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Centre Australia**

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NDA Advice - Practical Checklist for Legal Practitioners

This checklist is intended for use when advising clients on confidentiality and non-disparagement clauses in workplace sexual harassment and discrimination matters.

This checklist is intended to provide general guidance for legal practitioners across Australian jurisdictions. Due to the commencement of the Restricting Non-Disclosure Agreements (Sexual Harassment at Work) Act 2025 (Vic) in May 2026, a specific statutory framework now applies to the use of NDAs in workplace sexual harassment matters in Victoria.



Accordingly, this checklist is not relevant to Victoria. Practitioners advising in Victoria should have regard to the requirements of the Victorian legislation and ensure compliance with its provisions.

Core Advice - Informed Choice

When advising on non-disclosure agreements (NDAs), practitioners should ensure they:

1. Advise clearly that NDAs are not mandatory and can be negotiated.
2. Explain that confidentiality and non-disparagement clauses are not required by law and may include carve-outs.
3. Provide advice about the difference between compensation for harm and payment in exchange for silence.
4. Explain the legal limits of NDAs, including what cannot lawfully be restricted.
5. Discuss risks and consequences of breach in realistic, proportionate terms.
6. Allow adequate time for consideration and avoid artificial urgency.
7. Avoid statements that terms are 'standard', 'non-negotiable' or 'required' unless that is legally accurate.
8. Ensure the client understands the long-term implications of confidentiality obligations, including limits on speaking about their experience and broader regulatory or work, health and safety (WHS) implications where systemic risks remain undisclosed.

Such steps support informed choice and reduce the risk of solicitors breaching professional conduct obligations.

Legal Limits: When NDAs can break the law

NDAs cannot lawfully be used to:

- Prevent or discourage reporting of criminal conduct
- Conceal or obstruct investigation of serious offences
- Prevent disclosures to trade unions, police, regulators, courts or statutory bodies
- Prevent access to medical, psychological or therapeutic support
- Prevent access to workers' compensation, victims of crime or whistleblowing schemes
- Interfere with disclosures required by law

Practitioners should ensure any proposed clause complies with criminal law, discrimination law, WHS law and professional conduct obligations

Key NDA practices that create serious risk

Blanket confidentiality clauses

Blanket confidentiality clauses, particularly those with no carve-outs and unlimited duration, are among the most harmful NDA practices.

They can:

- Silence victim-survivors from speaking to family, doctors, psychologists, or their union
- Prevent reporting to police or statutory bodies
- Undermine compliance with the Positive Duty under s 47C of the Sex Discrimination Act 1984 (Cth)
- Obstruct workplace investigations and WHS compliance
- Conceal systemic risk from boards and executives
- Exacerbate trauma and psychological harm

Confidentiality clauses should never be assumed to be standard, necessary or mutual. Lawyers must carefully assess whether confidentiality is appropriate at all, and if so, strictly limit its scope and duration, with substantial carve-outs.

Non-disparagement clauses

Non-disparagement clauses often operate as de facto gag orders. Without carve-outs, they can prevent victim-survivors from:

- Seeking medical or psychological support
- Describing their experiences accurately
- Participating in systemic prevention or reform

Practitioners should consider whether such clauses are necessary and ensure they do not silence truth-telling or access to support.

Minimum Safeguards

Where confidentiality is included, practitioners should ensure:

- NDAs are treated as exceptional, not default
- Confidentiality is used only where genuinely requested or necessary
- Scope is narrow and time limits are finite
- Clear carve-outs are included for:
 - Trusted support persons
 - Police and regulators
 - Courts and inquiries
 - Medical and psychological support
 - Victims of crime and workers' compensation schemes
 - Whistleblowing
- Penalty, clawback and intimidation clauses are avoided

NDAs must never operate to conceal harm, enable repeat offending or undermine prevention.



[For model best practice confidentiality clauses and guidance, scan the QR Code \(or click here\) to access the Australian Human Rights Commission's Respect@Work resource.](#)