

Disrupting the System

Preventing and responding to
sexual harassment in the workplace

Sexual harassment and the use of NDAs

Building trust through care, accountability
and transparency





In 2020 the Champions of Change Coalition released

Disrupting the System

a comprehensive framework for the prevention and response to sexual harassment in the workplace. The prevention of sexual harassment forms part of the Coalition's broad and long-term mission to achieve gender equality, advance more women into leadership and build safe, respectful and inclusive environments for all.



Our position on sexual harassment

Sexual harassment, in all its forms, is an abuse of power.

It is unethical and against the law. It is inextricably linked to gender inequality.

We have seen the psychological, emotional and physical toll sexual harassment takes, and the detrimental consequences it can have on the careers and personal lives of those affected, as well as their families and those close to them.

We acknowledge that past approaches to address sexual harassment have been insufficient.

We agree that new approaches are required, recognising that this is a human and societal issue.

We will act to prevent sexual harassment and ensure effective responses for those impacted within, and connected to, our organisations.

We will enable people to recognise sexual harassment in all its forms, and empower them to speak about it, change behaviour if required and respond appropriately in the moment to prevent repetition and escalation.

We will strive for ethical responses over expedient solutions.

We will support respectful transparency so that we can learn from incidents of sexual harassment, continuously improve our approach, and improve our accountability to our staff, our stakeholders, and the broader community.

We will lead a new conversation and take new actions to ensure that sexual harassment in our workplaces is eradicated.

Source: *Disrupting the System Preventing and responding to sexual harassment in the workplace*, https://championsofchangecoalition.org/wp-content/uploads/2020/09/Disrupting-the-System_Preventing-and-responding-to-sexual-harassment-in-the-workplace_CCI_web-FINAL.pdf September, 2020. p13.

The good, the bad and the ugly of NDAs



- A Non-Disclosure Agreement (NDA) also known as a confidentiality agreement in the context of sexual harassment has been a long-adopted legal and commercial strategy to settle sexual harassment issues with the minimum of disruption and reputation damage to organisations.
- A traditional NDA is a legally enforceable confidentiality agreement or confidentiality clause in an agreement between an organisation and an individual. A financial sum is often provided to the individual by the organisation to release the organisation from any legal liability in the matter in exchange for confidentiality. **Where NDAs in sexual harassment matters go further is to impose conditions on the person who experienced sexual harassment to never discuss the experience, even for the purpose of recovery and support.**
- NDAs have come under criticism for their role in silencing people who report sexual harassment, while protecting offenders and organisational reputation and enabling sexual harassment to re- occur. Unequal power dynamics can come into play when people are pressured to sign NDAs when they are most vulnerable.
- For many people who experience sexual harassment, an appropriate NDA can be an important tool for protecting their privacy, avoiding further trauma through public scrutiny and gaining closure.
- Retaining agency over their story is important for the wellbeing of those impacted by sexual harassment. Over time, people often want to talk about their experience - to be affirmed, acknowledged and supported (not to create an exposé).
- **The key requisite for using an NDA is informed choice.** When an organisation offers non-disclosure as a choice to people who experience sexual harassment, rather than a requirement, they cannot 'cover up' or 'shut down' issues without the person's experiences ever being acknowledged or investigated. Informed choice means that any financial incentive paid in an NDA is limited to the organisation securing a release from any legal liability and compensating for the harm to the person impacted by sexual harassment. Financial incentives are not offered for the purpose of pressuring the person impacted by sexual harassment to agree to silence about their experience.
- NDAs that contain carve-outs that retain a person's right to speak, empower individuals **to tell their own stories in the way that they want to, if they want to, when they want to.**
- Transforming the use of NDAs from restricting the voice of the person impacted to providing genuine choice over confidentiality requires a shift in mindsets.

When we hold care, accountability and respectful transparency at the core of our response to people who report sexual harassment, **there is no place for an NDA that silences people or protects those who harm.**

Elizabeth Broderick,
Founder Champions of Change Coalition

NDAs can support transparency and confidentiality



- Grounding the use NDAs in principles of care and accountability rebalances the traditional approach to confidentiality and transparency, where secrecy was key, and demonstrates an organisation's commitment to preventing and being accountable for sexual harassment.
- Transparency also enables organisations to learn and change so sexual harassment can be prevented.
- Confidentiality remains a cornerstone of how organisations need to respond to people who raise issues. This means:
 - only those involved or helping to resolve the issue, know about the issue
 - the identity and well-being of all parties involved are protected
 - the specific details of the matter are not disclosed
 - issues are not investigated in the full glare of workforce or media scrutiny
- Transparency is essential for building trust and reinforcing that sexual harassment is treated as a serious workplace issue. This means:
 - leadership acknowledges the issue - they are open and honest about fact that sexual harassment exists in their organisation
 - de-identified numbers, cases, trends or themes are communicated openly
 - findings of cultural reviews are published
 - organisations' sexual harassment processes and lessons are shared
 - people who experience sexual harassment are able to talk about their experience for their own healing and well-being if they wish
 - in cases that involve senior or high-profile employees and where there is legitimate public or stakeholder interest, organisations may share the circumstance and outcome of an investigation, while still protecting the privacy of those impacted by sexual harassment if that is their wish.
- A commitment to transparency also sends a strong signal to men with power in our organisations that will help prevent future sexual harassment. It tells them that the consequence of proven cases of sexual harassment will not be a quiet departure with a healthy payout, but rather that their behaviour may become public knowledge and disclosed to future employers.

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

Shifting our mindset and the system on NDAs

From protecting perpetrators and silencing people impacted  to transparency, accountability and care



➔ Actions for CEOs

There are some specific and immediate actions for CEOs in relation to the use of NDAs.

- 1. Take a clear leadership stance** and explain 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) - and reflect this position in policy and process.
- 2. Engage with your senior leadership team**, particularly key legal, people and culture, and communications leaders to work through practical implementation, using the [Respect@Work Guidelines](#) as a resource.
- 3. Establish governance processes** for approval of the use of NDAs by the CEO (or equivalent) and establish Board (or equivalent) reporting protocols including themes, settlement terms and frequency of use of NDA's, together with comprehensive reporting on sexual harassment instances, trends over time, prevention and response.
- 4. Inform your external legal advisors** of the change in approach, as appropriate.
- 5. Understand how your organisation has traditionally approached the use of NDAs** and establish a centrally held register of what you have in place now.

➔ [Respect@Work Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints](#) outline a recommended approach to inform the use of confidentiality clauses in 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 a 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 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.

For more information see: [Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints](#), Respect@Work.

Further information

[Disrupting the System: Preventing and responding to sexual harassment in the workplace](#), Champions of Change Coalition (2020)

- page 30: Leading from the top: 10 principles for Executive Teams and Boards
- page 39-49: A guide to confidentiality and transparency

[Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints](#), Respect@Work.

[Transforming NDAs to prevent sexual harassment](#), Amanda Watt, Workplace Relations Partner, MinterEllison.



About Champions of Change Coalition

Champions of Change Coalition Members include CEOs, secretaries of government departments, non-executive directors and community leaders. Champions of Change believe gender equality is a major business, economic, societal and human rights issue. Established in 2010, by Elizabeth Broderick AO, our mission is to step up beside women to help achieve gender equality and a significant and sustainable increase in the representation of women in leadership.

championsofchangecoalition.org

