Finance Sector Union

Restricting NDAs in workplace Sexual Harassment Cases

Industrial Relations Victoria

Finance Sector Union Submission

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About the FSU

The FSU is a registered employee organisation representing approximately 22,000 members across the banking and finance sector throughout Australia. FSU members work in banking, insurance, superannuation, financial planning and finance. Our membership is predominately female, many of whom are engaged in part-time and casual employment.

The FSU is a democratic organisation with representative governance by elected officials and volunteer members. The FSU is a member-led organisation in which rank and file members are elected to honorary official positions to governing bodies within the Union. This includes the National Congress which is the supreme governing body of the Union.

National Congress has the management and control of the affairs of the Union and is comprised of predominately volunteer members. These members are elected by the wider membership to represent their interests. They are not paid officials.

The FSU is proud of its long history representing members to achieve better wages and fairer conditions.

Our members are committed to higher integrity in the finance sector and see their role as advocates for a better industry.

Introduction

In February 2024, the Finance Sector Union (FSU) released a report on "Sexual Harassment in the Finance Industry". This report was compiled following a survey conducted by the FSU of people working across the finance sector.

The experiences of sexual harassment shared in the survey were perpetrated by customers, co-workers, and managers, and make for harrowing reading.

The FSU made a decision to be proactive about eliminating sexual harassment in the finance industry. Finance employers have, on balance, taken the path of least resistance and have chosen to rely on ineffective and inaccurate risk assessments rather than questioning the cultural and systemic reasons as to why this behaviour is so persistent in the sector. As demonstrated throughout this submission the reliance and proliferation of NDAs mean that the poor consultation and risk assessment practices within the sector are not reflective of the full picture of hazards that exist in the sector. This culture of secrecy and underreporting of the most serious and heinous hazards in the workplace must come to an end and the Victorian Government has a golden opportunity to contribute through this enquiry.

To bridge the existing gaps, the FSU invited representatives from the largest banks, insurers, and superannuation funds to participate in a roundtable discussion in February 2024 with Sex Discrimination Commissioner Dr Anna Cody and Safe Work Australia CEO Marie Boland.

The purpose of the roundtable was to demonstrate a willingness to work with industry to establish better systems and processes to eliminate sexual harassment because any instance of sexual harassment at work is one too many.

Among other commitments, participating employer representatives agreed in-principle toa commitment not to use Non-Disclosure Agreements (NDAs). The only exception will be where one is requested by a victim, and it will be drafted in line with the recommendations of the Respect@Work Report.

The Victorian Trades Hall Council, in its publication "The Case for Ending Non-Disclosure Agreements" stated the following:

- 1 in 3 workers report being sexually harassed in the workplace over the last 5 years.
- Only 18% of victims report incidents workplace sexual harassment.
- Close to 70% of women report to have been the victim of gendered violence in the workplace.
- Women are the largest cohort of sexual harassment victims, but sexual harassment is compounded by intersections such as race, age, disability status, gender identity and sexual Orientation.

- Victims say that they regret entering into an NDA post settlement with most experiencing feelings of regret between 3-6 months later.
- Victims who did not file a formal complaint say that anticipating signing an NDA was a major factor in their decision.
- There are health risks associated with keeping complex trauma a secret, including post-traumatic stress disorder.

The Financial and Insurance Services | Jobs and Skills Australia shows the finance sector consists of approximately 529,900 employees nationwide (approximately 4% of the workforce) with women making up approximately 48% of the total number of workers within the sector.

There is often a power imbalance between employers and complainants where NDAs are imposed almost exclusively to protect the employer. It is a feature of the current system that where a worker is sexually harassed in the workplace, their claim is most often against the employer, not the perpetrator as an individual. This sets the victim survivor up for a dispute in the context of a significant power imbalance, but also against a party with substantially more resources.

Our submission emphases breaking the power imbalance between employers and victim survivors by banning the use of NDAs by employers as means to cover up bad behaviour. Where NDAs are initiated by the complainant, that it is at their sole discretion. This submission highlights the importance of setting out the details and terms of the NDAs, the access to legal advice and legal services all of which will bring back a resemblance of control to the complainant. Finally, it will make some recommendations about what should occur in response and talk to further regulation.

Use and Proliferation of NDAs in the Finance Sector

The FSU sees the use of NDAs as an unnecessary evil that has been present within the sector for a great many years. NDAs have been used by employers as a way to shield themselves from reputational damage and to suppress the disclosure of significant cultural issues within the sector.

Culture in the Finance Sector

In preparing this submission, the FSU reviewed records of our members' cases over the past decade. This review revealed that sexual harassment is common in our sector, and NDAs are a common feature where a worker leaves their employment.

The culture in the finance sector is one which prioritises high performance in the pursuit of ever-growing profit. This is a culture that preferences profit over ethics and the wellbeing of the people working within the sector. Workers joining the sector are incentivised to become part of this culture by the need to remain employed, but also through carrots like promises of promotion and higher remuneration packages.

This creates a culture where adherence to the norms of the organisation is valued above all else, and even where inappropriate or even illegal behaviour is taking place, there is a strong incentive to turn a blind eye. We see this culture playing out very directly in the prevalence of corporate retreats and similar events where some of the worst behaviour in the sector takes place.

One such story is of an FSU member working for one of the big four banks. She had been put on a corporate fast track process and within a few years of joining the bank she was attending events and senior staff retreats. The major issue occurred when she was at one retreat where all of the attendees were drinking heavily. A senior manager, who had made sexual comments to her in the past, plied her with alcohol and ended up sexually assaulting her while on the retreat. Following this, the member was unable to ever return to work and was silenced about the incident through the use of an NDA settlement. At the time of the incident, she was not even 30 years old.

At the same time, most finance employers are obsessed with their public image. It is critical to these employers to ensure that any scandals that take place remain confidential, and the company is able to project a public image of being competent, professional and ethical. However, we frequently hear that the very culture that many bank executives attribute to their extraordinary profits is also the permissive culture that allows sexual harassment at scale to occur.

Use of NDAs in the finance sector

NDAs are used in the finance sector to cover all manner of misconduct and inappropriate behaviour.

Gender inequality and power imbalances underline the cultural norms that create environments that allow sexual harassment to occur and to go unchallenged. As one of our survey respondents shared:

"Boards in [our industry] hold a lot of power. We have a very powerful chair. The chair directly contacts female staff and can be disparaging of work and opinions. Women in the organisation are very stressed and want the system to change of [executive] allowing direct contact. The power imbalance is awful. We talk about it all the time with each other but feel powerless. These power imbalances in [the] finance sector are horrible and no one talks about it and where do you go. I want to leave my job." - Margaret*, 53.

The FSU most commonly sees NDAs used in sexual harassment cases in our sector where the victim survivor is leaving their employment. This points to a serious issue in our sector where many women who make a sexual harassment complaint ultimately end up leaving their employment as a result. This happens for a range of reasons including:

- The sexual harassment allegations not being substantiated;
- The employer being unwilling to make arrangements for the victim survivor and perpetrator to work in different locations or teams;
- The confidentiality of the allegations not being maintained;
- The perpetrator maintaining their employment or facing minimal or no consequences for their actions.

Where a worker leaves employment due to sexual harassment, it is common for employers to seek to impose an NDA to ensure that the sexual harassment remains confidential. Sometimes a token amount of money is paid to the victim survivor as part of the deed. The terms of these deeds most often require absolute confidentiality of all matters relating to the employment and non-disparagement obligations.

Effect of NDAs on finance workers

The effect of these NDAs is that victim-survivors are never able to discuss what happened to them and seek care and closure on those issues. Often, survivors have been asked to make decisions about resolving their complaint for sexual misconduct at the same time that they are dealing with the aftermath of misconduct. Which often means that they are struggling socially, financially, and dealing with significant adverse effects on their mental health. This is exacerbated by the fact that in the finance sector, these NDAs are most often negotiated when the victim survivor's employment is coming to an end.

It is common in the finance sector that workers are offered two settlement amounts – a higher amount if they leave their employment under the terms of an NDA, and a lower amount (or no compensation at

all) if they refuse to sign an NDA. This leads to the conclusion that what these employers are actually paying for is the protection of their reputation and the silence of the complainants rather than compensating workers for the harm that the workplace has caused them. FSU finds this to not only be a disgraceful use of these legal tools but makes of mockery of the health and safety obligations that employers have to their employees.

Rather than addressing the root causes and cultural and behavioural issues in their workplaces, NDAs allow employers to supress illegal and immoral behaviour and buy the silence of victim survivors.

Workers and the community have a right to know what happens in these organisations so that they have confidence they are working for or patronising ethical businesses. This is especially the case where sexual misconduct is a factor. FSU is of the view that if the conduct of these organisations is ethical and legal and meets community standards then there is nothing that shouldn't be capable of being disclosed. This is true of legal settlements, pre litigation settlements and health and safety practices.

Impact on victim survivor recovery

Studies show that the cognitive behavioural therapy amongst other talk therapy is one of the most effect ways for survivors of sexual misconduct to be able to heal and recover after the event.

The rate of completion for talk therapies is already far too law, being around 50% or less in some demographics. This is due to a complicated mixture of factors including, financial, social and a lack of hope that the treatment is going to assist the person being treated in their recovery.

Where there are additional barriers such as legal bars to disclosure and litigation threats, this can only be seen to lower these rates of completion. This is another significant problem that is presented were NDAs are being used. Whether the terms of the NDA specifically prohibit seeking mental health assistance or not, often the mere existence of an NDA is sufficient to deter a worker from seeking assistance.

Further, the support of family, friends and other significant people in the life of the victim survivor is important in ensuring their recovery from the misconduct. Ensuring that survivors are able to communicate openly and freely about the case and the effect that it is having on them is another significant component in the recovery of these workers.

Terms of NDAs

When are NDAs appropriate

FSU is supportive of NDAs being available to workers where:

- the NDA is requested by the worker;
- the worker has received independent, expert legal advice;
- the worker has been advised that there is no requirement to agree to a confidentiality arrangement;
- there is no improper influence on the worker to agree to a confidentiality arrangement (for example, in exchange for a larger settlement payment); and
- the term of the NDA follows prescribed standard terms as set out below.

Where a complainant has requested that an NDA be used in resolving their sexual harassment case at work, FSU believe that it should be mandatory for them to include the following:

1. Details of the circumstances that cannot be disclosed;
2. Exemptions for medical and psychosocial care;
3. Exemptions for legal and union advice;
4. Exemption for disclosure to immediate family;
5. Sunset provisions of no more than 5 years unless extended at the election of the victim survivor;
6. Revocability at the election of the complainant; and
7. A one month cooling off period.

FSU would be in favour of a standard form of NDA that is derived from the relevant legislation and respects the rights of victim survivors. This would ensure that there is consistency in the terms as well as the application of NDA provisions.

In doing so FSU would want to ensure that the standard form clearly outlined the details of the circumstances that led to the complaints and therefore the need for an NDA.

There should be exemptions within the standard NDA form for the victim survivor to be able to engage with medical practitioners, psychologists and other practitioners involved with their health and recovery. This would at least ensure that there are no further barriers to victim survivors seeking care in the aftermath of an incident.

There should also be an exemption for legal and union advice so that employees are able to discuss and seek guidance from either their legal advisor or union officials about further causes of action or other workplace related issues.

An exemption for immediate family is necessary so that the victim survivor is able to continue to discuss the matter with them at their discretion. This will ensure that they are not isolated from important people in their lives at a time where they likely needed the most.

FSU would favour a sunset provision within any NDA where the the NDA is inoperable after a period of no more than five years or shorter by agreement. Where the parties decide not to talk about the circumstances after the sunset provision that is their decision. However, where a complainant later decides that they wish to speak publicly about the circumstances that led to their sexual misconduct complaint there would be no way for a guilty party or employer to prevent this from happening.

Victim survivors should have the right to revoke the confidentiality arrangements at their election or after some minimum period. This would mean that where circumstances change, and the victim survivor wishes to speak publicly or participate in in public discourse an then they should be able.

The times when workers are most likely to have to think about whether or not to sign an NDA and make decisions is when they can be at their most vulnerable. The decision to agree to an NDA even with the requirement for there to be legal advice prior to taking such a decision is one that should be subject to a cooling off period.

FSU submits that a period of one month should be sufficient for workers to be able to reconsider the decision without the pressure of being there in the moment.

FSU is of the view that with all of these elements in place, and with a standard form NDA, that workers who do elect to use an NDA will be properly protected, their rights respected, and they will retain the ability to change their mind if circumstances change. This will of course help to ensure that bad actors in the workplace are not able to continue undetected and that victim survivors are in control of the outcome notwithstanding the enormous power imbalance between workers and employers.

FSU does not believe that the employers and harassers should be able to seal wrongdoing behind an NDA. Allowing this kind of practice will do nothing to shine a light on wrongdoing in the workplace and will continue to give both alleged and confirmed harassers cover.

The role of an NDA should fundamentally only be for situations where a victim survivor requests one to ensure their dignity and safety following proper legal advice.

Where an NDA is initiated by the victim survivor there must be restrictions on the employer from imposing non-disparagement terms. Where they to be allowed in the absence of an NDA, it would have the same chilling effect on expression and recovery as would the case of having the NDA.

Legal Services for Complainants

When considering the way that victim survivors are able to access legal services when they have encountered misconduct of any kind in the workplace, consideration needs to be given to the barriers to legal representation.

Regardless of the personal and financial position of the survivor, it can be prohibitively expensive for workers to gain access to adequate and competent legal advice. The quality and availability of legal support varies widely depending on where an individual lives, and how much they can pay. This is a substantial barrier for many workers to access justice and information about their rights at times when they need it the most.

FSU believes that the best way to ensure that workers are represented in their workplace and are fully informed of their workplace rights used to be a member of the union. One of the consequences of the declining rate of union membership is a precipitous lack of knowledge about workplace rights and access to representation. We invite the Victorian Government to give consideration to the proposition that the system of industrial relations was designed with workers being fully represented by their union in mind and how this can be supported and restored.

The finance sector comprises some of the largest and most profitable companies in Australia. Including the big four banks, some of the largest insurance companies as well as the superannuation funds and other profitable employers. There is a significant imbalance in the financial resources available to employers, familiarity with the systems and access to experienced and adequate legal advice and representation.

Some reports have the cost of legal services increasing by as much as 35% over the last five years. Which means that for many workers they are simply incapable of affording independent legal services in particular at times where their employment might be precarious.

For this reason, workers having access to free and independent legal advice, preferably through their union, would be an enormous step in the right direction and would ensure that many workers were able to get access to legal advice during crucial decisions like resolving sexual misconduct complaints in the workplace.

FSU is concerned that a model of funding such legal advice from the employer at the time where the service is engaged could lead to a lack of independence on the part of the worker. Coupled with the lack of familiarity with legal systems and structures, FSU proposes that there be independent legal advice available for workers either through their union or through other independent legal services established for this purpose, funded from a pool of money that is paid into by employers in the same way that they pay for their workers compensation insurance.

By having those resources available and not dependent on the decisions of an employer and their willingness to pay, we believe that greater confidence can be inspired in both the advice and the consistency of outcomes for workers.

By establishing a levy against employers who conduct business within the state of Victoria based on the number of employees in the state a pool funds could be established for the purpose of providing this legal advice and representation.

By making the funds available centrally to workers this would ensure that those workers in more regional and remote areas of the state would not be disadvantaged and be able to engage legal representation from inappropriate source even if that is not in the same location where they work. This fund should also be available to unions who provide the same advice.

FSU is also concerned that ensuring that the choice of lawyer is in the hands of the worker or from a predetermined group of lawyers or firms who are engaged specifically to do work within the scheme described above.

This will once again ensure that true independence is achieved and that there can be no conflicts between the interest of the firm and the interest of the workers.

We adopt the position of the VTHC where a lawyer or union engaged and funded through the scheme described above, could issue a certificate to say that the provisions of the NDA and the need for it have been initiated by the complainant as an additional measure to ensure there is no undue pressure on the worker.

Further Regulations

FSU believes that an employer or third party who enters into an NDA or seeks to enforce a non-compliant NDA should be guilty of an offence that attracts civil penalties. FSU believes that this would work as a deterrent to some employers from using NDAs inappropriately and from breaching them where they are valid.

One element to consider with this is that employers should not be able to secure insurance against these kinds of civil penalties. Allowing insurance of this kind undermines the deterrent power of these kinds of penalties.

FSU notes that while civil penalties are a powerful tool to protect workers and hold employers accountable, that when dealing with employers on the size and scale of those in the finance sector, that the penalties would need to be quite sizable to make any kind of real impact.

For example, the enquiry should take notice of the penalties against the Commonwealth Bank for systematic and intentional underpayment of workers. Nevertheless, the Commonwealth Bank has recorded profits of approximately $10 billion for the past two years. There is an issue of scale and proportionately that needs to be considered.

One possible way to ensure that there is compliance with the obligations for the existence of an NDA would be to require the parties to register the NDA with a Government body such as the Victorian Equal opportunity and Human Rights Commission (VEOHRC) or the Wage Inspectorate.

This could then trigger a process of review from the body to ensure that the parties agree it has all of the compliant terms and that it was initiated by the complainant.

It should be an easy, fast and inexpensive method for victim-survivors to enforce an NDA where it has been breached or where an employer proposed one without prompting from a complainant. This right should be extended to unions representing their members on these issues.

An important way to ensure the use of NDAs does not lead to any adverse health and safety or other impacts on third parties is to ensure that the NDA is revokable at any time for that purpose. This would include for the purpose of undertaking risk assessment.

Recommendations

The Finance Sector Union supports all of the recommendations in the submission of the Victorian Trades Hall Council. We reiterate the following recommendations:

1. The use of NDAs in cases of workplace sexual harassment be prohibited unless a victim survivor requests an NDA following legal advice.
2. Provide the ability for workers who have experienced sexual misconduct in the workplace to receive independent legal advice from their union or another lawyer. This should be funded from a pool of funds levied from employers in Victoria based on their number of employees.
3. That there be a standard form of NDA prescribed by legislation that included the following elements:
    a. Details of the circumstances that cannot be disclosed;
    b. Exemptions for medical and psychosocial care;
    c. Exemptions for legal and union advice;
    d. Exemption for disclosure to immediate family;
    e. Sunset provisions of no more than 5 years unless extended at the election of the victim survivor;
    f. Revocability at the election of the complainant; and
    g. A one month cooling off period.
4. Legislation must make entering into a non-compliant NDA unlawful and provide that any breach will attract civil penalties.
5. That a Government body such as the Wage Inspectorate or VEOHRC have compliance power to ensure that NDA that are entered into are compliant with the standard form and entered at the request of the complainant.