or threaten to organise or take, any action against another person with intent to pressure them into requesting or agreeing to a confidentiality clause.



All people involved in negotiating a settlement agreement should work to anticipate and manage any power imbalances to minimise the potential for unfairness.

## **Allow time for consideration and advice before signing any settlement agreement**

The person who made the allegation should be provided with a reasonable amount of time to seek independent legal advice before and during negotiations and before signing any settlement agreement.

The person who made the allegation should also be provided with a reasonable amount of time to read and understand any proposed settlement agreement and confidentiality clauses before signing the agreement.

## **Mediation and conciliation**

Mediation or conciliation is a process where practitioners assist parties to resolve a complaint. The practitioner helps the parties to identify issues and develop options to reach an agreement to resolve the dispute.

The settlement process may involve conciliation or mediation between the employer and the person making the allegation, and sometimes, the alleged harasser. Where possible, attempts to resolve workplace sexual harassment complaints by conciliation or mediation should be facilitated by someone who is impartial and, ideally, independent from all parties involved. This helps to ensure the needs of all involved are heard so that they can inform any settlement agreement on terms that are appropriate and fair.

Where possible, mediation or conciliation should be conducted by a qualified mediator or conciliator who has been trained in trauma-informed practice and cultural competency.

Where possible, representatives employed by the organisation from which the workplace sexual harassment complaint arose should not facilitate the negotiations due to a risk of bias.

The mediator or conciliator should encourage the person who made the allegation to seek independent legal advice prior to signing any agreement containing confidentiality clauses and provide adequate time to source such support. The mediator or conciliator should also provide information to the person who made the allegation about accessing legal advice and support, including through community legal centres, unions, interpreting and translation services and counselling services.



During negotiations between parties, the mediator or conciliator should remain impartial. They should understand these Guidelines well and be mindful of any power imbalances in the negotiation of terms that might advantage one party over another.

*Some questions to consider:*

- Has the person who made the allegation had an opportunity to seek independent legal advice about the settlement agreement?
- Has information about access to internal and/or external support services been provided to the person who made the allegation?
- What do all parties need so that they will be able to understand any confidentiality obligations in the agreement?
- Is the person who made the allegation fully informed about what the confidentiality obligations are, and if not, do they need any additional information or support to understand?
- Has the person who made the allegation been given time to understand their rights and obligations, and the terms of the settlement agreement and confidentiality clause?
- Who is facilitating the settlement agreement discussion? Will they be accepted by all parties as impartial, independent and qualified?

### **Resources:**

- The [Australian Pro-Bono Centre](#) offers advice and information about what organisations across various states and territories may provide legal help.
- The [Mediator Standards Board](#) contains a register of Nationally Accredited Mediators and more information on accreditation bodies.



## 6. Negotiations 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

All persons involved in settlement negotiations should be treated fairly and equally. Care should be taken to ensure so far as possible the wellbeing and safety of the person who made the allegation.

It is important to consider that people who have experienced sexual harassment may have experienced trauma. Talking about the allegation, including when discussing confidentiality, can re-open trauma or make it worse.

### Trauma-informed practice

Everyone involved in the settlement process should be trained to recognise that an experience, or experiences, of sexual harassment can be traumatic, and aim to prevent any re-traumatisation. Discussions about the use of confidentiality clauses should ensure so far as possible the wellbeing and safety of all persons involved, including the person who made the allegation. This can be done by taking a trauma-informed approach, which is based around the following five principles:

- **Safety:** ensuring physical and psychological safety
- **Trustworthiness:** building trust with the person who has experienced trauma
- **Choice:** increasing their options and choices in a conversation
- **Collaboration:** cooperating in conversation with the person who made the allegation
- **Empowerment:** maximising empowerment in conversations with the person.



Taking a trauma-informed approach may include taking steps such as:

- ensuring the person who made the allegation's safety and wellbeing in discussions, and considering the specific needs of all parties during discussions;
- not requiring the person who made the allegation to re-tell their story on multiple occasions;
- offering support or referring the person who made the allegation to support services including access to an independent trauma expert or counsellor, union or legal representative, and permitting them to discuss the negotiation with those supporting them during the process;
- considering whether discussions or negotiations should occur at a neutral location to prevent possible re-traumatisation;
- considering whether parties should be in separate rooms during discussions or negotiations;
- including a support person, including interpreters or translators where necessary, for the person who made the allegation; or
- offering to take breaks when someone is showing signs of stress.

## **Consider whether groups may need additional supports**

All persons involved in the process should be treated fairly and with dignity and respect. Negotiations should be accessible and consider the particular needs and circumstances of the individuals involved. Groups who may require specific supports may include:

- First Nations Peoples
- Culturally and Linguistically Diverse (CALD) people
- people with disability
- LGBTQIA+ people
- older people
- young people.

It is also important to be mindful that some people may be in a vulnerable position or at higher risk of harm. Workers at higher risk of harm can include:

- volunteers
- workers who do not have English as their first language



- temporary visa holders
- those employed in insecure or precarious work, such as seasonal workers
- casual workers
- international students
- remote workers
- young or older workers
- people living with a disability or who have caring responsibilities.

*Some questions to consider:*

- What do all parties need to be active, equal, and respected participants in the discussion?
- Does everyone involved in the negotiations have access to relevant support or representation?
- Is it appropriate to conduct the negotiations in, or away from, a particular place?
- Do you know how to recognise the symptoms of a stress response, and what you can do to reduce distress?
- Are there any factors that could affect the quality of agreement to a confidentiality clause, such as a lack of specific supports or resources? If so, what are the factors and how can they be mitigated?

**Resources:**

- [The Blue Knot Foundation](#) offer resources and information on ways that you can learn how to apply trauma-informed principles.
- [The Centre for Cultural Competence](#) provides information and services including training and support to develop culturally appropriate and trauma-informed policy, programs and service delivery.



## Where to find help

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

- [Respect@Work website](#)

*Make a complaint in relation to workplace sexual harassment*

- [Australian Human Rights Commission – disputes under the Sex Discrimination Act](#)
- [Fair Work Commission](#)

*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](#)

*Other support services*

- [ReachOut](#)
- [MensLine Australia](#) or call 1300 78 99 78
- [Australian Unions Support Centre](#)
- [Australian Pro Bono Centre](#)





## Stakeholders

These Guidelines were created with the assistance of stakeholders. A special thanks to:

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Australian Human Rights Commission  
Australian Institute of Company Directors (AICD)  
Champions of Change Coalition  
Chief Executive Women (CEW)  
Clayton Utz  
Comcare  
Fair Work Commission  
Fair Work Ombudsman  
Federation of Ethnic Communities Councils of Australia (FECCA)  
Harmony Alliance  
JobWatch  
Maurice and Blackburn: Josh Bornstein (Partner) and Jessica Dawson-Field (Senior Associate)  
MinterEllison: Amanda Watt (Partner) and Rosie Meyerowitz (Associate)  
National Aboriginal and Torres Strait Islander Women's Alliance (NATSIWA)  
New Chambers: Kate Eastman AM SC  
RMIT University Professor Judith Bessant  
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