

**Submission to Industrial Relations Victoria
Inquiry on Restricting Non-Disclosure
Agreements (NDAs) in Workplace Sexual
Harassment Cases**

By

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Restricting Non-Disclosure Agreements (NDAs) in workplace sexual harassment cases

1. We are pleased to make this submission to the consultation process for the above matter. The Centre for Future Work is a labour policy research centre located at the Australia Institute, an independent research and policy think tank. We conduct and publish research into a range of labour market, employment, and related issues. Our research has included a strong focus on gender and work including sexual harassment and other forms of gender-based violence and harassment at work. Dr Heap, a co-author of this submission, has recently published her doctoral thesis *Preventing Gender-based Violence and Harassment at Work: A Study of the Potential of New Regulatory Approaches*. That thesis explores the broader regulatory context within which legislative and policy changes in relation to Non-Disclosure Agreements (NDAs) could be considered.

2. The focus of this submission is on the issues of transparency associated with NDAs and the impact of these agreements on public interest concerns regarding the prevention of sexual harassment and other forms of gender-based violence and harassment at work. We believe that greater transparency regarding the practices associated with settling sexual harassment claims will lead to greater accountability. This accountability should be supported by legislative reforms that mandate minimum conditions such as those set out in this submission.

3. In this submission we use the term Non-Disclosure Agreements (NDAs) to include confidentiality clauses or agreements on confidentiality, and non-disparagement agreements and clauses. We also extend the concerns expressed in this submission to methods, procedures and practices adopted by regulatory bodies such as human rights and equal opportunity regulators who adopt confidentiality provisions associated with the issue, noting that confidentiality has become ingrained in equality law practices and processes in Australia.¹

4. It is generally reported that NDAs can benefit victim-survivors by providing anonymity and privacy where that is the victim-survivor's choice. However, it is also reported that power imbalances between victim-survivors on the one hand and perpetrators and employers/organisation on the other have left workers feeling they had little choice but to sign NDAs. NDAs have had the impact of silencing victim-survivors, disguising the actions of perpetrators and covering up the prevalence of

¹ Dominique Allen and Alysia Blackham, 'Under wraps: Secrecy, confidentiality and the enforcement of equality law in Australia and the United Kingdom', *Melbourne University Law Review*, 43(2):384-422, 2019.

sexual harassment and other forms of gender-based violence and harassment within organisations.² At times, this has enabled harassers to remain in the same workplace or move within industries and continue to engage in sexual harassment.

5. We note that claims that the use of NDAs facilitate less litigation and higher settlements for victims-survivors are largely anecdotal and not backed by research. The continued absence of information about settlements due to NDAs makes it very likely that, overall, settlements are lower than would otherwise be the case, even if individual victims think that they have obtained a better payout by signing an NDA. This is a similar logic to that applying, for gender equity reasons, to the federal government's ban on pay secrecy clauses.

6. Our recommendations focus on the public interest aspects of the issue. In our view, the emphasis in legislation and policy regarding NDAs must be on maximising the prevention of sexual harassment and other forms of gender-based violence and harassment at work including sex-based harassment. Hence our recommendations highlight the importance of transparency, as a key mechanism for achieving prevention.

7. Our view is that any approach to addressing NDAs, should treat sexual harassment and other forms of gender-based violence and harassment as systemic issues rather than matters of concern to individuals. Our recommendations therefore prioritise addressing the culture, systems, behaviours, practices and processes of organisations, as these in turn facilitate or hamper the perpetration of sexual harassment.

8. We are concerned that the reforms considered in the discussion paper still treat the NDA process as exclusively about the direct parties (the perpetrator, the victim-survivor and the organisation) and do not deal with the wider group of people who are affected by NDAs. That is, the reforms address inequities in the private aspects but do not adequately address the public interest considerations associated with NDAs. This is because they do not pay adequate attention to the fact that repeated instances of sexual harassment can be facilitated by the existence of NDAs.

9. We support an approach that will limit the circumstances in which NDAs can be used and that will also put strict controls on their use.

Impact of NDAs

10. Non-disclosure agreements (NDAs) have several effects:

- a) they enable victims of sexual harassment and the organisations who are making the payout to reach a financial settlement. We are unaware of any empirical evidence on whether this leads to higher or lower settlements than would otherwise occur;
- b) they protect the reputation of the organisation;
- c) they protect the reputation of the perpetrator;
- d) they enable the victim-survivor to maintain anonymity if they wish and may assist them in 'getting on with their lives';
- e) they stop the flow of information about sexual harassment cases, including the value of settlements. This information would (i) otherwise inform subsequent settlements of further cases of sexual harassment, especially for other victim-survivors in the organisation directly

² AHRC, *Respect@Work: Sexual Harassment National Inquiry Report*, Australian Human Rights Commission, 2020

concerned, but also for victim-survivors in any organisation; and (ii) enable potential victim-survivors to beware of working for or with particular persons or organisations;

- f) by hiding the identity of the organisation and the perpetrator, they may increase the likelihood of repeat occurrences of harassment.

Reform proposals

11. In our view the appropriate legislative/policy response should be one that enables the victim-survivors to have a good chance of getting closure and compensation through:

- (i) placing the victim-survivors in the driving seat about when and if NDAs are used;
- (ii) limiting the use of NDAs by creating a presumption that they are not necessary;
- (iii) prohibiting NDAs that require strict confidentiality, thus only allowing confidentiality on specific matters and retaining the right for broader disclosure by victim-survivors; and
- (iv) limiting the extent to which NDAs can restrict victim-survivors from discussing their experience with others who can provide support and assistance including friends, family colleagues (including union delegates/officials and health and safety representatives), lawyers, medical or psychiatric professionals.

12. To promote transparency, all NDAs regarding sexual or other forms of gender-based violence and harassment, including sex-based harassment, should be lodged with a registry held by a central agency. In Victoria, in the first instance, this agency should be the Victorian Equal Opportunity and Human Rights Commission (VHREOC), but ultimately, if federal co-operation on a national approach can be achieved, it would become the Australian Human Rights Commission. Hence the agency is referred to below as the “Human Rights Commission”.

13. Legislation should provide a prescribed format for NDAs.

14. To be valid, an NDA should be registered and should follow the prescribed format. An NDA should have no effect if it is not lodged and not in the prescribed format. The prescribed format should include the name of the perpetrator and the name of the employer/organisation. A receipt must be sent to both the organisation and the victim-survivor when an NDA has been lodged. Hence the NDA can have no effect if there is no receipt.

15. If an NDA does not follow the prescribed format, any deviation should be investigated by the Human Rights Commission, leading to either its being amended to meet requirements, or deemed invalid.

16. Organisations should have to report on their use of NDAs on annual basis. This reporting should include the number of NDAs it has finalised in a specific period. This number might be defined as a function of organisational size (since arithmetically a larger organisation would be more likely to have multiple, unrelated harassment incidents, but it would also have greater resources to create a culture that prevents harassment behaviours).

17. If an organisation appears a specified number of times within a specified period on the central registry, an investigation into the procedure, practices, systems and processes of the organisation should be undertaken. The organisation should either be prosecuted under WHS law or subject to civil penalties where they continue to fail to provide an environment free from sexual harassment and other forms of gender-based violence and harassment.

18. The Human Rights Commission should disclose (e.g. publish by gazettal or on its website) the names of any organisations and perpetrators who have repeatedly (a specified number of times) entered into NDAs.

19. The Human Rights Commission should be required, if its registry receives a second or subsequent NDA regarding the same individual (as perpetrator) or organisation, to inform the relevant victim-survivors (including on the first NDA) that multiple NDAs have been received for that person and/or organisation. In such situations, the victim-survivor of any NDA (including the first NDA) could apply to a court to have some or all obligations of compliance in that NDA annulled. Representative actions could also be brought on behalf-of multiple victim survivors in these circumstances. Unions should have standing to bring these representative actions. The victim's name could not be disclosed unless that was sought in the application and the rest of the application was granted.

20. The Human Rights Commission must keep the NDAs and data associated with them secure and protected. However, it can and should issue statistics and regular reports about the incidence of NDAs, including the industries, occupations, localities, and genders affected. A confidential dataset should also be released to approved parties, on a regular basis, to enable external researchers to undertake further research into harassment and/or NDAs.

Conclusions

20. The reforms suggested in this submission would enable payouts for 'isolated' (for want of a better word) acts of harassment to retain a reasonable monetary value. Importantly, though, this policy would also create a substantial incentive for perpetrators to not repeat, and, even more importantly, a substantial incentive for employers/organisations to address and put in place systems, processes, and practices to prevent sexual harassment and other forms of gender-based violence at work.

21. The requirement for a prescribed form of NDA would make the publication of statistics and the development of a database much easier. It would address the constraint in this area, recognised by Dominique Allen and Alysia Blackham, that it is otherwise 'time-consuming for statutory agencies to prepare de-identified data for public release'.³ As the resources of any regulatory agency are limited, it is important that external parties — individual scholars and interest groups — be able to undertake research into sexual harassment and/or NDAs.

22. An initial model for an NDA, from which the standard could be built, appears as an appendix to the *Let's Talk About Confidentiality* report by Regina Featherstone and Sharmilla Bargon, published by the University of Sydney Law School.⁴

23. We are concerned that proposals for reforms that simply outlaw NDAs unless they are victim-initiated will have limited positive impact if the reality of the power imbalances at work are not also addressed in these proposals. Hence our approach emphasises greater transparency to promote accountability and to reflect the public interest in exposing where sexual harassment and other forms of gender-based violence and harassment are occurring.

24. We also believe that there is a need for greater responsibility to be placed on those who are advising victim-survivors of sexual harassment and other forms of gender-based violence and harassment, particularly legal professionals. We support the initiative of the Victorian Legal Services Board to raise awareness within the profession about the appropriate use of NDAs and the

³ Dominique Allen and Alysia Blackham, 'Under wraps: Secrecy, confidentiality and the enforcement of equality law in Australia and the United Kingdom', *Melbourne University Law Review*, 43(2):384-422, 2019.

⁴ Regina Featherstone and Sharmilla Bargon, *Let's talk about confidentiality: NDA use in sexual harassment settlements since the Respect@ Work Report*, Sydney: University of Sydney Law School, March 2024.

obligations of legal professionals to the courts.⁵ The responsibilities of legal professionals should be reviewed in light of the reform proposals set out in this submission. Initiatives to educate these professionals on their responsibilities should be funded by the Victorian Government and supported by the profession. Initiatives to fund unions and civil society groups to provide education and awareness raising about these reforms should also be considered.

25. We thank the Victorian Government for the opportunity to participate in this consultation.

Yours sincerely

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⁵ Victorian Legal Services Board, Advice for lawyers: Using confidentiality clauses to resolve workplace sexual harassment complaints, <https://lsbc.vic.gov.au/lawyers/practising-law/sexual-harassment/advice-lawyers-using-confidentiality-clauses-resolve>.