

Disrupting the System

Preventing and responding to
sexual harassment in the workplace

03

Sexual Harassment: A guide to confidentiality and transparency



Disrupting our mindsets, management systems and processes

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Elevate the prevention of sexual harassment and early intervention as a leadership priority

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Address sexual harassment as a workplace health and safety issue

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Introduce new principles on confidentiality and transparency for high-profile sexual harassment cases

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Inform, empower and expect everyone to speak up and take action on sexual harassment in the workplace

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Listen to, respect, empower and support people impacted



Introduce new
principles on
**confidentiality and
transparency** for
high-profile sexual
harassment cases

The current system silences people

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.

In the past, many organisations have prioritised legal responses and 'shutting down the issue', driven by reputation management. This can have the perverse outcome of protecting and/or emboldening higher-status employees at the expense of complainants, their co-workers and the broader interests of the organisation and the community in naming and tackling sexual harassment.

Commercial settlements and non-disclosure agreements often reinforce this view and ensure issues are kept out of the public domain and opportunities to learn from cases are diminished.

Solutions that involve removing the person impacted or transferring the offender have served to silence others, and often have not stopped the behaviour.

When picked up by and tracked through the media, the problems of incidences of sexual harassment can compound and rapidly turn into significant personal and organisational crises for those involved. In the face of intense media scrutiny, it is often difficult to protect the interests of those impacted.

It is very common to hear stories of victims – employees, colleagues, family and friends – who have never spoken up because they see that the system deters it at every level.



A case-by-case approach is required

Organisations are all different, and therefore the right general approach in each organisation will also be different. Context matters, and there are different implications for small professional services firms and large, national employers; for government organisations and multinational companies; and for organisations with constant media attention and listed companies.

Each specific issue, allegation or circumstance is also different. While all sexual harassment is unlawful, some allegations raise the prospect of police involvement and serious criminal charges; some involve one complainant and some involve many; some involve people whose mental well-being has already suffered considerably, or who have previous challenges in their lives that resurface in the light of a current incident.

For these reasons, it is very difficult to draw definitive conclusions about actions that should always be taken, or that every organisation must pursue – we will respond better to sexual harassment when each organisation, and leaders, considers context, the needs and wishes of the person involved and works towards a tailored response.

The landscape has changed

Sexual harassment has never been acceptable but frustration with its persistence and systems that fail to hold offenders accountable have pushed the issue into the public domain.

Traditional and social media have created a new kind of permanent transparency and the lines between what should be public and private are less clear.

These factors challenge the tension between traditional notions of confidentiality (e.g. keep everything in-house, protect those involved) and new expectations of accountability and transparency.

Our organisations are responding to a new environment and spending more time thinking about the context of our stakeholders, shareholders and communities. Boards and senior management teams are constantly considering legal, social and environmental licence to operate.

While the experience of people impacted by sexual harassment has not changed, there has rightly been a shift in the reputational and market costs of perceived cover-ups, which are now significant and are beginning to appropriately reflect the harm of sexual harassment to individuals, organisations and our community. Proactive disclosure is highly valued by key stakeholders. The balance in reputational management between transparency and secrecy has tilted significantly towards transparency.

In the most extreme cases of serious harm and systemic disregard for the issue, we now see redress schemes that threaten the long-term viability of organisations.

The harm to our organisations from avoiding public scrutiny is now more significant than the harm of being upfront about misconduct.

Unless we change our view and approach to secrecy, we will continue to see high rates of sexual harassment and poor organisational responses.

Confidentiality remains a cornerstone of natural justice

Irrespective of whether a reported issue is resolved through informal pathways or formal investigation, due process and natural justice are essential.

This includes giving someone the opportunity to understand the allegations and to respond; respecting and supporting individuals involved; facilitating a timely and objective process; substantiating decisions and ensuring outcomes are fair and proportionate. And critically, confidentiality is maintained.

This is particularly important when the way the organisation responds (e.g. initiating a formal investigation) impacts the rights of the alleged harasser. These principles are critical to preserve the integrity of the process and well-being of all the parties involved and to guard against pressure for expediency, false accusations, stereotyping those involved and victim-blaming. Due process and natural justice is also essential for organisations to meet their parallel legal obligations to ensure dismissal of an employee (should that be the outcome) is fair, just and reasonable.

We must prioritise and protect the identity and well-being of the person impacted, and anyone else that the investigation reveals has been subjected to or witnessed the harassment. Investigations also work better, at a very practical level, when they are not conducted in the full glare of employee and/or media scrutiny.

Keeping the details of complaints confidential while investigations are underway must be prioritised.

Transparency offers a new strategy to better protect victims and deter offenders

Transparency in the context of sexual harassment means we will be open about the existence of sexual harassment in our workplaces, visible in the action we are taking to address it and honest with stakeholders, including our people, about the circumstances and outcomes in certain cases.

Transparency about the prevalence of sexual harassment in a workplace and strategies in place to eliminate it first and foremost sends a clear signal about the standards of behaviour that will be accepted. It also shines a light on sexual harassment and supports close examination of lessons from specific cases and the culture and standards which are either driving or enabling the behaviour.

When there is a legitimate public or stakeholder interest, for example where an offender is a senior leader of an organisation, there is now a greater imperative and an expectation from employees and stakeholders that organisations will have a degree of transparency about such cases. We have experienced that without transparency, speculation can be rife and extremely damaging to the parties involved.

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.

The role of non-disclosure agreements

The use of non-disclosure agreements (NDAs) has been a widely discussed issue given the competing interests that they serve.

On one hand, NDAs come under much criticism for their contribution to silencing people who report sexual harassment, while protecting offenders.

On the other hand, for many people who experience sexual harassment, a non-disclosure agreement is an important tool for protecting their privacy, avoiding further trauma through public scrutiny and gaining closure. For others, raising the possibility of public disclosure of the behaviour may be the only option available to compel action or redress, with NDAs used to facilitate this.

The key issue here is choice. When an organisation offers non-disclosure as a choice for people who experience sexual harassment, rather than a requirement, they cannot 'cover up' or 'shut down' issues without a person's experiences ever being acknowledged or investigated. Further, by retaining a person's right to speak, we support recovery and empower them to tell their own stories in the way that they want to, if they want to.

This approach requires a significant shift in mindsets around the use of NDAs, making them optional for the person who experiences sexual harassment rather than a blanket condition of settlement. This shifts the use of non-disclosure agreements from restriction to protection of the person impacted.

Based on the wishes of the person subjected to the harassment, organisations can be open about the fact of an individual settlement (not the value) and the circumstances that led to it. By aggregating and reporting on the themes, cost and frequency of use of NDAs, Boards and other stakeholders can also get a clearer picture of what gives rise to them and any remedial action required.

Internal transparency and confidentiality need to be rebalanced

The desire and need for greater transparency are not only limited to individuals of seniority or public interest. For our employees, there is equally as much concern about incidents involving people they work with every day which are also the vast majority of matters dealt with in organisations.

We rebuild confidence in our ability to resolve issues when all employees know that issues are taken seriously, people involved are respected and supported, and that outcomes are fair. This does not mean full disclosure of all the details, but rather considered sharing of relevant information in order to encourage organisational learning and prevent similar cases from happening in the future.

We cannot anticipate the circumstances or degree of internal transparency appropriate for every issue, but we can be consistent with our aspiration for greater internal and external transparency that prioritises the best interests of the person impacted and organisational health and learning through organisational transparency and fairness to respondents.

» Example

A research organisation provides interim updates to all staff that reinforces expectations of behaviour and also offers de-identified information about recent cases: the number of issues raised; themes; length of resolution; support and outcomes for the parties involved; and the decision-making framework that guided the organisation's response.

Our approach to transparency means we are honest about the fact that sexual harassment exists, can learn and improve our prevention efforts, let people talk about it for their own healing and well-being if they wish, and ensure external and internal stakeholders know that we treat sexual harassment as a serious workplace issue.

New principles on confidentiality and transparency for high-profile sexual harassment cases

The following principles set out an approach to communicating about high-profile sexual harassment cases in our organisations, in particular **where the allegation demands investigation, where the offender or alleged offender is one of our organisation's senior leaders and where there is legitimate public or stakeholder interest**. The principles will be relevant to CEOs, human resources and legal functions and communication teams and will in many cases be given effect through legal documents such as a Deed of Settlement.

These principles represent a significant shift in organisational practice. They serve as both a prevention mechanism and practical guide.

Principle 01	Our organisations will be transparent with internal and external stakeholders about the fact that sexual harassment claims exist.
Principle 02	The identity of those involved will be protected by our organisations at all times during the investigation process.
Principle 03	We will ask everyone involved to keep any workplace investigation process confidential while that process is underway with an exception for receiving expert counselling or support.
Principle 04	Once any investigation is complete, our organisations will not restrict the complainant's right to speak.
Principle 05	Where there is a legitimate public or stakeholder interest and an investigation has found that allegations are substantiated, our organisations may identify the offender.
Principle 06	Where an investigation has substantiated the allegations, we will be transparent about the outcomes and where an alleged offender leaves our organisation, we will be transparent about the fact of any financial settlement as part of that departure.
Principle 07	If a financial settlement is reached with the complainant, the fact of the settlement will be disclosed by our organisations to relevant stakeholders, together with the restrictions it imposes but not the amount.

01

Our organisations will be transparent with internal and external stakeholders about the fact that sexual harassment claims exist.

Potential external language

'We have had 14 complaints of sexual harassment over the past financial year, and right now 2 reports are being investigated. The average time taken for reports to be fully resolved has been 21 days this year.'

Explanation

- Stakeholders (including government, shareholders, staff and customers) expect major organisations to show leadership in addressing these issues.
- This transparency will assist in addressing the under-reporting of harassment.
- We need to be honest with the community about this issue and communicate regularly about it.
- We will work to identify how best to report these matters through annual reports and other relevant documents.

02

The identity of those involved will be protected by our organisations at all times during the investigation process.

Potential external language

'There is an investigation underway, but in order to protect the well-being of those involved, we will not reveal names, their work units, or other details that could identify them.'

Explanation

- It is not reasonable or fair to either party for our organisations to release the name of the person involved or alleged offender during the investigation process.
- People may not come forward if they fear problems for their career or personal life, or that they will lose control of their experience.
- It is not fair to the alleged offender to identify them until an investigation has run its course.
- In some circumstances, where there is significant public interest, where media are planning to publish names, or where there is ongoing public speculation over the identity of an alleged offender, this will be challenging. It may in some circumstances be practically impossible not to acknowledge the identity of an alleged offender, even though it would be preferable for this information to remain confidential.

03

We will ask everyone involved to keep any workplace investigation process confidential while that process is underway with an exception for receiving expert counselling or support.

Potential external language

'To protect the integrity of the investigation process, we have asked everyone involved to refrain from public comment until that process has reached a conclusion.'

Explanation

- While people impacted will sometimes feel frustrated by a workplace investigation process, it is impossible to fairly investigate an allegation if the issues involved are being openly discussed amongst staff and/or the media at the same time.
- This will require the person impacted to agree to confidentiality during an investigation, before that investigation is commenced.
- It will also require the alleged offender to agree to confidentiality before any allegations are put to them.
- This confidentiality arrangement should be narrowly framed to refer to the specific allegations that relate to an individual report.
- This would not include where someone is receiving support from a formal peer support or expert provider e.g. employee assistance program, community legal centre.

04 Once any investigation is complete, our organisations will not restrict the complainant's right to speak.

Potential external language

'The investigation into this matter has [substantiated the concerns raised/has not substantiated the concerns raised]. The person impacted is free to tell their side of the story if they wish. The risks and benefits to them that could arise from speaking publicly about the circumstances are something that only they can judge.'

Explanation

- It is not reasonable for our organisations to restrict complainants from talking about these matters using their own channels (not the organisation's) and in a personal capacity (rather than as a representative of the organisation).
- We know this can be critically important for their healing, mental health and well-being.
- Speaking publicly about the issue involves risks for everyone involved – including reputational risks and legal risks such as defamation. Those risks are a matter for the individuals involved to judge.
- Organisations should also be well-prepared to address these issues should the individual impacted exercise their right to speak. This should include being able to clearly articulate prevention, early intervention and response strategies in place and the procedural fairness adhered to as relevant to a particular case.
- Even in circumstances where a person impacted chooses to enter a non-disclosure agreement with the organisation, they will always retain the ability to talk about their circumstances with any formally constituted government or process that they choose, for example a Royal Commission or National Inquiry.

05 Where there is a legitimate public or stakeholder interest and an investigation has found that allegations are substantiated, our organisations may identify the offender.

Potential external language

'An investigation into allegations of sexual harassment made against our CEO, John Smith, has found some of those allegations to be substantiated. Mr Smith denies the allegations. The [Board/CEO] is now considering what appropriate steps to take following the investigation's conclusion.'

Explanation

- Substantiated sexual harassment is unlawful and against the values of our organisations. As organisations, we need to be transparent about these matters. This is particularly so for senior people, who have substantial power in workplaces, given that sexual harassment is a significant abuse of power.
- 'A legitimate public or stakeholder interest' will not arise in respect of every individual within our organisations who is found to have engaged in sexual harassment. Generally, the Board and senior leadership team will trigger this interest for listed companies or public sector organisations as their conduct will usually involve the most egregious misuse of power. Each situation should be judged in its own context.
- Public comment by our organisations will need to carefully balance a range of risks, including the risk of defamation. We will, however, pursue transparency wherever possible.
- Relevant leaders will be made aware of this policy position upon their appointment.

06

Where an investigation has substantiated the allegations, we will be transparent about the outcomes and where an alleged offender leaves our organisation, we will be transparent about the fact of any financial settlement as part of that departure.

Potential external language

'An investigation into allegations of sexual harassment made against our CEO, John Smith, has found some of those allegations to be substantiated. Remedial and restorative measures are in place'

OR

'As you know, the former CEO John Smith left the organisation at the end of July. He was paid a financial settlement consistent with his contractual arrangements in circumstances in which we wish the employment relationship to cease.'

Explanation

- Stakeholders of our organisations have legitimate expectations of transparency.
- Transparency about broad outcomes for offenders assures external and internal stakeholders that we treat sexual harassment as a serious workplace issue and hold people to account for their behaviour at work.
- While we will ensure that alleged offenders do not benefit from the situation, it will often be pragmatically necessary to enter departure negotiations that involve some element of financial settlement – for example, in line with the arrangements that would apply if the Board wished to terminate the contract for other reasons.
- Our organisations will be transparent about the underlying contractual basis of any financial arrangement agreed upon.
- The identity of the complainant will remain confidential, if that is what they wish.

07

If a financial settlement is reached with a complainant, the fact of the settlement will be disclosed by our organisations to relevant stakeholders, together with the restrictions it imposes but not the amount.

Potential external language

'Following the conclusion of the investigation, we have reached a settlement with the complainant that seeks to financially compensate them for the harm they have suffered. Our organisation will not disclose the settlement amount – this is up to the individual, if they wish. The settlement does not require confidentiality on the individual's behalf. The individual has agreed that this settlement, rather than legal proceedings, is the most appropriate way to resolve the issue.'

Explanation

- It is particularly important that our organisations are transparent with our stakeholders, including the public where relevant, about any financial settlement that may be agreed.
- Our organisations will not pay 'hush money' and will be explicit about the fact that a financial settlement does not require silence.
- It is not fair to the person impacted for our organisation to reveal the exact amount unless they are comfortable for us to do so.
- It is appropriate to request that a person impacted agree not to sue the organisation as part of a settlement. Settlement is a choice, by both sides. It is a faster, more pragmatic and more open way to resolve the matter through an agreed payment rather than a lengthy and costly court process.
- People who receive a financial settlement will need to be informed of their organisation's stance on transparency.
- The identity of the complainant will remain confidential, if that is what they wish.

Example:

A senior male leader is accused of sexual harassment, dating back several years involving several women. The allegations revealed a longstanding pattern of behaviour of propositioning and caressing younger women, whose career progression relied on the advocacy of this influential leader.

The media are made aware of the allegations, which is confirmed by the organisation when asked (**Principle 1**) without revealing any of the parties involved (**Principle 2**).

Consistent with the organisation's policy, those involved and investigating the complaint are asked to sign a confidentiality agreement to protect the well-being of those involved until the investigation is complete (**Principle 3**).

Given the nature of the allegations, the senior male leader is asked to take leave while the investigation is underway. All involved are offered counselling and support during the process.

An external expert is engaged to investigate the issue. Throughout the investigation, the media continue to speculate about the identity of the people involved and seek further comment on the circumstances, given the public and stakeholder interest in the alleged harasser. (**Principle 2**).

At the end of the investigation, the Board makes a statement to the media, confirming the investigation has concluded, that their investigation has substantiated sexual harassment has occurred and identifying the offender (**Principle 5**).

The organisation's statement confirms to relevant internal and external stakeholders that the offender has left the organisation and is transparent about the contractual basis of any financial arrangement agreed upon, without disclosing amounts. (**Principle 6**).

The organisation also confirms that the organisation has financially compensated the women impacted for the harm they have suffered (without disclosing amounts) as the women believe that this settlement, rather than legal proceedings, is the most appropriate way to enable them to move on (**Principle 7**).

The women at the centre of the matter are not asked to sign a non-disclosure agreement, thereby retaining the right to share their story if and how they wish to including participating in any formal inquiry at some point in the future should they choose to (**Principle 4**).

SUMMARY

03 Introduce new principles on **confidentiality and transparency** for high-profile sexual harassment cases

Practical actions

Actions for leaders

- ✓ **Develop and endorse** new principles around transparency and confidentiality as part of our processes covering communication with parties involved, the media and the organisation.
- ✓ **Change** standard approaches to non-disclosure agreements to avoid silencing complainants and allow some transparency and disclosure to employees, stakeholders and the community.
- ✓ **Communicate** the guidelines widely so that our position is clear, supports prevention efforts and acts as a deterrent to offenders.
- ✓ **Share** internal updates on sexual harassment with the organisation.

Fundamentals for organisations

- ✓ **Work** with key internal teams and relevant suppliers covering HR, Legal, Compliance and Corporate Affairs to introduce and apply the principles. Lead a change in approach and communicate it widely.
- ✓ **Build** internal updates on efforts to address sexual harassment into the schedule of staff communications.

Disrupting the System

This resource is an extract from *Disrupting the System - Preventing and responding to sexual harassment in the workplace*. Find the full report here:

championsofchangecoalition.org/resource/disrupting-the-system/

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

