Human Rights Law Centre

Redfern Legal Centre

Restricting Non-Disclosure Agreements in Workplace Sexual Harassment Cases

18 September 2024

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Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Human Rights Law Centre acknowledges the lands on which we work and live, including the lands of the Wurundjeri, Bunurong, Gadigal, Ngunnawal, Darug and Wadawurrung people. We pay our respect to Elders of those lands, both past and present. We recognise that this land always was and always will be Aboriginal and Torres Strait Islander land because sovereignty has never been ceded. We acknowledge the role of the colonial legal system in establishing, entrenching, and continuing the oppression and injustice experienced by First Nations peoples and that we have a responsibility to work in solidarity with Aboriginal and Torres Strait Islander people to undo this.

Redfern Legal Centre

Redfern Legal Centre (**RLC**) is a non-profit community legal centre that provides access to justice. Established in 1977, RLC was the first community legal centre in NSW and the second in Australia. RLC provides free legal advice, legal services and education to people experiencing disadvantage in our local area and statewide. RLC works to create positive change through policy and law reform work to address inequalities in the legal system, policies and social practices that cause disadvantage. RLC specialist legal services focus on tenancy, credit, debt and consumer law, financial abuse, employment law, international students, First Nations justice, and police accountability, and provide outreach services including through a health justice partnership. We provide effective and integrated free legal services that are client-focused, collaborative, non-discriminatory and responsive to changing community needs – to our local community as well as state-wide.

Contents

1. Recommendations

The Human Rights Law Centre and Redfern Legal Centre recommend that the Victorian Government implement a trauma informed approach when considering the legislation restricting the use of Non-Disclosure Agreements (**NDAs**) in workplace sexual harassment matters. We make the following recommendations:

Recommendation 1 – Victim Survivor Choice: Centre the experiences of victim survivors by empowering them with true choice around NDA use. This should be informed by key principles:

1. NDAs should only be entered into in a workplace sexual harassment claim where this is the expressed wish and preference of the employee concerned.

2. Any requirement for victim survivors to receive legal advice should be provided by solicitors with training on NDA use.

3. Complainants bound by an NDA entered into prior to the Victorian Government's proposed reforms should be able to disclose the circumstances of past harassment to certain classes of individuals.

Recommendation 2 – Education: Implement more education and resources for the legal profession, employers, perpetrators and victim survivors on NDA use.

1. Resources should be provided to support victim survivors negotiating a settlement which reflects their own needs. These resources should include discrete examples of acceptable and unacceptable negotiation conduct for employers, individuals and the legal profession.

2. NDA drafting guidance should be provided, allowing for implementation flexibility. A proposed list of permitted confidentiality disclosures should be published.

Recommendation 3 – Intersectionality: Expand the scope of the Victorian framework to address intersectional experiences of sexual harassment and discrimination.

Recommendation 4 – Accessibility: Ensure compliance and enforcement mechanisms for breaches of the proposed Victorian framework are accessible.

Recommendation 5 – Accountability: Mandate data and reporting requirements around NDA use to drive greater cultural change.

Recommendation 6 – Secrecy: Reform secrecy provisions in Victorian legislation that have an equivalent impact to NDAs on victim survivors in the Victorian public sector.

2. Introduction

Sexual harassment exists on a spectrum of gendered violence. It is a form of gendered violence in public life. We know that 1 in 3 people have been sexually harassed in Australian workplaces in the last 5 years.[1] Beyond incident numbers of harm, we know very little else about sexual harassment. We do not know the cultural drivers and the experiences of victim survivors being sexually harassed at work.

Only 18% of people who have experienced sexual harassment at work file a sexual harassment complaint in the Australian Human Rights Commission (AHRC).[2] Those matters likely settle, with very few proceeding to a litigated court outcome.[3]

Litigated court outcomes are not representative of the spectrum and quantum of sexual harassment in Australia. Having only a few publicly available court judgments every few years cannot be representative of the problem which affects one third of Australians.

NDAs are a barrier to knowledge and redress for sexual harassment. For many victim survivors, as outlined in these submissions, they are also a barrier towards healing. While they can be an effective resolution tool if parties are empowered to make informed decisions about their use, the misuse of NDAs and their widespread use has been identified by the Australian Government in the Respect@Work Report as a significant problem.

Recommendation 38 of the Respect@Work Report recommended the Federal Government introduce guidelines that identify best practice principles for the use of NDAs in workplace sexual harassment matters.[4] In December 2022, the Respect@Work Council published these guidelines (**NDA Guidelines**).[5]

In considering the effectiveness of the NDA Guidelines, the authors of this submission, Regina Featherstone and Sharmilla Bargon conducted research at the University of Sydney as part of the Social Justice Practitioner in Residence placement 2023/2024. We produced the report titled, Let's Talk About Confidentiality (the **Research**) which found that strict NDAs[6] remain the default resolution in sexual harassment settlements. The Research shows that the NDA Guidelines to date have not been effective in addressing the problem identified by the Australian Government, that NDAs are misused. The Research also revealed a latency in the legal profession with many solicitors failing to advise on the scope of NDAs and their optionality.

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[1] Australian Human Rights Commission ('AHRC'), Time for Respect: Fifth National Survey on Sexual Harassment in Australian Workplaces (30 November 2022) 130 <https://humanrights.gov.au/time-for-respect-2022> 130.
[2] Ibid.
[3] Margaret Thornton, Kieran Pender and Madeleine Castles, 'Damages and Costs in Sexual Harassment Litigation' (Study Conducted for Respect@Work Secretariat, Australian National University, 24 October 2022), 21 [Graph 5]
[4] AHRC, Respect@Work: Sexual Harassment National Inquiry Report (2020) (5 March 2020) <https://humanrights.gov.au/our-work/sexdiscrimination/ publications/respectwork-sexual-harassment-national-inquiry-report-2020> ('Respect@Work').
[5] AHRC, Guidelines on the Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints (19 December 2022) <https://www.respectatwork.gov.au/sites/default/files/2022-12/Guidelines%20on%20the%20Use%20of%20Confidentiality%20Clauses%20in%20the%20Resolution%20of%20Workplace%20Sexual%20Harassment%20Complaints.pdf>.
[6] 'Strict NDAs' has been defined to mean confidentiality and non-disparagement obligations that are not time capped and allows for only disclosures at law (e.g. financial advisors). Strict NDAs, in effect, mean that a victim survivor cannot speak to anyone (aside from permitted legal disclosures) in perpetuity: R Featherstone and S Bargon, Let's talk about confidentiality: NDA use in sexual harassment settlements since the Respect@Work report, University of Sydney, Law School, 6 March 2024, p. 28.

The below submissions draw on the Research to respond to the discussion paper. A more fulsome exploration of NDA use and misuse, data on settlement practices and international legislative analysis is found in the Research. We rely on the Research in addition to these submissions.

Sharmilla Bargon leads the Employment Law practice at Redfern Legal Centre which provides free legal assistance victim survivors of sexual harassment across NSW – from advice to representation in court. Regina Featherstone is a Senior Lawyer in the Whistleblower Project, Human Rights Law Centre – the first dedicated legal service set up to assist whistleblowers across Australia. For many women at work, whistleblowing and speaking up about serious wrongdoing relates to their personal safety. We make these submissions based on our Research and expertise in working with victim survivors in sexual harassment settlements.

All case studies have given their permission to have their words and stories used in these submissions.

These submissions use the term 'victim survivor' or 'applicant' in lieu of complainant.

Content warning:

The below submissions contain continuous reference to sexual harassment and sexual assault. Some readers may find this upsetting and triggering.

If you feel upset by the content, reach out to 1800 RESPECT on 1800 737 732 or your treating medical practitioner.

If you have experienced sexual harassment and need legal advice, or you have an NDA and want further advice about it, you can ask your local community legal centre for assistance https://clcs.org.au/legal-help/

3. Response to discussion questions

3.1. Proposed Victorian NDA legislation: evidence and effectiveness

Responding to discussion questions 1 – 3 of the Consultation Paper

Given the ineffectiveness of the NDA Guidelines and other professional guidance for the legal profession to date on changing NDA misuse and practice, we support legislative prohibition of NDA use unless requested by the complainant (victim survivor). Legislative reform may be an effective tool to moderate inappropriate settlement conduct as other non-enforceable regulatory mechanisms have had limited utility. Legislative amendment alone will not address the problem of NDAs being misused: it must be accompanied by education and accessible enforcement mechanisms.

Consultation with victim survivors is critical to create a best practice trauma-informed model which seeks to correct the power imbalance between victim survivor and perpetrator/business. Practically, this means that NDAs should only be entered into when that is the express desire of the victim survivor.

We draw on the victim survivor testimonials provided by Victorian Trades Hall Council (**VTHC**) in the Research at pages 23 and 24 to reiterate the importance of victim survivor engagement in this process. Their voices should be at the forefront of this discussion. Our role is to amplify those voices and provide commentary on practical implications on the proposed Victorian framework.

Section 14B(2) of Ireland's *Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021* requires that an NDA may only be entered into in a workplace sexual harassment claim where this is the expressed wish and preference of the employee concerned. This Bill's approach follows that of Prince Edward Island's *Non-Disclosure Agreements Act 2021* which requires that an NDA is only permitted if such an agreement is the expressed wish and preference of the applicant.[7] It is recommended that the Victorian framework adopts a similar approach to those above. The approaches taken in Ireland and Prince Edward Island strike a balance between centring the applicant's desires and providing the respondent with a degree of agency.

Of critical importance here is centring the experiences and desires of the applicant. Accordingly, that should not necessarily preclude a respondent from suggesting that the parties enter into an NDA. However, the framework should prohibit the parties from entering into an NDA unless it is the explicit desire of the applicant. The NDA ought to be prepared in terms acceptable to the applicant and the applicant, having received independent, competent, legal advice, should be agreeable to the NDA.

Evidence

An applicant's desire to enter into an NDA could be evidenced by a signed statement to the effect that the applicant has been provided with legal advice as to the meaning and effect of the NDA and that they wish to enter into the NDA. This statement could be signed by the practitioner who provided the advice, in addition to the applicant. Such statements are commonly used in other contexts, usually where power imbalances may exist, including in family law.[8]

The legislated approaches in Ireland (noting that this is still a Bill and has not been formally enacted) and Prince Edward Island render an NDA unenforceable where entering the NDA is not the express wish and desire of the applicant. In determining whether entering into an NDA in these jurisdictions is truly the wish and desire of the applicant, there are a number of criteria that ought to be satisfied to ensure that the applicant's choice is genuine, they are well-informed and are able to exercise their autonomy. Accordingly, entering into an NDA in these jurisdictions against the wishes of the applicant is unlawful.

[7] *Non-Disclosure Agreements Act 2021* (PEI), s 4(2).
[8] See for e.g. *Family Law Act 1975* (Cth), s 63E(2)(b)(iii).

This approach is aimed at ensuring that NDAs are used to fulfil the desires of applicants, and not just those of respondents who may wish to conceal the details of any claims or silence complainants. This approach, therefore, is wholly aimed at reducing NDA misuse.

The proposed Victorian framework would ensure that an NDA is not the default resolution term. The use of an NDA would have to be actively considered to be included, rather than removed from standard settlement terms: 'opt in' and not 'opt out'. This would restore a power imbalance where the bargaining power of a victim survivor is reduced because of their recurring experiences of trauma and in some cases, limited means. The question becomes "do I want to include an NDA?" rather than "This is why I want to remove the NDA" or "what am I prepared to forgo?".

Human Rights Law Centre case study:

Ana* experienced sexual harassment and physical assault while working for a Government department in 2010. She filed a discrimination complaint and resolved her claim by way of a deed of settlement in 2013. She came to the Human Rights Law Centre in 2024 seeking assistance to remove her confidentiality and non-disparagement terms from a deed of settlement 13 years ago. Since 2011 she has written countless times to Prime Ministers, Taskforces and Cabinet Ministers, pleading to have her NDA removed from the agreement. All have refused to assist.

On one occasion, Ana received correspondence from the department stating that the settlement, including compensation, had been based on Ana's acceptance of the deed, including confidentiality and non-disparagement clauses. The department said it had fulfilled its obligations under the deed, and said: 'We expect you to do the same by honouring the terms of the agreement you made.' The department said it would not renegotiate.

Ana's words:

> *I never wanted an NDA from the outset. I'm by nature a writer, a storyteller. For writers our words are our way of meditating, its cathartic. I had been adamant with my Solicitor of my position from the beginning. Fast forward a couple of years into negotiations with my employer and my story had been ripped apart, amended, critiqued, shamed, objectified and re-written so many times by others that I had completely lost my identity. My mental health was in such a bad way by then that I no longer would write or tell stories or even read them to my children for that matter.*
>
> *By the time I was presented with what appeared to be the END of the process, I was hit with the NDA. My solicitor simply knew I had run out of fight and out of words. I blamed myself for not fighting him to fight for the NDA removal…*
>
> *As I fought off the black dog, suicide ideations, PTSD and enveloped mental health professionals, CBT, self-care…a new narrative was born. I wanted my voice back. As my words returned to the page so did my strength, my advocacy and my emails. To Prime Ministers, Cabinet Ministers, Local Ministers as I begged for their leniency to undo 'my' error and remove my NDA. Fifteen years later and 'their' confusion remains the same, "Why is it still harming you?" and my answer remains the same, "It's not my ENDING".*

**Details have been changed to protect the identity of the victim survivor. We do the same throughout these case studies.*

Ana's story reflects an experience of many victim survivors: those worn down by the complaints process, experiencing trauma who sign an NDA. When Ana recovered enough strength to try to remove her NDA with the Government agency, she was told to 'honour the terms of the agreement you made'. Ana continues to fight for her NDA to be removed.

3.2. Legal advice: costs, safeguards and parameters

Responding to discussion questions 4 - 8 of the Consultation Paper

Advice

Redfern Legal Centre case study:

Margaret* was dismissed one day after she lodged a sexual harassment claim against a senior member of staff at her employer. Her manager said she had been underperforming and this is why she was being dismissed. The manager said that the business would give her 10 weeks' pay, representing notice, unpaid wages, accrued but untaken annual leave, in exchange for Margaret agreeing to say that she resigned and to sign a deed of release.

Her employer gave Margaret one day to make a decision, telling her that otherwise the offer would lapse. The next day, her manager sent her a deed of release for her to sign 2 hours before close of business. He told Margaret that if she signed, he would give her a positive reference for prospective future employers. He also told Margaret that the deed would 'protect' her. She was worried about getting a bad reference, and signed the deed without receiving legal advice. Margaret came to Redfern Legal Centre for advice about the deed, and she was shocked to find out that she was not allowed to take legal action against her employer for the sexual harassment or almost anything else, and was not allowed to tell anyone about the sexual harassment.

Margaret consented to having this case study used in these submissions for this enquiry, and provided this comment:

> *"I would not be surprised if the deed of release laws disproportionally affect individuals from marginalised backgrounds and those who cannot afford to see a lawyer when time is critical. A deed of release should never be weaponised to force employees into making decisions without legal consultation."*

Access to independent advisors and support people will not only ensure that an NDA is fair to all parties but will also assist with the negotiation process. This was one of the key recommendations of the Respect@Work NDA Guidelines.[9] Similarly, settlement agreements in the United Kingdom are not legally valid unless the complainant has received independent legal advice.[10] To empower victim survivors with the tools to make decisions about their settlement terms, there should be a requirement that they are offered independent legal advice at the cost of the employer.

However, the legal profession must also be equipped to provide best practice legal services. The Research demonstrated that 30% of applicant Solicitors and 50% of respondent solicitors do not provide advice that there is an option to resolve a sexual harassment settlement without an NDA.[11] This may be in breach of the Barristers and Solicitors Conduct Rules which require "clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter".[12]

If lawyers are not providing fulsome legal advice about NDAs, there is a risk that the legal profession is underperforming in its service delivery in advising clients on this issue; where an individual lawyer may effectively be making the choice for their client on settlement terms by not providing them with all of the facts

[9] AHRC, Guidelines on the Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints (19 December 2022) 9.
[10] *Employment Rights Act 1996* (UK), s 203(3)(c).
[11] R Featherstone and S Bargon, Let's talk about confidentiality: NDA use in sexual harassment settlements since the Respect@Work report, University of Sydney, Law School, 6 March 2024, p. 32.
[12] Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW) ('Solicitors' Conduct Rules') r 7.1.

and options in their matter. For example, in our Research, solicitors identified that a higher settlement associated with the NDA benefit being conferred on the employer/respondent is "underhanded" and that "they wouldn't engage in that unless I had very clear instructions to do so".[13]

Human Rights Law Centre Case study:

Stella* contacted the Human Rights Law Centre after the Let's Talk About Confidentiality Report was published (at some time in March 2024). She was in the middle of negotiations in an out-of-court sexual harassment settlement where her paid lawyer gave her a Strict NDA to put to the other side to start the negotiation. Stella was not consulted before this term was included in the agreement. Stella pushed back and asked her lawyer why they would start with such a Strict NDA and referenced the Report. The Lawyer who knew of the Report said that she was unlikely to get a good settlement without a Strict NDA. Stella had to advocate for herself to her Lawyer and explain the importance of her being able to speak about her experience and that a settlement would be conditional on this. Stella explained that a good settlement for her was one that included the ability to speak about her experiences.

The above case study from Stella and the findings from the Research demonstrate how some lawyers fail to provide adequate legal advice for clients to make informed decisions. We recommend that any requirement to receive legal advice is accompanied by confirmation that the solicitor providing services have attended training on NDA use. Our Research found that many sexual harassment practitioners had experienced challenges negotiating with inexperienced representatives on the other side, including the need to educate the other side with back-and-forth negotiations to budge from a Strict NDA.[14] Regulation of solicitors' conduct to ensure victim survivors are appropriately resourced is a critical consideration of this legislative development.

It is critical that a fact sheet also accompanies any sexual harassment settlement negotiation which informs the victim survivor on their rights. This fact sheet could be issued by the anti-discrimination body the complaint is being managed through.

Payment

In circumstances where victim survivors are required to receive independent legal advice, it is in the interests of all parties that employers pay for the legal advice. This ensures that any NDAs agreed to are legally enforceable, protecting both the employer and the victim survivor.

Safeguards

Employers paying for legal advice should, however, be subject to a number of safeguards to ensure that the advice is truly independent:

- The legal adviser must be engaged directly by the complainant;
- The legal adviser must not be employed by or acting in the matter for the respondent or the respondent's employer, or indeed any other matter which may present a conflict; and
- The complainant has complete discretion to choose their legal adviser.

The respondent/their employer would only be involved with the complainant's legal advisers to the extent necessary to facilitate payment of fees, similar to the way that a party may pay the opposition's costs in another

[13] R Featherstone and S Bargon, Let's talk about confidentiality: NDA use in sexual harassment settlements since the Respect@Work report, University of Sydney, Law School, 6 March 2024, p. 38.
[14] R Featherstone and S Bargon, Let's talk about confidentiality: NDA use in sexual harassment settlements since the Respect@Work report, University of Sydney, Law School, 6 March 2024, p. 41. Strict NDA being an NDA term without carve outs and or time limits.

dispute. The respondent is unable to influence the advice provided to the complainant in any way and solicitors must uphold their professional legal obligations to their client in these interactions.

Payment must be made to the solicitor and not by way of a reimbursement mechanism to the victim survivor.

Parameters

Negotiations are unique and dependent on a range of factors. Accordingly, it is difficult to implement definitive parameters that ought to apply generally to all NDA negotiations. While employers may wish to have some certainty around financial or temporal limits in relation to legal advice, such limits can be inherently restrictive in particularly complex or lengthy negotiations. It is for this reason that financial or temporal limits on legal advice are not appropriate in this context. However, as in other areas of legal service delivery, fixed fee solutions could be developed (as one example of an approach). Advice should relate to the entirety of the Deed and not limited to the NDA terms.

3.3. No attempts have been made to unduly pressure or influence a complainant to enter an NDA

Responding to discussion questions 9 - 10 of the Consultation Paper

The Victorian framework should include provisions which confirm the victim survivor was not subject to undue influence to enter into the NDA agreement, like that in the Irish Bill, the Prince Edward Island Act (**PEI**) NDA Act and Ontario legislation and the Bills of Nova Scotia, British Columbia, Manitoba.

An effective mechanism to protect a complainant from undue influence or pressure by an employer is to equip the victim survivor with the tools and resources to negotiate a settlement which reflects their own needs. This includes providing parties with ways to identify undue influence or pressure, as well as providing them with appropriate legal support. In order to achieve this we recommend including discrete examples of acceptable and unacceptable conduct for employers, individuals and the legal profession. Directive guidelines setting out what is and is not appropriate in using NDAs in discrimination cases, and consequences for poor conduct, have been provided by the Equality and Human Rights Commission in Great Britain[15] and the Advisory, Conciliation and Arbitration Service in the United Kingdom[16]. Similarly express guidance should be issued setting out what is required to negotiate in good faith, providing examples of bad faith negotiation, including where an employer/respondent puts forward an insubstantial offer of settlement without an NDA and a significantly larger settlement with an NDA.

Our Research also shed light on an alarming trend – the abusive use of legal claims, like defamation concerns notices to intimidate victim survivors. This is detailed at Chapter 5 of our Research and highlights the ways that pressure and influence may manifest in attempting to coerce a victim survivor to take certain action. Our Research found that in response to sexual harassment claims, respondents lodge ancillary legal claims which would qualify as undue influence and coercion to pressure victim survivors to agree to an NDA. Currently in Australia, there is nothing which prevents these sorts of retaliatory actions.[17] or Strategic Lawsuits Against Public Participation (**SLAPP**). While we welcome the proposed Victorian framework, unless there is additional guidance which helps to identify SLAPP claims as constituting undue pressure or influence these provisions may have little effect.

A lack of appropriate legal advice may also mean that victim survivors experience a perception of pressure or influence from their own lawyers. The Research showed that victim survivors encounter pressure from all sides in the negotiation to include Strict NDAs: these were considered "standard" and we know that not all victim survivors receive appropriate legal advice. An Applicant Lawyer told of the lack of 'fight' some victim survivors

[15] Equality and Human Rights Commission, The Use of Confidentiality Agreements in Discrimination Cases (Guidance Paper, October 2019) ('EHRC, Use of Confidentiality Agreements').
[16] Advisory, Conciliation, and Arbitration Service, *Guidance: Non-disclosure Agreements,* (Guide, February 2020)
[17] Noting that the victimisation provisions under sexual harassment laws has not been adequately tested R Featherstone and S Bargon, Let's talk about confidentiality: NDA use in sexual harassment settlements since the Respect@Work report, University of Sydney, Law School, 6 March 2024, pp. 56.

have in these negotiations, which indicates the susceptibility to succumb to pressure or influence. They said, "the issue I have though is a lot of my clients, they're very disadvantaged and they've only got so much fight in them sometimes, so we'll go in there asking for no non-disparagement or no confidentiality clause but really that's one of the first things that they're happy to negotiate on."

Redfern Legal Centre case study:

Anouk* worked at the same business as her husband, Peter, for 6 years. Peter was much more senior than Anouk and friends with her managers. Peter sexually harassed Anouk at work and was violent at home. Anouk told her manager about the violence, the incidents at work, and that she was trying to separate from Peter because she wanted to take leave to find new housing. Anouk also asked that she move office locations so she didn't need to work with Peter anymore. Her manager investigated the sexual harassment but made no findings against Peter. In response to Anouk making this complaint, Peter cut off Anouk's access to their shared finances. Anouk was dismissed. Her manager offered for her to sign a deed of release with a 'silence clause' in exchange for the termination being classified as a resignation. Anouk's manager only gave her 3 days to sign the deed, which she did because of her very limited access to her money and her need to move house to protect herself and her children.

Redfern Legal Centre challenged the enforceability of the deed on the basis that it was entered into subject to duress and coercion. While this was not accepted by the employer, the matter settled favourably for Anouk.

3.4. Ensuring an NDA does not adversely affect others

Responding to discussion questions 11 - 12 of the Consultation Paper

In line with other legislative bills, the Victorian framework should include provisions which provide that a permitted NDA does not adversely affect the future health or safety of a third party of the public interest. With this, guidance should be issued as to what this means and in what circumstances the public interest is considered.

With the positive duties under the *Sex Discrimination Act 1984* (Cth)[18] and *Equal Opportunity Act 2010* (Vic),[19] it is appropriate that a proposed framework requires all NDAs to include a clause that an employer engage in preventative, positive action to eliminate sexual harassment in the workplace.[20] As noted in the discussion paper, this is also consistent with the VEOHRC Guidelines which suggest that employers consider drafting NDAs in such a way that requires employers to implement measures to eliminate sexual harassment in the workplace.[21]

The positive duties require employers to actively take steps to eliminate sexual harassment in the workplace.[22] As it presently stands, a contravention of the positive duty imposed by the EOA may be investigated by the Victorian Equal Opportunity and Human Rights Commission. Under the SDA, the Australian Human Rights Commission will only use investigative and enforcement powers to support cultural change in workplaces,[23] but not to resolve individual complaints in relation to the positive duty. Accordingly, while the positive duties are a

[18] *Sex Discrimination Act 1984 (Cth)*, s 47C.
[19] *Equal Opportunity Act 2010 (Vic),* pt 3.
[20] R Featherstone and S Bargon, Let's talk about confidentiality: NDA use in sexual harassment settlements since the Respect@Work report, University of Sydney, Law School, 6 March 2024, p 22.
[21] Victorian Equal Opportunity and Human Rights Commission, Guideline: Preventing and responding to workplace sexual harassment – Complying with the Equal Opportunity Act 2010, August 2020, p 90.
[22] *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth).
[23] AHRC, 'The Positive Duty under the Sex Discrimination Act 1984 (Cth)' (Web Page) https://humanrights.gov.au/our-work/sex-discrimination/positive-duty.

positive step towards cultural redress, they do not provide individuals with an avenue to seek redress for an employer's failure to meet their obligations under the positive duty. Ensuring that employers are contractually obligated to ensure they meet their obligations under the positive duty is one way to enforce compliance and ensure cultural shifts in the workplace to eliminate sexual harassment.

3.5. Permitted disclosures: proposed models

Responding to discussion questions 23 – 25 of the Consultation Paper

Strict NDAs mean that a victim survivor cannot speak to anyone aside from permitted legal disclosures, in perpetuity.[24] Such terms are highly restrictive and potentially harmful: the Speak Out Survey conducted by UK organisation Speak Out Revolution found that 95% of people who have signed an NDA experience negative impacts on their mental health related to the NDA and the inability to speak about their experiences.[25]

We recommend that the Victorian NDA model should include a list of permitted disclosures as well as an option for any other person as agreed between the parties (should the victim survivor choose to settle with an NDA). This is important because it introduces nuance into the discussion that if an NDA is wanted by a victim survivor, its scope and application isn't automatically that of a Strict NDA, but rather a Varied NDA.[26]

The purpose of having a list of permitted disclosures would be to increase clarity and to avoid complexity over who people can or can't talk to. It also assists to change the conversation of what a Varied NDA may look like, so that the victim survivor has choice in tailoring the agreement to their needs. The legislation must be clear, especially when people are experiencing multiple intersections of stress related to the process.

Significantly, the PEI Act[27], Nova Scotia,[28] Manitoba[29] and British Columbia[30] Bills provide that the class of persons to which disclosure is permitted apply *retroactively*, meaning that complainants bound by an NDA before the PEI Act became law are now able to disclose the circumstances of past harassment to these outlined classes of individuals. We recommend that retroactive disclosure is similarly allowed in these reforms.

The Irish Bill and PEI Act provide examples of possible lists of exclusions, with their list of legal and medical professionals and relevant state regulators, which in our context would be regulators such as ASIC or SafeWork. The list of individuals and organisations we recommend are:

a. the police;
b. a lawyer for the purpose of obtaining legal advice;
c. a tax advisor for the purpose of obtaining tax advice or financial advisor for assistance with financial affairs;
d. a spouse, partner or immediate family member of the Person, provided the person to whom the disclosure is made agrees to comply with the obligation of confidentiality at [relevant clause] prior to the disclosure;
e. a treating medical professional for the purpose of obtaining medical treatment;
f. a treating mental health professional for the purpose of obtaining mental health treatment;

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[24] R Featherstone and S Bargon, Let's talk about confidentiality: NDA use in sexual harassment settlements since the Respect@Work report, University of Sydney, Law School, 6 March 2024, p. 28.
[25] Let's talk about confidentiality final_0.pdf (rlc.org.au) p 20; Olivia Leahy, 'The Channel 4 News Women are just the Tip of the Iceberg - Have Women of Colour been Disproportionately Silenced via NDAs for Years?' Speak Out Revolution (Web Article).
[2626] Strict NDAs are defined in our Research as confidentiality and non-disparagement obligations that are not time capped and allows for only disclosures at law. Varied NDAs relate to time capped confidentiality terms, confidentiality around terms only but free to speak to incident and confidentiality which didn't prevent disclosures to medical practitioners etc. R Featherstone and S Bargon, Let's talk about confidentiality: NDA use in sexual harassment settlements since the Respect@Work report, University of Sydney, Law School, 6 March 2024, p. 28.
[27] Non-Disclosure Agreements Act, RSPEI 1988, c N-3.02
[28] Bill M 144, Non-Disclosure Agreements Act, 1st session, 64th General Assembly, 2022, Nova Scotia, 2022
[29] Bill M 225, Non-Disclosure Agreements Act, 4th session, 42nd Legislature, 2022, Manitoba; Bill M 215, Non-Disclosure Agreements Act, 5th session, 42nd Legislature, 2023, Manitoba.
[30] Bill M 215, Non-Disclosure Agreements Act, 4th session, 42nd Parliament, 2023, British Columbia ('Bill M 215')

g. the Australian Human Rights Commission or State or Territory discrimination body;
h. a workers' compensation authority;
i. a workers' compensation insurer;
j. an authorised representative of a registered employee association or trade union, provided the representative agrees to comply with the obligation of confidentiality at clause [insert reference to clause in the form of clause 1.1 above] prior to the disclosure;
k. Victim services state compensation schemes; and/or
l. Whistleblowing and work healthy and safety regulators;
m. [list of names of individuals and support persons as agreed]

While some of the above are permitted disclosures at law, we know misrepresentations are made to restrict who a victim survivor can and cannot speak to. In our Research, we heard from an Applicant Lawyer who spoke about the challenges in including carve-outs for disclosures of crimes, despite it being a criminal offence to prevent the reporting of a serious, indictable offences.[31]

Having poorly identified carve outs and NDA exemptions can act as a deterrent for victim survivors in accessing support or reporting sexual harassment.

Human Rights Law Centre Case Study

Kylie* came to the Human Rights Law Centre advising she had signed an NDA relating to a workplace sexual harassment and sexual assault incident several years before. Kylie instructed that she signed a document in the investigation process when making her internal complaint which said that she would keep the disclosure and investigation "confidential". This meant Kylie did not make a report to the AHRC or discuss her concern with others, despite being permitted at law. This is an example of how confidentiality obligations act in practice and the effect an agreement or perceived obligation can have on a person's actions.

> Kylie's testimony: *I've always considered myself a resilient woman, through my eyes, there was nothing I couldn't just move on from, that is until I was r*ped on a business trip by a senior executive team member… a man that I viewed as a mentor and someone I trusted.*
>
> *The aftermath of what happened actually sealed in my trauma, not only was I traumatised by my r*pe but also traumatised by the actions of my employer. I hoped that they would do the right thing and protect me (especially considering they were predominantly women). As they advised me of the outcome of the investigation, it was followed with an explanation of the need to protect the shareholders. It made me feel alone and afraid.*
>
> *The icing on the cake was the wording of the findings letter "you can't discuss this matter"…*
>
> *I will never be me again, I now live in this constant fight/flight state… always on edge and never really trusting and terrified of any employment structure…*

Ultimately, having a list of permitted disclosures and the inclusion of agreed parties on the list, would assist victim survivors better understand who they can speak to and to provide greater detail to the respondent party. This would be a significant step towards creating trauma-informed legislation which is aimed at assisting victim survivors across a broad set of experiences and cultural backgrounds.

3.6. Prescribed form

Responding to discussion question 27 of the Consultation Paper

[31] R Featherstone and S Bargon, Let's talk about confidentiality: NDA use in sexual harassment settlements since the Respect@Work report, University of Sydney, Law School, 6 March 2024, p. 35.

Our Research participants clearly identified contractual drafting ability and experience as a practical barrier to negotiate from a Strict to a Varied NDA.[32] The profession's reliance on templates was articulated as an ongoing hurdle to tailoring clauses which reflect the needs and agreement between the parties.

As part of our Research, we drafted publicly available confidentiality clauses, to remove this obstacle in NDA negotiations.[33] While we support NDA clause guidance or a form which allows for flexibility at the victim survivor's request, we do not support a legislated form of NDA for use in discrimination matters.

In 2019, there was wide consultation in the United Kingdom about the recommendation by the Women and Equalities Committee that standard, plain English NDAs should be legislated for use in settlement agreements for discrimination matters, setting out the meaning, effect and limits of confidentiality clauses.[34] Consultation respondents provided feedback that a specific set of words for drafting an NDA would provide clarity and reduce room for abuse. Campaign organisations also advocated for the benefits of specific wording, as it would reduce any legal ambiguity. Employment lawyers commented that the use of standard settlement agreements and clauses "tweaked to fit the individual circumstances" would "reduce legal fees massively" by reducing the amount of time needed to go through agreements.[35]

In the UK, consultation respondents raised concerns that legislating specific wording for NDAs would require frequent updates and could be constricting, considering the different types of settlement agreements.[36] It was suggested by legal professionals and employers that guidance rather than legislation would provide the correct level of flexibility for drafting professionals.[37]

Acknowledging these concerns about standard wording, the UK government committed instead to legislate the following drafting requirements:

- be clear and specific about what information cannot be shared and with whom;
- contain agreements about acceptable forms of wording that the signatory can use, for example in job interviews or to respond to queries by colleagues, family and friends;
- contain clear, plain English explanations of the effect of clauses and their limits, for example in relation to whistleblowing.[38]

We support providing drafting guidance with these drafting requirements that will allow for developments in accepted legal practice. This guidance should be easily amended and updated to reflect community standards.

3.7. Duty to report on NDA use: actions and redress

Responding to discussion questions 28 - 30 of the Consultation Paper

Most sexual harassment complaints settle out of court, and as such there is much we do not know about sexual harassment. There is no complete record which reflects the prevalence or substance of sexual harassment issues and employer responses.[39] Additionally, parties may not be able to contribute crucial data to research regarding

[32] R Featherstone and S Bargon, Let's talk about confidentiality: NDA use in sexual harassment settlements since the Respect@Work report, University of Sydney, Law School, 6 March 2024, p. 41.
[33] Available at https://rlc.org.au/letstalkaboutconfidentiality
[34] Department for Business, Energy and Industrial Strategy, Confidentiality Clauses: Response to the Government Consultation on Proposals to Prevent Misuse in Situations of Workplace Harassment or Discrimination (Report, July 2019)('DBEIS, Confidentiality Clauses') 11; House of Commons Women and Equalities Committee, The Use of Non Disclosure Agreements in Discrimination Cases (House of Commons Paper No 1720, Ninth Report of Session 2017–19, 5 June 2019) 37.
[35] Ibid.; House of Commons Women and Equality Committee, 'Oral Evidence: the Use of Non-Disclosure Agreements in Discrimination Cases, HC 1720' House of Commons (Web Page, 19 December 2018) Q48 .
[36] DBEIS, Confidentiality Clauses (n 286) 11;
[37] Ibid
[38] Ibid
[39] R Featherstone and S Bargon, Let's talk about confidentiality: NDA use in sexual harassment settlements since the Respect@Work report, University of Sydney, Law School, 6 March 2024, p. 18.

this topic, if they are prohibited by NDAs.[40] During the Respect@ Work national workplace sexual harassment inquiry consultations, public servants subject to NDAs who wished to give evidence were required to take the extra step of applying for a waiver of that agreement in order to give evidence.[41]

We would support a duty to report on NDA use. A model similar to the WGEA reporting program should be adapted for use of NDAs in workplace sexual harassment. Reporting should include details that will help measure NDA legislation effectiveness, progress and enforcement. Workplaces have WH&S obligations to their staff and this is simply a reporting function of this.

Ultimately, reporting on NDAs would increase visibility and transparency in companies and organisations in Australia on a gender violence issue. Similarly to wage gap data, it would help to empower consumers, shareholders and potential employees with information to make decisions on organisations they wish to associate with. Greater public scrutiny on NDA use and practice, in circumstances where there is currently no data, can only be a good thing.

Reporting should reflect how many complaints were received and how many were resolved with NDAs. We also recommend the collection of the types of harassment incidents and company investigation outcomes.

The consequences for failure to report should be similar to those in the WGEA. Under s 19D of the WGEA, failure to comply with the WGEA requirements can result in:[42]

- Being named publicly in a report to the Minister that is tabled in Parliament.
- Being named publicly as non-compliant by electronic or other means (for example, on the Agency's website). Not every employer who has failed to comply is named; When determining whether to exercise the discretion to name an employer, WGEA considers a range of factors including:[43]
    - if the employer has made a reasonable attempt to comply,
    - if the employer is a first-time reporter,
    - the size of the employer,
    - prior history of compliance, and
    - any written representations from the employer.
- Being ineligible to tender for some Government contracts, Commonwealth grants or other financial assistance.

Reporting on NDAs will assist to reduce the misuse of NDAs and prevent sexual harassment in the workplace because employers would be held accountable for the number of complaints they have received and how they resolved them. A high number of NDAs would not reflect positively on the employer and therefore the pressure of transparency would help reduce the misuse of NDAs and to prevent sexual harassment in the workplace. Public scrutiny can be a driver of cultural change.

3.8. Non-disparagement clauses

Responding to discussion question 33 of the Consultation Paper

It is critical that any proposed Victorian legislative NDA restriction should extend to non-disparagement clauses. This is because non-disparagement clauses can secure confidentiality by way of capturing any future disparaging comments, which will include allegations of sexual harassment. This is why we defined NDAs in our Research with:

> *Both applicants and respondents often seek 'standard terms' including 'confidentiality' and 'mutual non disparagement' in agreements, effectively providing a woven fabric of clauses to form an*

[40] Employers named as non-compliant under the Workplace Gender Equality Act for 2022-2023 Gender Equality Reporting | WGEA
[41] Sally Whyte, 'Public Servants must Clear Extra Hurdle to Speak to Sex Harassment Inquiry' The Sydney Morning Herald (Web Article, 25 January 2019).
[42] Workplace Gender Equality Act reporting requirements for employers | HRD Australia (hcamag.com)
[43] Employers named as non-compliant under the Workplace Gender Equality Act for 2022-2023 Gender Equality Reporting | WGEA

> *Australian equivalent of the more internationally used term 'NDA'. This report adopts the widely used term 'NDA', which is in use in the USA, Ireland, UK and Canada. The term NDA is also used in the Respect@Work Report. Non-disparagement clauses Confidentiality Non-disparagement protections prohibit victim survivors from saying negative things about the respondent in the future, which can include speaking about allegations of sexual harassment.*[44]

Our definition is supported by the AHRC's data in providing that in 2022/23, 68 of the 87 that resolved with financial compensation were "likely to have included a non-disparagement clause as a component of the agreements".

Non-disparagement and confidentiality terms are important to consider before agreeing to them. Agreeing to these terms relates to an individual's agreement to not engage in disparaging statements or breaching confidential information. A breach of these terms cannot be defended with a truth defence (like in defamation). This is furthered in the findings of Hammerschlag CJ in *Network Ten Pty Limited v van Onselen* [2023] NSWSC 829 when considering breach of a non disparagement term at [74]:

> *This is not a defamation case. It is a claim for breach of contract. There is no defence of fair comment. This is a case about the right to free speech, but only to the extent that, by the Deed, Dr van Onselen bargained that right away. The question is whether Dr van Onselen breached the contract he made with Ten.*

As above, if the Victorian framework intends to have any effect, it must capture the use of non-disparagement terms which cause to limit the disclosures of sexual harassment by virtue of sexual harassment disclosures containing disparaging comments (regardless of whether are true). The proposed NDA framework must include non-disparagement if it wishes to have any effect on the misuse of NDAs. This would follow the Irish Bill, the PEI NDA Act and the Nova Scotia and British Columbia Bills.

3.9. Compliance and enforcement

Responding to discussion questions 36 - 40 of the Consultation Paper

What we have learned from our Research is that the NDA Guidelines have been ineffective in changing NDA practice in the legal profession, with the default resolution being Strict NDAs. Their ineffectiveness could be for a number of reasons:

1. people may not be aware they exist, for example we know that 25% of practitioners had not read them. More time may be needed for sufficient uptake and use;[45]
2. Their ineffectiveness could also be that Strict NDAs are so culturally embedded as a resolution tactic that changing cultural practices with guidance is not sufficient; or
3. The NDA Guidelines themselves are drafted in a non-directive way and do not provide examples of inappropriate negotiation conduct. If the NDA Guidelines are breached, this is not legally actionable. There is no direct relationship between these guidelines and breach of the solicitors and barristers conduct rules and possible professional sanction.

We support a standalone piece of NDA legislation which contains some of the recommendations in these submissions, as well as remedies for breaches of the legislation. This legislation could cover sexual harassment claims brought under the *Sex Discrimination Act 1984* (Cth), *Fair Work Act 2009* (Cth) and the *Equal Opportunity Act 2010* (Vic) in the state of Victoria.

Deterrent measures are needed: if an NDA is entered into that does not meet the specified criteria, it should be void. We support measures provided in the PEI NDA Act and the Nova Scotia, Manitoba and British Columbia Bills to fine non-compliant parties.

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[44] R Featherstone and S Bargon, Let's talk about confidentiality: NDA use in sexual harassment settlements since the Respect@Work report, University of Sydney, Law School, 6 March 2024, p. 6.
[45] Featherstone and Bargon page 28.

Legislative change is not a stand-alone solution. Enforcement mechanisms must be accessible and readily available should breaches to the legislation occur. While not the purpose of these submissions, we draw a parallel with the Protecting Vulnerable Workers Amendments in 2017 to the *Fair Work Act 2009* (Cth) which added a series of protections for migrant workers and to ensure they are paid fairly at work. These amendments included implementing increased penalties for serious contraventions and reverse onus of proof for record keeping obligations. However, what we know is that migrant workers continue to be underpaid at work and struggle to enforce their rights with 9 out of 10 migrant workers being underpaid at work.[46] What we also know is that despite its promises of a process accessible to self-represented applicants, the small claims procedure of the Federal Family Circuit Court of Australia continues to be inaccessible to migrant workers wishing to secure their underpaid entitlements.[47]

The appropriate jurisdiction for any breaches of the proposed Victorian NDA legislation would likely rest in the Supreme Court of Victoria. This jurisdiction is an inaccessible jurisdiction to many victim survivors to seek remedies for breach. We submit that great consideration must be provided to accessibility of enforcement mechanisms to achieve the compliance and regulatory purpose the framework is aiming for.

3.10. Wider context – secrecy provisions in Victorian legislation

While the focus of the present consultation is on regulating contractual NDA provisions, the secrecy caused by such provisions – and the well-recognised negative impact of that secrecy – is also an issue in Victorian legislation. Secrecy provisions in the *Public Interest Disclosures Act 2012* (Vic), *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), and sector-specific legislation such as the *Victoria Police Act 2013* (Vic), for example, have the effect of preventing women who have been sexually harassed in their Victorian public sector workplace from speaking up about their experiences. The impact of these provisions is acute – while contravention of an NDA may lead to civil litigation, and damages, breaching statutory secrecy provisions can lead to imprisonment.

The Human Rights Law Centre's Whistleblower Project has acted for several clients impacted by these intersecting and overlapping statutory secrecy provisions. There is presently no mechanism for them to be waived, or expire after a certain period, meaning the secrecy persists indefinitely. Accordingly, it is imperative that the Victorian government reform these regimes at the same time as proceeding with its wider regulation of NDAs. It would be problematic for the government to act in this context, through regulation of the private sector, without getting its own house in order: the continued existence of what are, in effect, statutory NDAs.

4. Conclusion

We support a trauma informed, victim survivor centric Victorian framework which restricts NDAs in workplace sexual harassment cases. In line with broader definitions of the workplace in sexual harassment law, we submit that all persons associated with a workplace, including contractor or volunteer are covered by proposed framework.[48] Further, we support the Victorian framework being extended to all areas of sexual harassment in public life, as well as all discrimination complaints.

Australia's anti-discrimination laws operate in silos which do not recognise the multiple intersection of lived experience of victim survivors. The current anti-discrimination framework allows for harassment and discrimination complaints as they relate to *a* characteristic of a person's experience, rather than the intersectionality of experiences. Yet we know that women of colour and women with disabilities experience higher rates of sexual harassment than the general population.[49] We also know that workplace sexual

[46] Catherine Hemingway, Fiona Yeh, Laurie Berg and Bassina Farbenblum, All Work, No Pay: Improving The Legal System So Migrants Can Get The Wages They Are Owed (Migrant Justice Institute, 2024).
[47] Ibid
[48] Question 34.
[49] https://humanrights.gov.au/sites/default/files/2020-09/sub_157_-_womens_legal_service_nsw_2.pdf p 32

harassment is consistently experienced alongside exploitative work conditions and/or racial discrimination.[50] Our laws do not reflect the lived experience of the people who experience sexual harassment and discrimination. Having to select one characteristic over another as the cause of discriminatory or harassing conduct, can act as a further barrier to pursuing a legal claim.[51] Due to the fragmentation of complaint mechanisms, women and their advisors (lawyers and other supporters) make decisions based on specific aspects of workplace abuse but are unable to address their intersection entirely.[52] Broadening the Victorian framework's application to all discrimination complaints would provide a more intersectional and victim survivor focused approach by recognising the lived experience of victim survivors. It would resolve issues where a victim survivor may have a complaint which relates to multiple grounds of discrimination where the Victorian framework may apply to one facet of the complaint but not another.

We are in support of proposals which empower victim survivors to make decisions about their circumstances and how they resolve legal claims. We support a cooling off period which allows for the victim survivor to think deeply about their agreement and obtain psycho-social supports in any proposed framework.[53] In addition to the use of NDA agreements between victim survivors and employer respondents, agreements NDA use should be regulated between victim survivors and individual harassers as some victim survivors may choose to only list an individual respondent (alleged harasser) in their claim.[54]

We support a holistic Victorian framework - the introduction of legislation is only one part of the solution. Any reform must include education initiatives to empower victim survivors and the legal profession. Compliance and enforcement mechanisms of contraventions of the law must be accessible to have effect.

While we support the introduction of legislation in Victoria, we also support greater education and further research on NDA use across Australia. While these submissions relate to a Victorian framework, an opportunity exists in other Australian jurisdictions for solicitors to empower clients with the agency to determine how their sexual harassment matters resolve. The NDA Guidelines may have unrealised potential and we recommend greater engagement with this issue from all state and territory anti-discrimination bodies as well as the AHRC.

We are available to give evidence to the Victorian Government on any part of these submissions or our Research.

[50] https://anrows-2019.s3.ap-southeast-2.amazonaws.com/wp-content/uploads/2024/08/19203606/ANROWS_Segrave_Migrant_Refugee_Sexual_Harassment_REPORT_2024.pdf P 11
[51] https://humanrights.gov.au/sites/default/files/2020-09/sub_157_-_womens_legal_service_nsw_2.pdf p 32
[52] https://anrows-2019.s3.ap-southeast-2.amazonaws.com/wp-content/uploads/2024/08/19203606/ANROWS_Segrave_Migrant_Refugee_Sexual_Harassment_REPORT_2024.pdf p 101.
[53] Question 22.
[54] Question 31/32.