

Sexual harassment is a work, health and safety (WHS) systemic issue – NDAs are stopping us from making systemic change



NDAs:

Factsheet for employers

One in five Australians experience sexual harassment at work each year. But fewer than one per cent ever report it.

That silence is not because the harm is minor. It is because our systems wait. They wait for complaints. They wait for workers, already harmed, to take on their employer. They wait until it's too late.

We don't treat faulty scaffolding or asbestos like this. We don't wait until someone is injured to act. We prevent. That's what WHS laws are for. Yet when it comes to harassment, that prevention mindset has never applied.

Harassment and discrimination is about power

At its core, workplace harassment and discrimination is about power. Men dominate 61% of management roles. Women are clustered in insecure jobs. Migrant women, Aboriginal women, women with disability and LGBTIQ+ workers face higher risks.

The most common form of harassment isn't sexual advances. It's gender harassment: put-downs, exclusion, hostility. It's about keeping women, and anyone who doesn't conform, "in their place".

These patterns reflect deep inequalities in our workplaces. And they explain why the burden of harm is not evenly shared.

What is an NDA?

A non-disclosure agreement (NDA) is a legal obligation that requires confidentiality.

These agreements are widely used in sexual harassment and discrimination disputes. They require women who suffered harassment to keep their experience completely confidential or partly confidential – that is, they are not allowed to talk about what happened to them.

In circumstances where a woman does not want to stay silent, the insistence of confidentiality is a complete misuse of NDAs by employers or perpetrators.

In many cases, NDAs stop progress on a matter, and an employer may be less likely to take preventative measures. Employers that routinely use NDAs view gendered violence, harassment and discrimination as an individual, one-off issue rather than recognising it as a systemic workplace concern.

It is common for employers to treat the issue as resolved at the conclusion of a complaint process and in turn, avert from conducting a proper risk assessment to identify systemic risks associated with gendered violence and sexual harassment in the workplace.

Failure to ensure appropriate systems and controls are in place to eliminate or minimise these risks prevent employers from fostering a workplace culture that is safe, respectful and inclusive that values diversity and gender equality.

Although NDAs mostly require all parties (employer, woman with experience of harassment, and the perpetrator) to maintain confidentiality, the agreement is almost always requested by the employer and perpetrator, not the employee.

Often the NDA serves the perpetrator's interest but not necessarily the employer's interest.

Why does it matter for employers?

For employers, ending the misuse of NDAs will support:

- Compliance with the positive duty to prevent sexual harassment under the Sex Discrimination Act 1984; and
- Ensure they have met their primary duty in eliminating or minimising workplace psychosocial hazards as part of the WHS laws and regulation. A psychosocial hazard is anything that could cause psychological harm (e.g. someone's mental health), including sexual harassment.

Employers who do not regularly use NDA's will be better placed to identify systemic and cultural problems, patterns of behaviour, and structural vulnerabilities that might otherwise remain hidden. This fosters accountability and serves as a deterrent to future misconduct, contributing to safer and healthier workplaces.

Importantly, it can also protect employers' reputations in the long term. While NDAs may have once been considered a means of shielding reputational risk, secret settlements that later come to light often may cause greater damage. More women are speaking up, the risk for reparational damage is higher than ever.

Case study: BHP

For many years BHP routinely used NDAs in legal settlements in claims brought by their employees who experienced gendered violence at work.

In 2018, the Australian Human Rights Commission found that 74% of women in mining had experienced harassment in the past five years, compared to 39% of women across other industries.¹

The WA Parliamentary Inquiry into sexual harassment against women in the FIFO mining industry commenced in December 2020 in response to growing reports of harassment and assault in remote mining camps, handed down its report *Enough is Enough* in June 2022 with 24 recommendations, and called for stronger workplace culture, improved reporting and safety mechanisms, accountability for mining companies, and better government oversight.²

BHP acknowledged that sexual harassment and assault were serious problems in its camp-style worksites. Between 2019 and 2021, for a workforce of about 13,500 people, it reported receiving **18 reports of sexual assault** and **73 reports of sexual harassment**, all of which it said had been reported to police.

BHP also apologised saying “We are deeply sorry and apologise unreservedly to those who have experienced, or continue to experience, any form of sexual harassment in our workplaces”.

In 2024, the company was heavily scrutinised when women who were sexually harassed or assaulted started exposing how they were forced to sign NDAs so BHP could cover up these unsafe work practices. This scrutiny led to the launch of a landmark class action against BHP for alleged widespread, systemic sexual harassment and gender discrimination in mining sites across the country³. This has heavily impacted BHP’s reputation as an employer.

Recently, we have seen BHP take practical steps to ensure they comply with the positive duty and that they are taking reasonable proportionate measures to eliminate, as far as possible, unlawful sex discrimination, sexual harassment, sex-based harassment, victimisation and work environments that are hostile on the grounds of sex.

The company has now publicly disclosed that they have ceased using NDAs or imposing confidentiality obligations on complainants in respect of their experiences in settlement agreements relating to sexual harassment.⁴

Clearer limits on NDAs provide legal certainty and enable employers to focus on substantive preventative measures. By supporting transparency and systemic change, law reform to address NDA misuse strengthens workplace culture, builds trust with staff and the public, and reduces the risk of serial offenders being moved across multiple organisations.

The cost of gendered violence as a systemic workplace issue

Women make up 57.8% of all serious workers' compensation claims for psychological injury and they are more likely to be exposed to psychosocial hazards, including work-pressure, work-related bullying and harassment, and occupational violence than men.⁵

Women and gender diverse people, including those with intersecting identities such as Aboriginal and Torres Strait Islander people, people with disability, migrant and refugee workers, and those identifying as LGBTIQ+ are at heightened risk of harmful behaviour at work.

Work-related gendered violence can lead to serious physical and psychological injuries, including anxiety, depression, acute stress disorder, PTSD, heart disease, physical injuries, immune deficiency and, in the worst cases, even suicide.⁶ The monetary cost of inaction is significant, estimated at \$30 billion per year, through lost productivity, absenteeism, turnover, and legal costs.⁷

The process to identify, manage and eliminate or minimise workplace psychosocial risks require planning and is an ongoing process. However, considering risks early prevents costly changes later and allows for more effective control measures to be used by employers, resulting in less harm to women in workplaces.



You can access more information on employers' **positive duty** under the Sex Discrimination Act 1984 [here](#).

You can access more information on employers' obligation to manage risks of psychosocial hazards under **WHS** laws and regulation [here](#).

References:

¹ Australian Human Rights Commission. (2018). *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces*

² Community Development and Justice Standing Committee of the Legislative Assembly of Western Australia. (2022). *ENOUGH IS ENOUGH: Sexual harassment against women in the FIFO mining industry*

³ <https://www.abc.net.au/news/2024-12-12/class-action-mining-rio-tinto-bhp-harassment-abuse-allegations/104714064>

⁴ <https://www.bhp.com/sustainability/safety-health/sexual-harassment>

⁵ Duggan, M. (2016). *Investing in Women's Mental Health: Strengthening the Foundations for Women, Families and the Australian Economy*. Australian Health Policy Collaboration


⁶ WorkSafe Victoria. (2022). *Work-related gendered violence including sexual harassment*


⁷ Ballard, A., Bozin, D. (2023). *The true (financial) cost of workplace violence in Australia*. Sage Journals, Volume 48, Issue 3

Join the conversation



Contact the Working Women's Centre Australia to learn more - we'd love to hear from you.

 campaigns@wwc.org.au

 wwc.org.au/nda-campaign