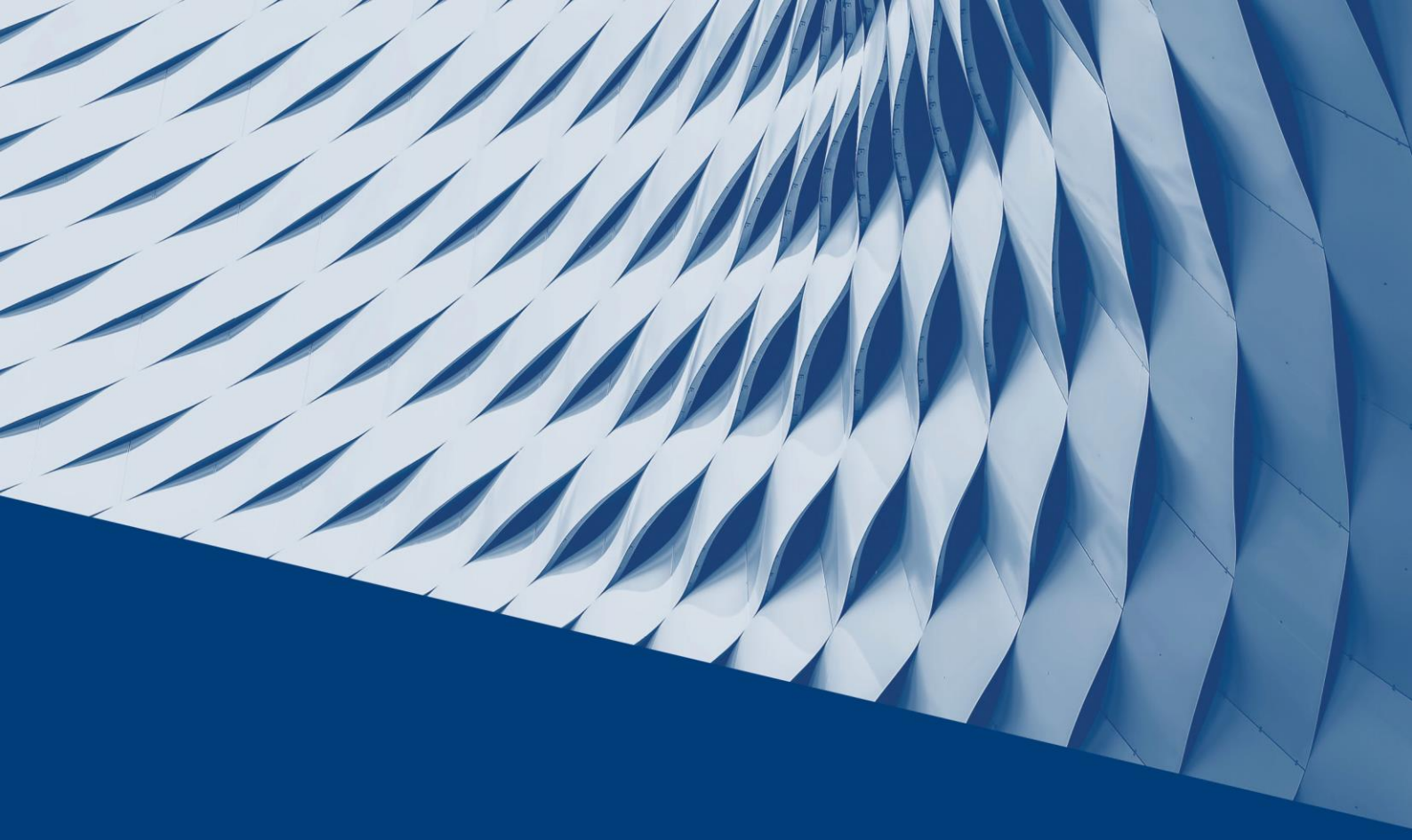

Consultation into Restricting NDAs in Sexual Harassment Cases

ACTU Submission to Victorian Government Consultation into Restricting the Use of Non-disclosure Agreements in Workplace Sexual Harassment Cases

ACTU Submission, 13 September 2024
ACTU D. No 67/2024

ACTU
australian council of trade unions

Contents

Introduction

About the ACTU

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. It has played the leading role in advocating for, and winning the improvement of working conditions, including on almost every Commonwealth legislative measure concerning employment conditions and trade union regulation. The ACTU has also appeared regularly before the Fair Work Commission and its statutory predecessors, in numerous high-profile test cases, as well as annual national minimum and award wage reviews.

The ACTU is Australia's sole peak body of trade unions, consisting of affiliated unions and State and regional trades and labour councils. There are currently 36 ACTU affiliates who together have over 1.7 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

Reflecting the diversity of the Australian workforce, the union movement includes people from all backgrounds and walks of life, including young people, members of the LGBTIQ+ community, First Nations workers, people with disability, and workers from religiously, culturally and linguistically diverse backgrounds. Over 50% of Australian union members are women. Australian unions have a long and proud history of fighting for workplaces free from racism, sexism and all forms of discrimination and prejudice, and standing up for justice, safety, respect and equality for all workers.

The Australian union movement has a significant interest in the effectiveness of Australia's anti-discrimination and human rights framework. Since the commencement of anti-discrimination laws, the majority of complaints have related to employment.[1] This is because work is absolutely central to human dignity and our ability to live a decent life. The significant power imbalance between employers and workers means that workers are particularly vulnerable to exploitation, discrimination and other human rights abuses. In particular, the Australian union movement made a significant contribution to the National Inquiry into Sexual Harassment in Australian Workplaces and has advocated for the implementation of all 55 recommendations of the Respect@Work Report since it was published in 2020.

[1] Australian Human Rights Commission 2022-23 Complaint statistics) show that in 2022-23, employment made up 34% of complaints under the *Disability Discrimination Act*; 78% of complaints under the *Sex Discrimination Act*; 36% of complaints under the *Racial Discrimination Act* and 62.5% of complaints under the *Age Discrimination Act*.

Background

The ACTU welcomes the opportunity to make a submission to this consultation about restricting the use of non-disclosure agreements (NDAs) in sexual harassment matters.

The misuse of NDAs (including as a tool to conceal sexual harassment, silence victims, protect perpetrators and organisations and avoid liability) is internationally recognised as a problem.[2] The #MeToo movement put this issue into the spotlight in 2017, and since then a significant shift in the understanding and regulation of NDAs has been taking place in many parts of the world. This has included legislative and other regulatory reform in multiple jurisdictions, informed by recent research and data about the harmful impacts of NDAs on victim-survivors, workplace cultures, and the ability of employers and institutions to prevent and respond to sexual harassment and discrimination.

The ACTU and its affiliates call for an end to the misuse of NDAs in workplace sexual harassment and discrimination cases. The ACTU strongly supports the campaign 'End the Silence' run by our affiliate, Victorian Trades Hall Council (**VTHC**) to end the misuse of NDAs. We acknowledge the significant amount of work done by VTHC, including conducting the only known survey of Australian workers with direct experience with NDAs in the workplace (**VTHC Survey**), which has received 243 submissions since March 2023. VTHC has also worked directly with victim-survivors to support them to share their experiences as part of this consultation. VTHC's submission to this consultation and its proposed legislative model are informed by its engagement with and the testimonies of victim-survivors, which have highlighted the short and long term impacts of being silenced.

Summary of ACTU Recommendations

The ACTU endorses the submission of the VTHC to this consultation and their proposed legislative model. We support adopting all 25 recommendations in the VTHC submission, and place particular emphasis on the following VTHC recommendations:

[2] 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, at page 2 https://rlc.org.au/sites/default/files/2024-04/Let%27s%20talk%20about%20confidentiality_24%20April%202024.pdf.

Recommendation 1: The Victorian government should legislate to restrict and reduce the use of NDAs in sexual harassment and discrimination matters.

Recommendation 2: The Victorian government should adopt the legislative model put forward by VTHC, which prohibits the use of NDAs unless initiated by and the expressed wish and preference of the victim survivor; and allows them to waive their own confidentiality in the future by giving 7 days' notice, while the employer's confidentiality obligations remain intact.

Recommendation 3: Legislation must make entering into a non-compliant NDA unlawful and provide that any breaches will attract civil penalties.

Recommendation 4: An NDA that was not initiated by and the expressed wish and preference of the victim-survivor (or does not meet other enforceability criteria) will be null and void and severable from the remainder of the agreement. The employer's (and perpetrators') requirement to confidentiality should be maintained.

Recommendation 5: Legislation must allow one-sided confidentiality agreements that binds an employer but leaves the victim-survivor free to talk about their experiences. A victim-survivor must have the right to initiate and enforce a one-sided confidentiality provision.

Recommendation 6: An NDA initiated by, and the expressed wish and preference of, the victim-survivor will only be enforceable if the victim-survivor had the opportunity to seek independent legal advice about the terms of the NDA.

Recommendation 7: An NDA initiated by, and the expressed wish and preference of the victim-survivor will not be enforceable if pressure or influence was placed on them to enter the NDA.

Recommendation 8: Legislation should clarify that a compliant NDA should not adversely impact the health and safety of any third parties. To meet this requirement, the legislation should require an option for the victim-survivor to waive their NDA and allow for permitted disclosures to be made.

Recommendation 9: Individual workers and unions should have standing to initiate individual or joint proceedings for a breach of the employer's positive duty to prevent sexual harassment.

Recommendation 10: The government should consider legislating to require employers to report on their use of NDAs in sexual harassment and discrimination matters. This could include models similar to WGEA or the Gender Equality Act. The government should require mandatory reporting of NDA use to Worksafe Victoria.

Recommendation 11: Victim-survivors, unions and government agencies such as Wage Inspectorate Victoria and/or VEOHRC must have standing to prosecute breaches of the legislation. Such organisations should be properly resourced to ensure compliance.

Sexual Harassment

Discrimination and sexual harassment are still widespread and pervasive in Australia. One in five Australians have experienced workplace sexual harassment over the last 12 months, with one in three reporting workplace sexual harassment over the last five years.[3] 77% of Australians aged 15 and over have been sexually harassed at some point in their lifetime.[4] Yet only 18% of people who experience sexual harassment at work made a formal report or complaint,[5] a woefully low reporting rate reflecting the many barriers victim-survivors face in bringing complaints, including the exacerbation of harm they often experience. Of those who did make a report, one quarter said it resulted in no consequences for the harasser. Of particular concern in the context of NDAs, over half of people harassed identified the same harasser as having sexually harassed another employee in the workplace.[6]

On average, less than 3% of all finalised discrimination complaints proceed to a court application, and the number that proceed to final determination is even lower. [7] For sexual harassment complaints, 3% are resolved in court.[8] Recent research into damages and costs in sexual harassment litigation commissioned by the Attorney-General's Department and conducted by the ANU[9] (**ANU Report**) also found that the number of cases pursued in court has been decreasing steadily since 1986.[10] The ANU Report identified a total of 193 cases concerning sexual harassment that have been brought in the federal courts since 1984 (when the *Sex Discrimination Act 1984* was enacted), with damages being awarded in 95 of those cases.[11] At the State and Territory level, the research identified a total of 251 sexual harassment cases

[3] Australian Human Rights Commission, Time for respect: Fifth national survey on sexual harassment in Australian Workplaces (Report, November 2022) ('Fifth National Survey') at pages 12, 49.
[4] Ibid at page 12.
[5] Ibid at page 15.
[6] Ibid, at p 10.
[7] Attorney General's Department (February 2023) Consultation Paper: Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws ('Consultation Paper') at page 15; Australian Human Rights Commission (December 2021) Free and Equal: A reform agenda for federal discrimination laws ('Free and Equal Position Paper') at page 103.
[8] Fifth National Survey (above n 3) at page 139.
[9] Margaret Thornton, Kieran Pender and Madeleine Castles (25 March 2022) Damages and Costs in Sexual Harassment Litigation ('ANU Report').
[10] Ibid at page 20, 42.
[11] Ibid at pages 9-10, 18, 28.

since 1984, with damages being awarded in 131 of those.[12] These figures demonstrate just how difficult it is for people who have experienced sexual harassment to get access to justice, and how the vast majority of sexual harassment matters settle before going to court.

NDAs

Use of NDAs

NDAs were originally invented to protect trade secrets and confidential information during the tech boom in the 1980s, as technology companies sought to protect their intellectual property.[13] Their use has since become routine in workplace disputes broadly, including in matters of sexual misconduct, sexual harassment and discrimination. They are a way for respondents to protect their reputation and ensure the victim-survivor is not able to speak about the matter, enabling them to silence victim survivors and avoid accountability. This also conceals serial offending and offenders.

Since that time, employers and employees entering into separation or settlement agreements arising out of workplace disputes have usually agreed to NDAs, being clauses inside the agreement that prohibit disclosure of the agreement and/or the circumstances leading up to it. Settlements of sexual harassment claims are no different and are almost always subject to an NDA. Often, these clauses are broadly drafted, and apply to the facts of sexual harassment, the identities of the parties, the circumstances and conduct leading to the claim, the negotiations leading up to a settlement, and the terms of the agreement.

While the terms of these agreements can vary in strictness, at the very least they will usually mean that the identity of the perpetrator and the settlement amount cannot be disclosed. Research indicates that confidentiality clauses tend to be broadly expressed, which means victim survivors are required to keep the details of the settlement and allegations of sexual harassment confidential and without a time limitation.[14] Regardless of their scope, NDAs legally silence victims of sexual harassment and have a chilling effect by preventing public discussion.

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[12] Ibid at page 10. The researchers identified and analysed all sexual harassment cases ever brought in Australia under Federal State and Territory laws in the period since 1984 when the Sex Discrimination Act 1984 was enacted, to the end of 2021 – see ANU report at page 18.
[13] Rachel S. Spooner, 'The Goldilocks Approach: Finding the "Just Right" Legal Limit on Nondisclosure Agreements in Sexual Harassment Cases' (2020) 37(2) Hofstra Labor & Employment Law Journal 331 ('Spooner, The Goldilocks Approach'), at page 331; NDA INFO — Can't Buy My Silence (cantbuymysilence.com), 'Recognising and Understanding an NDA', accessed 11 September 2024.
[14] Featherstone and Bargon Report, above n 2, at page 6.

These clauses are often referred to as confidentiality or privacy agreements. They are rarely described as "non-disclosure agreements" in an agreement, but they are the same thing. An NDA usually has no time limits and is intended to bind the parties to stay silent forever. These kinds of settlements usually also involve a non-disparagement clause, which prevents the parties from saying anything negative about each other that will affect the reputation of the other side, which can have the same or a very similar effect to a confidentiality clause or NDA. For ease of reference, this submission will refer to NDAs as an umbrella term which captures clauses which have a silencing effect on victim-survivors, regardless of what they are called (eg NDAs, confidentiality, privacy and/or non-disparagement).

Prevalence of NDAs

Only 1 in 230,000 victim-survivors of workplace sexual harassment bring proceedings to an Australian court. The Australian Human Rights Commission estimates that nearly 1 in 5 workers are sexually harassed at work each year, yet only 444 cases have ever been brought to court since 1984 according to the ANU Report (11 cases per year on average). The vast majority of sexual harassment matters are settled out of court or before court proceedings commence, due to the many and significant barriers to bringing claims, and most of these will be subject to an NDA.

Employers or their representatives are not currently required to report on the number or types of NDAs they enter into. There is therefore limited data on their incidence and usage across different industries. However, other data and research makes it clear that NDAs are used in the vast majority of sexual harassment and discrimination matters and have become accepted practice for settling such complaints, both in Australia and globally.

Global research has found that many lawyers estimate that 95% of civil settlements which use a standard "release" from a claim (the promise to discontinue a tribunal or court case or other complaint) now include an NDA.[15] Multiple US research sources now show that one in three American workers has signed some form of NDA.[16] The Speak Out Survey also shows more than

[15] NDA INFO — Can't Buy My Silence (cantbuymysilence.com), FAQs, How are NDAs being used now? Accessed 11 September 2024.
[16] (Note this includes intellectual property NDAs). NDA INFO — Can't Buy My Silence (cantbuymysilence.com), FAQs, Is this an equity issue? Accessed 11 September 2024; and Can't Buy My Silence Factsheet, accessed 11 September 2024 at NDA Fact Sheet May 2024.docx (squarespace.com)

one third of those responding to their survey (who have experienced sexual harassment and other misconduct in the workplace) have signed an NDA.[17]

NDAs are especially proliferating in lower income, insecure employment in retail, hospitality and accommodation and emerging data shows a differential impact on vulnerable groups with income insecurity. Low paid workers are more likely to experience sexual harassment and other forms of workplace mistreatment. The Speak Out Survey found that four times as many women as men have signed NDAs, and Black women report having signed an NDA (75%) at three times the rate compared to White women (28%).[18]

Research into the use of NDAs in Australia found that broad and exhaustive NDAs (being blanket confidentiality and non-disparagement terms) remain the default confidentiality term used by lawyers in workplace sexual harassment settlements in Australia.[19] This practice persists despite a suite of reforms to Australia's sexual harassment landscape since the global #MeToo movement.[20] Following the #MeToo movement, the AHRC has also confirmed that in Australia sexual harassment matters are routinely settled with NDAs.[21]

The #MeToo Movement and NDAs

The #MeToo movement that exploded following the revelations of Harvey Weinstein's serial abuse shone a light on the role that NDAs play in covering up wrongdoing and silencing victim-survivors. It allowed public discussion and scrutiny of NDAs for the first time, with criticism of their use in relation to sexual harassment matters becoming widespread. That criticism has led to proposed or actual law reform in many countries.

Zelda Perkins, a victim-survivor subject to an NDA who spoke out despite the immense personal and financial risks to her of doing so, co-founded "Can't Buy My Silence" (**CBMS**) in 2021, alongside Professor Julie McFarlane. CBMS has been collecting testimonies from people who have signed NDAs, and have collected valuable data on the prevalence of NDAs and the harms they cause. CBMS aims to stop the misuse of NDAs so that they are only used for the purpose for which they were created – the protection of IP and trade secrets. In 2021, CBMS collaborated on

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[17] Ibid.
[18] NDA INFO — Can't Buy My Silence (cantbuymysilence.com) FAQs, Is this an equity issue? Accessed 11 September 2024; Can't Buy My Silence Factsheet, accessed 11 September 2024 at NDA Fact Sheet May 2024.docx (squarespace.com); and 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)
[19] Featherstone and Bargon report, above n 2, at page 1, 30.
[20] Ibid.
[21] Ibid, at page 15.

drafting a "model bill" introduced in Ireland – the Irish Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021 (**Irish Bill**), and has been advocating for legal reform on this issue worldwide. Multiple jurisdictions in the US and Canada have passed legislation that restricts the use of NDAs, with more in process around the world.

Harm caused by NDAs

The use of NDAs in sexual harassment matters enable perpetrators (including serial offenders) to silence victim-survivors (often for life) and engage in unlawful conduct repeatedly. Their victims are prevented from speaking about their experience, including to identify the perpetrator. Victim-survivors are also prevented from seeking support through their families and friends, networks, co-workers, government bodies, unions and sometimes even medical professionals. It can also prevent them from contributing to inquiries and consultations like this one.

This means that perpetrators remain protected and the unlawful conduct is able to continue. NDAs allow perpetrators and organisations to conceal and continue longstanding patterns of sexual misconduct, avoid accountability, and prevent discussion of the accusations among victim-survivors, co-workers and the public. This is especially true of cases involving the most serious abusers, as employers have a big incentive to settle the most egregious claims to avoid high damages and negative publicity. This means the worst cases will often never see the light of day.

The use of NDAs is a large contributing factor to the ongoing concealment of the extent of sexual harassment. The systemic and widespread nature of sexual harassment (both at particular workplaces and in workplaces generally) makes it a matter that is of genuine concern to the broader community and a pressing subject of public interest. Harassers in the workplace pose a threat to the safety and well-being of others, both inside and outside of that workplace, making it an issue of public importance. This is of particular concern where, as is often the case in sexual harassment matters, the victim-survivor is forced out of the workplace and the perpetrator stays on, potentially putting other employees at risk, in breach of an employer's obligation under WHS legislation to provide a safe workplace and the positive duties contained in both federal and Victorian anti-discrimination legislation.

A growing body of evidence is demonstrating the acute harm caused by silencing those who come forward. In 2019, a report of the UK House of Commons (**UK Report**) found that NDAs effectively cover up unlawful discrimination and harassment, allowing management behaviour and organisational culture to go unchanged, enabling perpetrators to go on to harass or discriminate against others, and preventing victims from knowing about or supporting other

complaints.[22] The UK Report also found that NDAs can cause long-term issues for complainants who have signed them, including difficulty in moving on with their career, fear of repercussions if the agreement is breached, barriers to accessing professional or emotional support for the discrimination or harassment they suffered and other personal and emotional repercussions.[23]

In 2020, the Respect@Work Report found that confidentiality obligations can be harmful and counter-productive to the elimination of sexual harassment, and considered systemic issues of transparency, secrecy and the effect on victim survivors when they were stopped from telling their stories. Ironically, while the AHRC actively sought submissions from persons subject to an NDA, they received a 'small number' of responses. The AHRC took the additional step of asking businesses to issue a limited waiver of confidentiality obligations to allow more people to come forward, but only 39 organisations agreed to this waiver.[24] The AHRC heard that NDAs have often served to intimidate and silence victims, conceal the behaviour of harassers, and inhibit oversight by leaders (including managers and executives) and boards who, in some cases, may not be aware that complaints have been raised if they were settled confidentially. This has, in turn, enabled alleged harassers to remain in the same workplace or move within industries and continue to engage in sexual harassment.[25]

UK organisation Speak Out Revolution conducted the Speak Out Survey which found that:

- 95% of people who have signed an NDA in cases of sexual harassment experience negative impacts on their mental health related to the NDA, and the inability to speak about their experiences.[26]
- 95% of people surveyed regretted entering into an NDA, and those feelings of regret presented between 3 – 6 months post-settlement and persisted in many cases for years or decades.[27]
- 32% of respondents report that they did not go ahead and file a formal complaint, because they anticipated being asked to sign an NDA, and did not want to.[28]

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[22] House of Commons Women and Equalities Committee, The Use of Non-Disclosure Agreements in Discrimination Cases: Ninth Report of Session 2017-19, 5 June 2019, at page 9.
[23] Ibid.
[24] Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces, ('Respect@Work Report'), at pages 558, 564.
[25] Ibid, at pages 557-558, 563-564.
[26] 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).
[27] Ibid.
[28] Can't Buy My Silence Factsheet, accessed 11 September 2024 at NDA Fact Sheet May 2024.docx (squarespace.com).

Research done by VTHC about the experiences of Australia workers shows similar results and themes to this international research. To date, the VTHC NDA Experience Survey has received submissions from 243 workers across the country and found the use of NDAs in workplaces to be prevalent across industries. In many cases testimonies span the entirety of workers' experiences from the circumstances leading to the NDA, the negotiation process, the impact of the NDA at the time of entering it to its ongoing impact years or decades later. This data is unique in Australia and gives VTHC a unique perspective on the harm caused by NDAs - no other organisations have access to the volume and breadth of these testimonies of individual workers, who are mostly women.[29]

VTHC's ongoing engagement with victim-survivors shows the following key themes[30]:

- Being legally prevented from speaking about their experiences caused ongoing psychological and physical health issues;
- Workers report dealing with acute stress, trauma and anguish at the time of entering the NDA, and did not feel they had capacity to make a free and informed decision at the time;
- NDAs were presented as a condition of settlement. Often the NDA was presented with the settlement deed without any prior negotiation;
- Many settlements were the result of negotiated separation of the employment relationship following the victim-survivor making a complaint about sexual harassment at work and subsequently being forced from the workforce;
- The perpetrator/s often suffered little or no consequences for their conduct and/or little or no action was taken by the employer to improve systems of work following their complaint. Many victim-survivors reported that they were the only person to experience real consequences from the harassment;
- Overwhelmingly workers reported that they did not exercise a free choice to enter into the NDA - either through pressure, coercion, feelings of exhaustion, economic urgency, and/or a 'take it or leave it' approach to the settlement by their employer, their employer's lawyers and in some cases their own legal representation;
- All expressed desire to end their NDA to be able to talk freely and without fear about their experience.

[29] Submission of Victoria Trades Hall Council to the Consultation into Restricting the Use of Non-Disclosure Agreements in Workplace Sexual Harassment Cases, 6 September 2024, at pages 1, 5.
[30] Ibid, pages 5-6.

- 96% of respondents to the VTHC NDA Experience Survey indicated that they do not believe NDAs should be used in the resolution of workplace disputes.

It is clear that NDAs cause serious harm and further isolate victim-survivors, many of whom are forced out of the workforce. These agreements not only put other workers at risk, but also shield perpetrators from consequences. They exist primarily to protect the reputations of employers, allowing them to evade responsibility for failing in their duty to provide a safe workplace. The availability of NDAs also discourages employers from addressing the systemic cultural issues that led to the harassment, despite a positive duty to prevent sexual harassment being legislated in Victoria since 2010 and federally since December 2022.

Regulatory Responses to NDAs in Australia

There are currently no limitations on the use of NDAs in cases of sexual harassment in any Australian state or territory, but there have been various guidance materials developed which are voluntary.

In 2020, the Respect@Work Report found that guidance was urgently needed on NDA use and recommended reform in the form of voluntary Guidelines (**NDA Guidelines**) to assist practitioners in the resolution of sexual harassment matters.[31] Those guidelines were published in December 2022 and contain 6 principles, being that confidentiality clauses:[32]

- should be considered on a case by case basis;
- should be as limited in scope and duration as possible;
- should not prevent organisations from responding to systemic issues and providing a safer workplace;
- should be accessible, fair, clear, in plain English and translated/interpreted where necessary;
- the complainant should have access to independent support or advice to ensure they fully understanding the meaning and impact of the clause;
- negotiations should ensure the wellbeing and safety of the complainant as far as possible.

[31] Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces, ('Respect@Work Report'), Recommendation 38, at page 564.
[32] Australian Human Rights Commission (2022) Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints.

A positive duty to prevent sexual harassment, discrimination and victimisation was legislated in Victoria in 2010. In 2020, the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) released guidance for employers on how to prevent and respond to workplace sexual harassment and comply with the positive duty in the EO Act (**VEOHRC Guidance**). The VEOHRC Guidance provides a number of drafting considerations, states that NDAs should be used sparingly (eg where a complainant has requested confidentiality around their experience) and notes that employers should consider whether the use of NDAs may prevent their organisation from identifying and learning from systemic issues of harassment in an open and transparent manner.

The VEOHRC Guidance states that:

> *The use of non-disclosure agreements contributes to a culture of silence. Non-disclosure agreements contribute to underreporting of sexual harassment by keeping the problem of sexual harassment and the steps taken to address it hidden. Silencing those who have been brave enough to make complaints deters others from coming forward*.[33]

In 2023, the Victorian Legal Services Board and Commissioner (**VLSBC**) outlined the ethical obligations of legal practitioners in Victoria, specifically the risk that NDAs can be used by organisations to silence victims and cover-up abuses (**VLSBC Guidance**). The VLSBC notes that failure to properly advise clients (both applicant and respondent) of the risks of an NDA could breach professional or ethical obligations and lead to disciplinary action. The VLSBC advises lawyers to familiarise themselves with the NDA Guidelines and VEOHRC Guidance to ensure their own professional and ethical responsibilities are maintained. The VLSBC Guidance emphasises that when representing complainants, these obligations involve the practitioner understanding, and ensuring the complainant does not underestimate, the impact the clause will have on them and what it may prevent them from doing in the future. It also notes that it is easy to overlook the personal significance of such clauses when the primary focus is on a financial settlement.[34]

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[33] Victorian Equal Opportunity and Human Rights Commission, "Preventing and Responding to Workplace Sexual Harassment Complying with the Equal Opportunity Act 2010," August 2020, p 90. https://www.humanrights.vic.gov.au/static/8070e6b04cd51969490ccdecddff0c00/Resource-Guidelines-Workplace_sexual_harassment-Aug20.pdf

[34] Victorian Legal Services Board and Commissioner, "Advice for Lawyers: Using Confidentiality Clauses to Resolve Workplace Sexual Harassment Complaints | VLSBC,", last updated June 2024: https://lsbc.vic.gov.au/lawyers/practising-law/sexual-harassment/advice-lawyers-using-confidentiality-clauses-resolve

Recent research has assessed the efficacy of such voluntary guidance, focusing on the NDA Guidelines. In their report *Let's Talk About Confidentiality* published on 6 March 2024 (**Featherstone/Bargon Report**)[35], Regina Featherstone and Sharmilla Bargon examined the practice of using 'strict NDAs', being blanket confidentiality obligations – meaning that the victim survivor cannot speak to anyone about the incident(s). They also examined how lawyers responded to the NDA Guidelines and measured their effectiveness.

They found that the NDA Guidelines have had limited impact in driving changes among practitioners, specifically that:

- 15% were not aware that the NDA Guidelines existed[36];
- 25% had not read the NDA Guidelines[37];
- Only 22% of practitioners have used the NDA Guidelines[38];
- Strict NDA use is so entrenched that many lawyers do not advise of the option of not having one: close to 30% of applicant lawyers and 50% of respondent lawyers have never provided this advice to clients[39]; and
- 75% of practitioners had never reached a settlement in a sexual harassment case without a strict NDA in place, and many consider these clauses to be 'standard'.[40]

The Featherstone/Bargon report demonstrates the problem with voluntary and unenforceable approaches to NDAs, such as those discussed above. They are not mandatory, and do not require or incentivise practitioners to change. They rely on individual lawyers and individual victim-survivors fighting to shift deeply ingrained attitudes and practices – a burden that is unfair to place on those who have suffered the harm. Voluntary approaches also cannot shift inherent power imbalances that exist between workers and their employers, and between the legal representation each is able to afford, with employers almost always having access to more resources than workers.

The Featherstone/Bargon report sheds important light on how the legal profession has responded – or failed to respond – to the broader public and policy discussions on workplace sexual harassment and the extent to which NDAs obscure the scale of the problem. In order to

[35] Featherstone and Bargon Report, above n 2, at page 6.
[36] Ibid at page 28.
[37] Ibid.
[38] Ibid at page 29.
[39] Ibid at page 1.
[40] Ibid at page 1, 30.

properly prevent and eliminate sexual harassment and discrimination from our workplaces, we need legislative reform.

Voluntary approaches continue the deeply flawed approach our legal frameworks have taken with sexual harassment for far too long, by treating it as an individualised problem that the person who has experienced the harm needs to make a complaint about before anything can be done.[41] The Respect@Work Report and the resulting legislative reform has seen a very welcome shift to starting to understand and treat sexual harassment as a collective issue, and as something that needs to actively be prevented through WHS frameworks and the new positive duty under the *Sex Discrimination Act*. Employers are now required to take action to address cultures that allow sexual harassment and discrimination to persist. Removing their ability to enter into secret settlements that conceal unlawful behaviour in the workplace is key to delivering the cultural change necessary to reduce the prevalence and harm caused by sexual harassment.

Global Responses to NDAs

Globally, there has been a push in many jurisdictions to regulate and prohibit the use of NDAs, including the following developments:[42]

- The Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021 (Irish Bill) is currently under consideration by the Irish Parliament and was passed by the Irish Senate in October 2023. The Irish Bill restricts NDA use in relation to sexual harassment and discrimination matters.
- In the US, Google, Pinterest and Salesforce have agreed to stop using NDAs for anything other than the protection of intellectual property (as a consequence of the passage of California's Silenced No More Act in 2022 which bound their California-based head offices).
- 22 US states have now passed legislation to restrict the use of NDAs, with more in process. Also a federal Bill, the Speak Out Act, banning the use of pre-dispute NDAs for sexual harassment, passed into law in December 2022.
- In the UK, after the successful campaign to ask universities to sign a voluntary pledge not to use NDAs, the Higher Education (Freedom of Speech) Act 2023 was amended to

[41] For example, see discussion in Featherstone and Bargon, above n 2, at pages 21-22.
[42] Can't Buy My Silence Factsheet, accessed 11 September 2024 at NDA Fact Sheet May 2024.docx (squarespace.com).

include a legal commitment by universities not to use NDAs in relation to complaints of sexual abuse, harassment or misconduct and other forms of bullying and harassment.

- Legislation to restrict the use of NDAs has also passed in Prince Edward Island, Canada (which applies broadly to all forms of harassment and discrimination) and is tabled in four other provinces. There is also a federal Bill moving forward to prohibit the use of public funds to create or enforce NDAs.

Proposed model for legislative reform

VTHC is seeking legislation to restrict the use of NDAs, confidentiality agreements and non-disparagement agreements, in any circumstances where sexual harassment or discrimination has occurred or is alleged to have occurred (including where no court or Tribunal proceedings are initiated). This model is informed by their consultations with and the testimonies of victim-survivors, and is aimed at significantly reducing the use of NDAs and contributing to meaningful progress towards eliminating sexual harassment in Victorian workplaces.

VTHC proposes the following model:[43]

1. Legislation be introduced to substantially reduce the use of NDAs in matters where sexual harassment or discrimination has occurred or is alleged to have occurred. This could be in the form of a stand-alone Act, or as an amendment to the EO Act.
2. NDAs should be prohibited in all such matters, with one exception: that the NDA is initiated by and the expressed wish and preference of the victim-survivor (to protect their own privacy).
3. Where an NDA is initiated by and the expressed wish and preference of the victim-survivor, it will only be enforceable if the following requirements are met:
    a. The victim-survivor has the right to waive (opt out of) their own confidentiality (the NDA) through the giving of 7 days' notice to the other party.

For an NDA to be enforceable, the model should also require:[44]

    b. That there has been no pressure or influence placed on the victim-survivor to initiate or agree to the NDA;

[43] Submission of Victoria Trades Hall Council to the Consultation into Restricting the Use of Non-Disclosure Agreements in Workplace Sexual Harassment Cases, 6 September 2024, at page 10.
[44] Ibid, at page 11.

c. Victim-survivors retain the right to make permitted disclosures to a family member, friend, support person, union, medical professional, legal/financial advisor and any relevant government body such as WorkSafe, police or others (see VTHC submission to this consultation for a full list[45]);
d. A prohibition on any separate agreement or provision from being entered into which has the purpose or effect of concealing workplace sexual harassment or discrimination, such as a non-disparagement agreement;
e. The victim-survivor has been afforded an opportunity to seek independent legal advice about the terms of the NDA;
f. It to be unlawful for an employer to enter or enforce an NDA that is non-compliant, and civil penalties apply.

The matters at (b) to (f) are considered as supportive to the substantive requirement that a victim-survivor must initiate and expressly wish for an NDA, and the requirement for an option to waive their own confidentiality. These matters should relate to the enforceability of any compliant NDA. 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.[46]

The ACTU supports the model proposed by the VTHC. The model gives choice and agency to victim-survivors, including the ability to provide them with anonymity and privacy where that is what they want. It will also go some way to addressing the inherent power imbalances present, by giving the power to request and negotiate confidentiality terms back to the victim-survivor for their own privacy or wellbeing. Victim-survivors should also always have the right to request a one-sided confidentiality provision where they can choose to speak about their experience, whilst protecting their privacy by binding the employer to confidentiality.

The ACTU has some concerns that it will remain possible for employers and legal representatives to place pressure and influence on victim-survivors to initiate or agree to an NDA. Such pressure or influence can be exerted subtly and is difficult to police. In some ways, a model that banned all NDAs but which allowed one sided confidentiality provisions which protect the victim-survivor's privacy by binding the employer, but which allow the victim-survivor to speak about their experiences, could be a simpler model that meets the objectives of the reform to end the misuse of NDAs.

[45] Ibid, at page 23.
[46] Ibid, at page 11, 26.

With this in mind, the right to waive confidentiality is an absolutely essential part of the model, for several reasons. Firstly, evidence shows the overwhelming majority of people who sign an NDA experience regret and mental health impacts often presenting 3-6 months later. Victim-survivors generally report a need or desire to end their NDA because being silenced was exacerbating the impacts on their health, their ability to receive support they needed, or when their NDA was impacting on the safety of others.

Secondly, if there has been any pressure or influence exerted, or the victim-survivor didn't fully understand the implications, were ill-advised or otherwise unable to make an informed decision when they were signing, the waiver provides an opportunity to rectify this, without the victim-survivor being required to prove this in a court – something that in practice, is difficult to do, would require significant resources and would reinforce harmful practices. The option to waive confidentiality provides a clear, transparent and simple way to end an unenforceable or not permitted NDA without requiring a victim-survivor to challenge its enforceability in court, and reduces the potential for litigation. A waiver provides an opportunity for the victim-survivor to abandon their own confidentiality for any reason, whilst ensuring that the employer is still bound by their confidentiality obligations (which will protect the victim-survivor's privacy).

Finally, it is very common that victim-survivors are in a significant state of distress when engaged in negotiations about the settlement of sexual harassment matters. There is usually a significant power imbalance, and often economic urgency. The research and testimonies show that due to these factors, many people who sign an NDA do not understand the implications at the time of signing (for example, this was true for the vast majority of the individuals CBMS surveyed who have signed an NDA). The VTHC Survey showed that overwhelmingly, workers reported that they did not exercise a free choice to enter into the NDA - either through pressure, coercion, feelings of exhaustion, economic urgency, and/or a 'take it or leave it' approach to the settlement by their employer or the lawyers involved.[47]

The right to waive confidentiality is already legislated in the Prince Edward Island Non-Disclosure Agreements Act (**PEI Act**) at section (3)(d) and is also proposed in the Irish Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021 (**Irish Bill**).

[47] Ibid, at pages 5-6, 8.

Reporting of NDAs

The discussion paper raises several questions concerning whether a model similar to the WGEA reporting program be adapted for use of NDAs in workplace sexual harassment matters. A reporting regime would be extremely beneficial in providing transparency and access to data in the public domain. There are currently no useful statistics about the number of private settlement agreements that include NDAs in workplace sexual harassment and discrimination matters. The limited data that is available shows that they are extremely prevalent.

Reporting on NDA use will reduce their misuse. It will also prevent sexual harassment and discrimination in the workplace as employers will be on notice that they must take appropriate action. Transparency and open accountability also send a clear message to perpetrators that they will not be protected.

The benefits of a reporting regime can be seen from the recent reforms introduced to the *Workplace Gender Equality Act 2012 (Cth)* to allow WGEA to publish gender pay gap information at an employer level to encourage change within organisations.[48] Already, unions and workers have reported that access to this data is critical in ensuring accountability and being able to address gender pay equity issues in organisations.

Reporting should be mandatory, broad and include the number of complaints or reports received where sexual harassment and discrimination are alleged, how the matter was resolved (financial/non-financial settlement) and whether a one-sided NDA was entered into.

Common objections to regulation of NDAs

The most common objections to restricting NDAs are the assertions that fewer matters will settle, and that settlement outcomes will be reduced. There is no evidence for either of these assertions, and in fact some evidence to the contrary.

Aren't NDAs essential for settling cases?

No. Without NDAs, cases will continue to settle before court. International research demonstrates that the settlement rate for employment matters before a trial or tribunal hearing has been

[48] *Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Act 2023* (Cth)

sitting at 90-95% for 35 years.[49] This goes back long before NDAs were being used as extensively as they now, for purposes other than trade secrets.

In fact, a recent analysis of data[50] from the US Employment Equality Opportunity Commission (**EEOC**) compared the settlement rate for sexual harassment claims brought to the EEOC in 2017 - when there was no NDA legislation anywhere in the US - with 2022 - by which time legislation in 9 states banned NDAs for sexual harassment.[51]

In 2017, before there was NDA legislation, the settlement rate at the EEOC was 81%. After these 9 states had passed legislation forbidding NDAs for sexual harassment disputes in 2022, there was a settlement rate of 92.1%. This research suggests that restricting NDAs is having a positive impact on settlements in the EEOC in states that have enacted restrictions, and runs directly counter to objections that settlements will decrease if NDAs are restricted or if there is an unrestricted right to waive confidentiality.

There are many incentives to settle a case on both sides, including the significant cost and time involved. For individual/ employer/ institutional defendants in harassment and discrimination cases, there are additional disincentives such as the disruption to the organisation and the fact that a court or tribunal hearing is in the public domain and will only serve to reveal and intensity attention on the information they want to keep hidden in the NDA.

Won't this result in victim-survivors receiving less money in settlements?

This is a myth which can be countered with empirical data. Despite perceptions to the contrary, NDAs are oppressive relative to the financial resolution of claims and do not generally result in better outcomes.

Settlements for workplace harassment and discrimination are not large - and the monetary compensation paid is redress for harm caused, not for staying silent. The Center for Employment Equity analysed U.S Equal Employment Opportunity Commission and state Fair Employment Practices Agencies (data from 2012 – 2016) and found that complainants receiving monetary

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[49] Can't Buy My Silence Factsheet, accessed 11 September 2024 at NDA Fact Sheet May 2024.docx (squarespace.com). See also example Galanter & Cahill, "Most Cases Settle (1994); and Hadfield, Where Have All the Trials Gone? (2004). For example, in the Employment Appeal Tribunal in the UK, settlement before a hearing takes place in 95% of matters.

[50] Can't Buy My Silence Factsheet, accessed 11 September 2024 at NDA Fact Sheet May 2024.docx (squarespace.com).

[51] The 9 states were California, Vermont, New Mexico, Arizona, Hawaii, New Jersey, New York, Washington State, and Maine.

compensation for being sexually harassed at work were awarded an average of $24,700 and half received less than $10,000. The vast majority of these settlements would have included an NDA.[52]

The argument that including an NDA leads to multi-million settlements for victims is factually untrue, and is only ever made by lawyers with "celebrity" clients. Far from levering the negotiations to get more money, the vast majority of the individuals CBMS have surveyed who have signed an NDA did not understand all its implications at the time they signed. They often do so under a great deal of pressure from the other side (and sometimes their own representative). Moreover, an NDA can hide under-compensation for statutory entitlements such as severance and vacation pay.[53]

The Featherstone/Bargon Report found that just half of applicant practitioners had ever requested a higher financial outcome for confidentiality and two thirds of respondents had never agreed to higher damages for confidentiality.[54] VTHC also found in the testimonies it received that unrepresented victim-survivors do not get a better financial outcome for confidentiality.[55]

Conclusion

NDAs legally silence victims of sexual harassment and have a chilling effect by preventing public discussion. They leave impacted workers isolated, stigmatised, intimidated, ashamed and alone. They directly contribute to broader cultures of silence within workplaces that allow bad cultures, unlawful behaviour and unsafe systems of work to persist. This is unacceptable in modern workplaces and inconsistent with the positive duties to prevent sexual harassment and discrimination.

The ACTU strongly supports legislative reform to prohibit the use of NDAs. This reform would promote transparency, hold employers accountable, protect workers and victim-survivors, enable collective responses, ensure that workplaces can meaningfully prevent and respond to sexual harassment, and shift workplace cultures. We urge the Victorian Government to adopt the legislative model and the recommendations put forward by VTHC in its submission.

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[52] Can't Buy My Silence Factsheet, accessed 11 September 2024 at NDA Fact Sheet May 2024.docx (squarespace.com).
[53] NDA INFO — Can't Buy My Silence (cantbuymysilence.com) FAQs, Don't victims lever their right to speak out for more money? Accessed 11 September 2024.
[54] Featherstone and Bargon, above n 2, at page 38.
[55] Submission of Victoria Trades Hall Council to the Consultation into Restricting the Use of Non-Disclosure Agreements in Workplace Sexual Harassment Cases, 6 September 2024, at page 8.

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