

## Submission

### National Inquiry into Sexual Harassment in Australian Workplaces by the Australian Human Rights Commission

#### Submission from:

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I welcome the opportunity to make a submission to the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces.

#### Submission

This submission focuses on non-disclosure agreements (NDA) and their use by employers in responding to and remedying cases of workplace-based sexual harassment, abuse or sex-based bullying.

It recommends:

- (i) The passage of legislation that prohibits the use of non-disclosure agreements that prevent public dissemination of information about cases of workplace based sexual harassment, abuse or gender based bullying, along with the civil and criminal remedies in each case.
- (ii) Encouraging the systematic and regular publication and analysis of data of this kind by the Australian Human Rights Commission.
- (iii) That the AHRC, or a relevant law reform commission or the Government launch a new inquiry into the use of NDAs in sexual harassment and similar cases, where any form of harassment or other discrimination is alleged with terms of reference similar to the UK parliamentary Inquiry into NDA agreements that is now underway (UK Parliament, 2019).

#### Context

This inquiry is timely given mounting evidence about the nature and scale of the problem. The Personal Safety Survey carried out by the ABS (2016) indicates that one in two women and one in four men will be sexually harassed over their lifetime. While sexual harassment has been unlawful for over 30 years, its prevalence seems not to have diminished over this period (Good and Cooper 2016). The Australian Human Rights Commission's own survey revealed that 39 percent of Australian women experienced sexual harassment in their workplace over the past five years, and that in 79 percent of cases, the perpetrators of workplace sexual harassment were men (Australian Human Rights Commission 2012). A major study of the problem in Australian universities by the AHRC confirmed that sexual harassment was a serious issue in those workplaces (Australian Human Rights Commission 2017).

The inquiry is also timely because it comes at a time when concern about sex-based harassment and sexual abuse in many major social institutions and industries features in our social-political landscape courtesy of socio-political developments like the #MeToo

movement (Tippett 2018). This prompted considerable debate and commentary about safe workplaces in Australia and in many other western societies (McDonald et.al 2015: 41-58).

Research suggests that workplace harassment and sex-based discrimination are harmful especially for women, and that it breaches human rights and it is typically systemic. Workplace-based sexual harassment also adds to and compounds discriminatory behavior that plague too many workplaces. Added to this is persistent gender-based wage inequality and unequal employment and career advancement for women (MacDonald and Charlesworth 2018: 446-462).

Research also indicates that workplace-based sexual harassment is often opaque, or even made invisible, and for this reason significant levels of workplace harassment and sex-based discrimination becomes normalized. Its invisibility and the secrecy surrounding it also means it is difficult to establish a strong empirical assessment of the nature and extent of the problem (Thornton 2002: 422-44, Thornton 2010).

Moreover, research highlights how most people who experience workplace sexual harassment will not report it or seek support. As a discussion paper by Unions NSW (2018) observes, this may be because victims fear retaliation, or simply don't know what to do or where to go for help. It seems only 20 percent of people make a formal report or complaint, and only 29 percent seek support or advice. As research by McDonald and Charlesworth indicate this can be explained in part by the secrecy surrounding sexual harassment in workplaces (2013). Research by Unions NSW also reveals that currently there is no systematic reporting of cases of sexual harassment that have been settled, that there is no analysis of settlement data, and the cases are rarely evaluated (Unions NSW 2018). As a result those experiencing sexual harassment are prevented from accessing relevant information that could inform them about their options, their expectations of claims, evaluate the fairness of their settlement amounts, or indeed provide a deterrent to perpetrators.

Contributing to that secrecy are non disclosure agreements. As I argue in this submission they are instruments commonly used to prevent the public from knowing what is happening. They can also work to prevent many managers from knowing what the extent of the problem is in their workplace - and in this way non-disclosure agreement encourage a form of 'willful blindness'. This is problematic because such 'contrived ignorance' helps to create situations that diminish the prospect of any remedial action being taken by the workplace managers themselves (Heffernan 2100). It can also work to create situations whereby managers contrive to avoid civil or criminal liability for wrong doings by deliberately protecting themselves from the facts. This may involve managers deciding for themselves to use non-disclosure agreements to make themselves unaware, or it can be part of cultural and ingrained workplace practice that sees others (eg in human resources), assume the responsibility for 'protecting' senior managers by ensuring they are kept unaware of the full extent of the problems.

As I argue this preference for hiding sexual harassment, gender based bullying and other harmful behaviours in the workplace by encouraging secrecy via non-disclosure contracts encourages the practice of intentionally turning away from such legal and ethical problems under the guise of protecting certain interests or because the issues raised are too difficult or disturbing to deal with. For victims of sex-based harassment and related forms of unlawful conduct, this makes it is difficult to get an accurate account of the workplace culture in which they work. And as mentioned, it also denies those people information about salutary examples of those cases people have taken remedial action successfully.

A good example of this occurred in the course of preparing this submission. The Melbourne Age newspaper carried an extensive report on a significant confidential payout by Victoria Police to Ms. Yvonne Berry, a former police officer (Age 28 January 2019: 1,6). The payout was made to settle a 'brutality case' involving several police officers who attacked a woman who was a former officer in a police cell. The officers stripped the victim of most of her

clothing, stomped on her and then kicked her. One of the officers was finally convicted of serious assault on the woman in late 2018. This story is typical in that it took years for the allegation of a serious assault to be upheld in the courts and this happened only after an internal police inquiry failed to recommend action in 2016. The victim was reported by *The Age* as saying that she was unable to make comment on the matter or the payout 'because she was bound by a confidentiality clause'.

This case speaks volumes about the disregard for the public interest in knowing what the terms of the settlement were, which presumably involve the expenditure of considerable public funds. It means there is no public record of why the settlement was made, or what undertakings the police force agreed to as their liability, or what steps (if any) they would take to ensure there was no repetition of such unlawful conduct.

It also encourages what John Keane calls 'anti-learning mechanisms' (2018). In saying why the principle of freedom of public communication and its value as a form of damage prevention matters, Keane argues that 'warning mechanisms' enable citizens, organizations and the networks around those organizations to sound 'the alarm.' To prevent serious harm this needs to be done when people suspect or know that serious harm is being done or when 'calamities are bearing down on their heads in silence' (Keane 2018: 219). Keane continues arguing that in defending people in weaker positions who 'find themselves silenced by the strong', 'the early warning principle of communication' is critical and 'politically meaningful in a wide range of contexts' (2018: 219).

## **Discussion**

The focus in this submission is on the role of non disclosure agreements, confidentiality agreements, or non-disparagement clauses in their various forms in cases of workplace sexual harassment. This focus relates specifically to your following Terms of Reference:

- some workplace characteristics and practices are more likely to increase the risk of sexual harassment
- existing measures and good practice being undertaken by employers in preventing and responding to workplace sexual harassment, both domestically and internationally the impacts on individuals and business of sexual harassment, such as mental health, and the economic impacts such as workers compensation claims, employee turnover and absenteeism...
- make recommendations to address sexual harassment in Australian workplaces.

While the focus is specific, it is highly pertinent to the question of why and how high levels of workplace harassment and sex-based discrimination become normalized and-or made invisible.

This submission highlights the widespread use of non disclosure agreements, confidentiality agreements, or non-disparagement clauses in their various forms. It is argued that employers ought not to be allowed to require or regularize the use of non disclosure agreements to drop a cone of silence over complaints of sexual harassment or other offences and the remedies applied to cases of sexual harassment, abuse or gender-based bullying.

## **Knowing the problem**

Currently the extent and nature of the problem of non-disclosure contracts and their effect on sex-based workplace harassment and other wrong doings in Australia cannot be demonstrated by empirical research because there is no research on it. Elizabeth Tippet carried out pioneering exercise research on this problem in the American legal system (2018). Her research suggests the use of these devices has a chilling effect on the preparedness of victims to make complaints and seek redress.

The non reporting of sex based harassment and other wrong doings in the workplace helps to

cover up the scale of the problem which works against those in the workplace being able to recognize and mitigate such problems (Lievore 2003). As researcher Francis Milliken and colleagues reveal these clauses contribute to 'organizational silence' (Milikin et.al 2013). Employees they surveyed did not feel comfortable speaking to their bosses about problems or issues that concern them in the workplace and decided to stay silent rather than speak express their concerns. This has potential to undermine an organization's decision making and error correction capacities. While there are many Australian examples of the effects these dynamics can have, the culture of fear employees experienced is evidence of the impact a culture of intimidation can have (Milikin et.al 2013, Ehtiyar 2008, 51-68).

The 'Women and Equality Committee' in the British House of Commons is currently running an inquiry into 'the use of non-disclosure agreements in discriminations cases' (UK Parliament, 2019). This initiative comes on the tail of the Committee's recent inquiry into sexual harassment in the workplace inquiry (UK Parliament, 2018). Among the recommendations of inquiry into sex based harassment was the proposal 'that the Government should clean up the use of NDA's in sexual harassment cases' (ibid).

In response the British Parliament launched a new inquiry into 'the wider use of NDAs in cases where any form of harassment or other discrimination is alleged. This might include, for example, pregnancy or maternity discrimination or racist abuse' (UK Parliament, 2018). In her evidence to this inquiry Barrister and member of the 'House of Lords' Helena Kennedy argued that:

We have women rising inside workplaces who are much more prepared not to accept what goes on. They make complaints, they whistleblow and then they get themselves into the whole business of being in conflict with somebody who is powerful. This is about economic difference, the lack of an even playing field here (Kennedy in House of Commons 2019:4)

Baroness Kennedy also highlighted the negative impact arising from the use of NDAs which may included 'not being able to go to a therapist for psychiatric help or psychological help in dealing with the abusive experience without having permission' or 'in order to get your deal we know that women are often persuaded to say that the thing did not happen, to retract the allegation' (ibid).

The use of these devices contribute to a culture of fear that not only silences victims, but also protects powerful people from appropriate public censure and so serves to regularize the invisibility and continuance of workplace sexual harassment and similar offending. Workplace sexual harassment only survives when structural ie. continuing gender-based power imbalances are normalized and rendered opaque.

The extent of this problem is evident in recent events on the public record. In June 2018, Australia's Human Rights Commission announced it would run the world's first national inquiry into sexual harassment in Australian workplaces. At that time Kate Jenkins, Australia's Sex Discrimination contacted 120 Australian employers asking them to issue limited a waiver of confidentiality obligations in non-disclosure agreements to allow employees to make a confidential submission to the inquiry. The then Minister for Jobs Industrial relations and Women Kelly O'Dwyer, acted in a way intended to encourage workers to speak more freely and openly about harassment. She called on chief executives to provide limited waivers of non-disclosure agreements so victims of harassment and other kinds of abuse can provide evidence without the threat of further adverse action.

At the time of writing this submission only 19 organizations (including two banks and four universities) agreed to do so. The Australia's Human Rights Commission Inquiry had to extend its deadline for submissions as a result of potential witnesses being fearful of providing evidence because they were 'required' to sign gag orders as part of mediation or 'settlement' of their complaints.

Any workplace that is serious about promoting healthy workplace cultures and fixing problems like sexual harassment, bullying and adverse action needs to review the use and

value of confidentiality obligations in non-disclosure agreements. Confidentiality agreements have become standard practice across a range of informal and formal dispute mediation, resolution or restorative justice processes. Kelly O'Dwyer is right when she says non-disclosure agreements prevent us from addressing the issue of sexual harassment in the workplace.

Moreover, NDAs can further compound the damage done to the person harassed or harmed by bullying, adverse action or sexual harassment, adding new layers of harm to people's health, reputation, career advancement or capacity to get another job. By the time most workers who have had their complaint heard and upheld, they are already damaged by processes that involve sheer exhaustion and the effects of chronic stress and fear, all damaging their physical and mental health. This often makes contesting requirements by their workplace for a confidentiality agreement too much: complainants just want the whole thing over and done with.

Given the preponderant legal, financial and human power and resources most employers in big workplaces requiring confidentiality agreements have that outweigh any resources the individual worker has, the cone of silence established by non-disclosure agreements simply reinforces an already unequal relationship between the employer and worker (or former employee).

Confidentiality agreements also mean that little or no learning can happen. Typically this means there can be no real attempt on the part of the workplace senior managers and others to recognize what happened and to resolve the matter-s in ways that restore what the complainant has lost.

In this way confidential agreements aid institutional amnesia or preference not to know or tell that assumes 'things can go on as usual'.

Moreover, they can mean perpetrators stay on and even get promoted or go to other workplaces and continue their *modus operandi*. In this way non-disclosure agreements become a form of secondary victimization because complainants agree to them under duress – because they feel they have little or no choice. While it is a somewhat different context, we have seen what the use of non-disclosure agreements by the Catholic church and the damage that can be done when those in senior positions turn a blind eye has meant for the child victims of sexual abuse, their families, communities and indeed the catholic church. Non-disclosure agreements are unethical, they are harmful and they are not in the public interest.

## **Principles**

In considering an appropriate reform process it needs to be acknowledged there are defensible grounds for using non disclosure agreements. There are for example credible commercial reasons for using them to protect important commercially valuable information when eg an employee leaves a business enterprise. In certain civil matters non disclosure agreements can protect the privacy, well-being and/or reputation of innocent or vulnerable people.

In the context of sexual harassment and gender based bullying in workplaces there is no such defence for the use of these devices when:

- a) a person or group of people have been subjected to unlawful conduct (like workplace harassment and sex-based discrimination) and
- b) the person or group made a complaint that is investigated by an appropriately constituted external or internal process that investigated and upheld the complaint and recommended appropriate civil or criminal legal remedies.

There is a public interest and benefit in disclosing the circumstances of these kinds of complaints and the remedies adopted.

Saying this however is not to overlook the question of individual privacy or freedom or a person's right to have some control over information about themselves which is private. This is a particularly pertinent issue in the twenty-first century with the popularization of digital media and social media in particular. Rather, it is to acknowledge the different kinds of privacy and (intimacy, anonymity, solitude etc) (Austin 2018) and to put on the agenda the value of debating the following:

- the rules or norms that might best guide questions about balancing the rights to privacy and the public interest, and
- whether a balance between such apparently competing 'needs' for disclosure, participation and withdrawal into privacy is best in particular situations.

While it is true that sometimes victims of sexual harassment and bullying want confidentiality agreements, this is not the norm. And while it is important to protect an individual's private information, it is also in the public interest to know what is happening so we can have workplaces in which employees and employers and those they provide goods and services for benefit and can live well.

Victims can, after all, ask for a confidentiality agreement. The problem is, however, they have become standard practice and have become so at the behest of those with the power to protect their interests.

There are also a number of important principles worth considering like the following:

### **Freedom of speech**

There is the question of freedom of speech, something especially relevant to workplaces like universities, schools and many NGOs given their declared commitment to critical inquiry and free an open inquiry and advocacy. More generally free speech is critical for a healthy democracy and good policy making for it helps ensure open debate and is critical for broadening access to information and plurality of perspectives.

### **Model litigant**

It's particularly worrying when public service, of all employers, now commonly use such instruments to suppress serious allegations of sexual harassment and other wrong doings, and sometimes the facts behind settled employee disputes. When 'model litigants' or the 'role model' employers, (eg the public service workplaces, effectively snub the laws, what hope is there?

### **Transparency**

Transparency and accountability are practices most CEOs and senior managers publicly declare they support and are committed to enhancing. Transparency is also generally recognized as critical for preventing and responding to corruption and other bad practice like sexual harassment.

### **Conclusion.**

In the light of these principles and discussion it is timely to give urgent consideration to:

- drafting relevant legislation that prohibits the use of non-disclosure agreements to prevent public dissemination of information about cases of workplace based sexual harassment, abuse or gender based bullying and similar adverse actions along with the civil and criminal remedies in each case; and
- mandating the systematic publication and analysis of data of this kind by the Australian Human Rights Commission.

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