

Me Too – sexual harassment investigations in the workplace

AIPJ National Conference
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The current context



Analysis

#MeToo: how a hashtag became a rallying cry against sexual harassment

Nadia Khomami

Many employers unaware of psychosocial risk obligations

Wednesday, 14 December 2022 2:00PM

Bookmark

Employers now have "a lot" to do in complying with recent legislation changes, but one particular obligation is falling by the wayside, according to a workplace lawyer. →

'Revolting and humiliating': 10 things we learned about working at parliament from the Kate Jenkins review

Sex discrimination commissioner heard from 1,723 individuals and 33 organisations. Here's a breakdown of the shocking findings

[Work & Careers](#)

[Workplace](#)

[Federal election](#)

New laws would require employers to actively prevent sex harassment

[Workplace](#)

Broderick begins confidential EY culture probe interviews in Melbourne

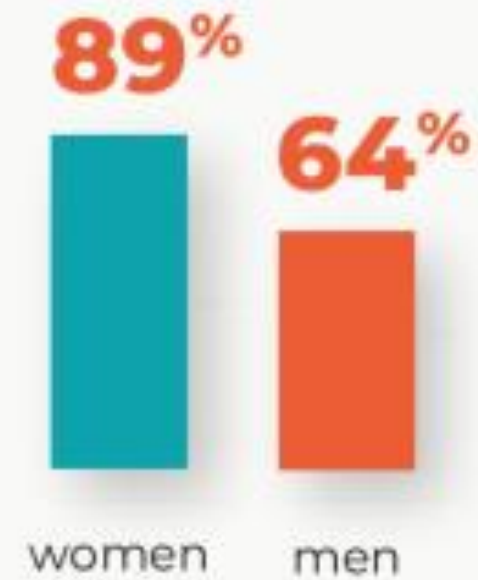
The wide-ranging review into EY's workplace culture led by Elizabeth Broderick will explore "the mental health impacts of bullying, sexual harassment, racism and a high operational tempo" at the firm.

Feb 7, 2023 | Edmund Tadros



AHRC 2022 survey

77% of Australians aged 15 or older have experienced sexual harassment at some point in their lives (89% of women and 64% of men).

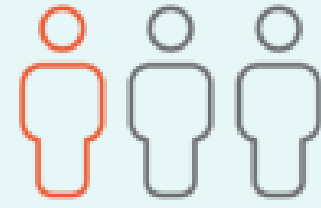


In the last 12 months

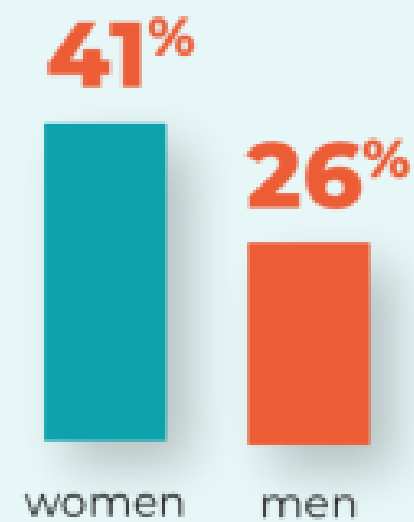
About **1 in 5** people

(19%) have been sexually harassed at work.

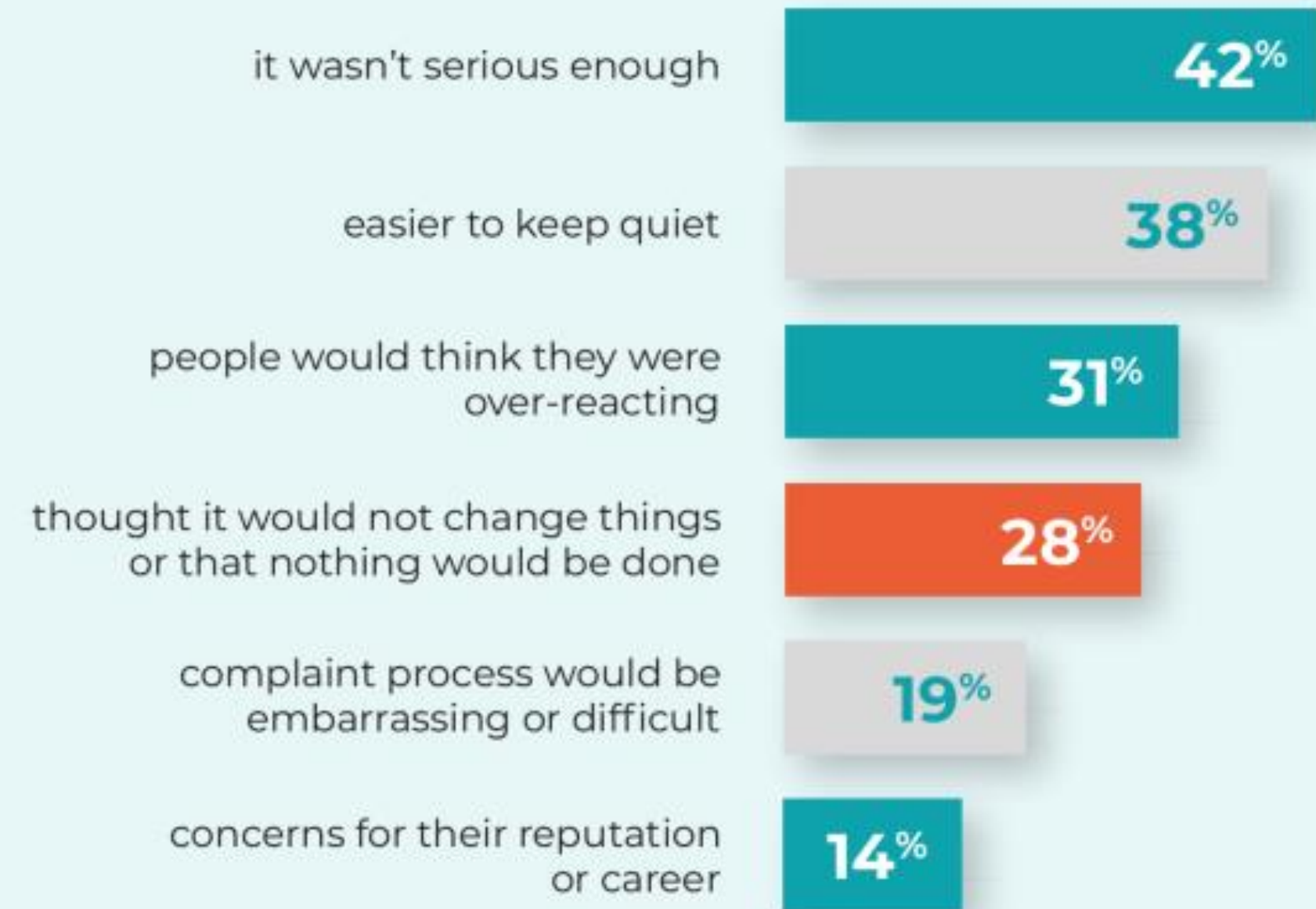
In the last 5 years

About **1 in 3** people 

(33%) have been sexually harassed at work (41% of women and 26% of men).



Reasons why people did not report:



Respect at Work Report Recommendations

Express prohibition

Creation of hostile or offensive environments

Sex-based harassment

Positive obligation

Sex-based discrimination and harassment

Sexual harassment

Victimisation

Improving workplace protections

Stop sexual harassment order

Sexual harassment as serious misconduct



The new positive duty

Positive duty on employers or PCBUs to take reasonable and proportionate measures to eliminate, as far as possible, conduct that includes...

	Meaning
Sexual harassment	Unwelcome conduct of a sexual nature
Harassment on the ground of sex	Unwelcome conduct, demeaning in nature based on the sex of the person, but not necessarily sexual in nature
Discrimination on the ground of sex	Differential treatment based on the sex of the person
Conduct that subjects a person to a hostile workplace environment on the ground of sex	Conduct that results in an offensive, intimidating and humiliating environment for people of one sex, but not necessarily directed at a person
Victimisation	acts of victimisation that relate to complaints, proceedings, assertions or allegations in relation to the above conduct

Power and functions of the Australian Human Rights Commission (AHRC)

AHRC have the power to monitor, assess and enforce compliance with the new positive duty.

- Conduct inquiries into a person's compliance with the positive duty and provide recommendations to achieve compliance;
- Issue a compliance notice specifying the action that a person must take, or refrain from taking, to address their non-compliance;
- Apply to the federal courts for an order to direct compliance with a compliance notice; and
- Enter into enforceable undertakings.

Enable representative actions

- Representative bodies are able to make representative applications in the Federal Courts on behalf of persons who have experienced unlawful discrimination.

Stop sexual harassment order



**STOP SEXUAL
HARASSMENT**

Applications can be made by a single person or by multiple people jointly.

FWC must be satisfied: the worker has been sexually harassed at work by one or more individuals and there is a risk that this will continue unless FWC makes an order to prevent the worker from being bullied or sexually harassed (or both) at work

Orders may include

- changes in working arrangements
- one or more individuals to stop specified behaviour
- regular monitoring of behaviours by an employer
- compliance with an employer's policy
- the provision of information and additional support and training to workers
- conduct a safety risk assessment for the workplace, and
- a review of the employer's workplace policies.

The requirement to comply with an order to stop bullying or sexual harassment (or both) is a civil remedy provision.

Best practice investigations

LEGAL
PROFESSIONAL
PRIVILEGE

LEGAL
PROFESSIONAL
PRIVILEGE

LEGAL
PROFESSIONAL
PRIVILEGE

Step 1: Managing an incident when a complaint is received

Complaints may either be received formally or informally and may be made by the alleged victim or a witness of the behaviour.

Key points to remember when an employer first receives a complaint include:

- Respond **promptly** within **established timeframes**
- Consider whether **interim/temporary measures** are required
 - Ask yourself, was it a critical incident which requires immediate management intervention?
 - Be clear that the measures are not disciplinary actions
- Consider the **nature of the complaint**
 - Resolve matters internally if appropriate
- Treat all matters **seriously** and assess all complaints on their **merits**
- Ensure **confidentiality** is maintained throughout the whole process
- Ensure **procedural fairness** is abided by
- Ensure there is **no pre-judgement** or **bias** by an investigator
- Provide **support** to all parties
- **Communication** is key – be transparent about the process, the likely timing and reasons for any interim measures taken
- Document and keep **records**

Step 2: The investigation process

Prepare the brief to investigator

Prepare the investigation plan

Prepare interview protocol and conduct interviews

Gather evidence

Draft investigation report with outcome

Communications

The complainant, the respondent and witnesses

Initial communication with parties should:

- set expectations
- highlight confidentiality requirements
- remind victimisation prohibited
- not make promises about the outcome
- outline the process
- refer to policy
- EAP/support person

Other parties?

Do other parties need to be kept updated/informed?

- Senior management?
 - will there be publicity?
 - does the matter involve a serious incident?
 - does the matter involve a senior member of staff?
- The police?
 - certain pornography
 - violence
 - weapons
- Worksafe?

Implement a 'trauma-informed' approach

Interviews

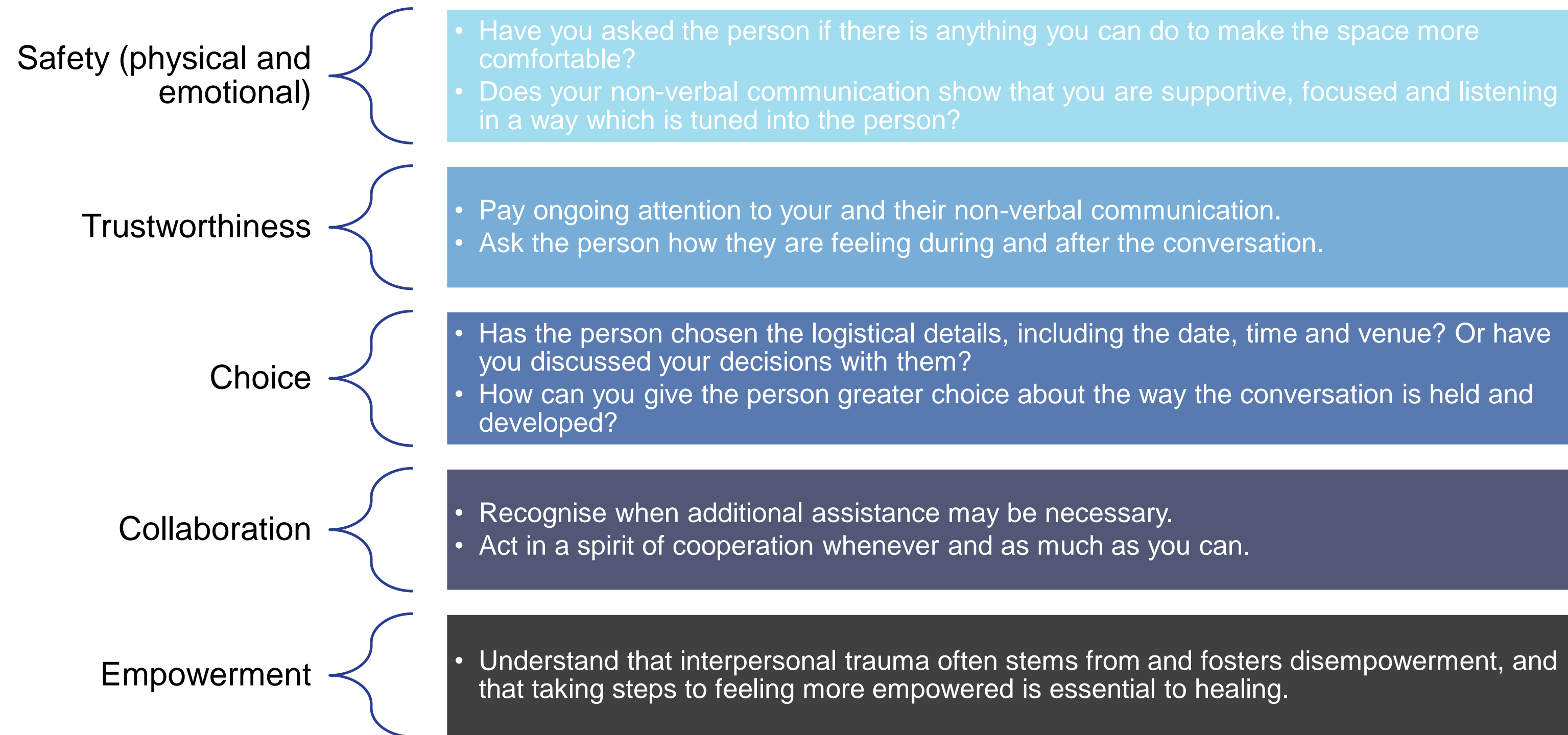
Below are a few points to consider when conducting interviews.

- At the start of each interview give a confidentiality/victimisation warning
- Remind any support person of their role and the need to keep the matter confidential
- Do not record interviews without consent
 - no obligation to consent
 - no obligation to provide copy of recording
- At the end of the interview – remind the interviewee and any support person that they need to keep the matter confidential
- Think about what you need to know to substantiate the allegation - helps structure the interview
- Use open ended questions and more specific questions when necessary to drill down
- Use simple questions – a single question has a single point
- Get specifics – dates, times, titles, full names
- Be prepared to be flexible during the interview
- Be prepared to challenge the interviewee
- At the end ask the interviewee if they have anything they want to add and if there are any other witnesses or documents/materials you should consider



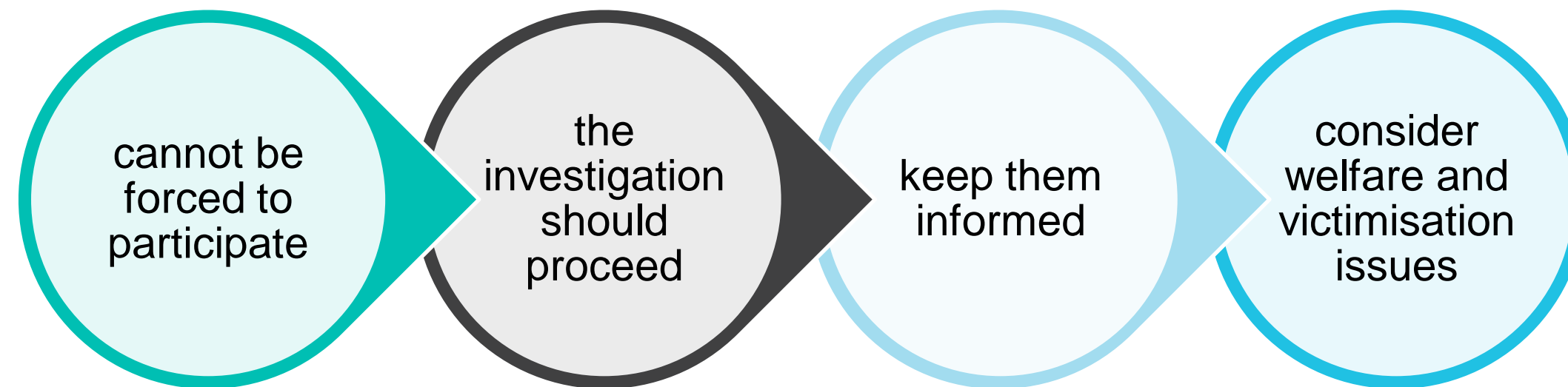
Trauma informed approach

An approach to interacting with someone who has experienced trauma that prioritises safety, trustworthiness, choice, collaboration and empowerment (Respect@Work Council 2022).



What about uncooperative participants?

The complainant that wishes to withdraw



The respondent who will not participate



Takeaways

Higher standards

Increased scrutiny

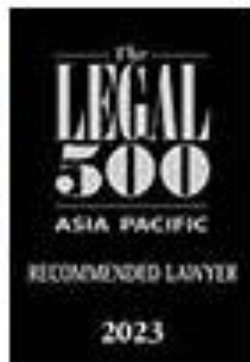
Significant sanctions and
consequences

Greater publicity

Thank you!



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This document is a guideline for training purposes only. Please seek legal advice regarding individual circumstances that may vary.