Working Women's Centre Australia

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NDAs, SEXUAL HARASSMENT AND LAWYERS' ETHICAL AND PROFESSIONAL OBLIGATIONS:

This factsheet 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 Factsheet 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.

Why this matters for legal practitioners

Non-Disclosure Agreements (NDAs) are often used in the resolution of workplace sexual harassment and discrimination matters and are frequently treated as a 'standard' term of settlement.[1] Research indicates that strict NDAs remain the default resolution approach, with many practitioners not advising clients that such terms are optional.[1]

In practice, this has led to an assumption across parts of the profession that NDAs are routine, default or commercially necessary.

However, NDAs are not legally required to resolve these matters. Their inclusion, and the scope of the terms adopted, is a matter of instructions and legal advice rather than legal necessity. Treating NDAs as standard, default or mandatory can narrow client choice and expose practitioners to legal and professional risk.

The regulatory landscape is also shifting. In Victoria, the *Restricting Non-Disclosure Agreements (Sexual Harassment at Work) Act 2025 (Vic)* introduces a statutory framework limiting the enforceability of NDAs in workplace sexual harassment matters. The Act makes clear that confidentiality must be requested by the complainant and cannot restrict certain permitted disclosures. Reform discussions are underway in other jurisdictions.

Change is coming across Australia, and practices once considered routine are now under active scrutiny.

As the regulatory, legislative and professional landscape continues to evolve, it is timely for legal practitioners to reflect on how NDAs are being used in practice, the assumptions that underpin their use, and the legal and ethical considerations that arise.

Professional conduct obligations

Under the Solicitors' Conduct Rules and Barristers' Conduct Rules, lawyers must:

- Act in the administration of justice
- Act honestly, with integrity and independence
- Avoid misleading or intimidating conduct
- Ensure informed choice
- Avoid taking unfair advantage of vulnerability
- Not engage in conduct that enables discrimination, sexual harassment or victimisation

Across the profession, NDAs are often described to clients as 'standard terms', 'non-negotiable' or 'required to settle'. Research in 2024 found that close to 50% of respondent solicitors had never advised clients that sexual harassment matters can be resolved without strict confidentiality terms, and that many clients signed such provisions without being told they were optional[1]. Where lawyers fail to explain that confidentiality and non-disparagement clauses are negotiable, or do not advise on alternatives, carve-outs, risks and legal limits, professional conduct concerns may arise.

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Advising that NDAs are mandatory when they are not, or failing to explain that confidentiality and non-disparagement clauses are negotiable, may:

- Undermine informed consent
- Amount to misleading conduct
- Exaggerate a client's legal rights or entitlements
- Contribute to ongoing risk within a workplace
- Expose practitioners to allegations of unsatisfactory professional conduct or professional misconduct

Failing to provide full and frank advice about NDA options, risks and alternatives may constitute unsatisfactory professional conduct or professional misconduct. This is especially the case where lawyers advise on NDAs as either as standard or mandatory.

When used without careful consideration of purpose, scope and consequence, certain NDA practices may:

- Limit the ability of parties to seek support or make lawful disclosures
- Create unintended legal or professional risk
- Prevent organisational learning and prevention

Solicitors and Barristers play a central role in shaping how NDAs operate in practice.

Where NDA Advice May Breach The Law

Criminal law
Across Australia, it is an offence to conceal or prevent reporting of serious indictable offences. Some forms of sexual harassment and sexual violence meet this threshold. Lawyers who advise on or draft NDA terms that prevent reporting to police risk criminal exposure.

The Positive Duty (s47C, Sex Discrimination Act 1984 (Cth))
Employers and Persons Conducting a Business or Undertaking (PCBUs) have a proactive duty to prevent sexual harassment and related unlawful conduct. NDAs that conceal risk, silence reporting or prevent systemic response may place employers in breach of this duty. Lawyers who advise on such NDAs may expose clients, and themselves, to regulatory, reputational and professional risk.

Accessorial liability (s105, Sex Discrimination Act 1984 (Cth))
Legal practitioners who aid, permit or fail to prevent unlawful conduct, where they have the power to do so, may be exposed to accessorial liability. This includes advising on NDAs that allow perpetrators to remain in workplaces without safeguards or prevent victim-survivors from seeking support or making disclosures.

Work, health and safety laws
Sexual harassment is a recognised workplace psychosocial hazard. NDAs that conceal risk or obstruct prevention strategies may contribute to WHS breaches and give rise to professional negligence concerns.

Core principles that must guide legal practice

Legal practitioners advising on NDAs must keep the following principles at the forefront:

- Sexual harassment and sexual violence are abuses of power and forms of gendered violence
- NDAs must never be used to buy silence
- Informed choice is the central ethical requirement
- The wellbeing, safety and dignity of victim-survivor must be paramount
- Systemic prevention must take precedence over reputation management
- NDAs must not undermine public interest, third-party safety or workplace safety
- Legal practice in this area must be trauma-informed, culturally safe and intersectional

References:
[1]Regina Featherstone and Sharmilla Bargon, Let's Talk About Confidentiality: NDA Use in Sexual Harassment Settlements since the Respect@Work Report (Research Report, University of Sydney, 6 March 2024). Scan the QR code to access the research report.

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