

Restricting the use of NDAs in workplace sexual harassment cases

Submission to Industrial Relations Victoria, Department
of Treasury and Finance, Victorian Government

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal people of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input to Industrial Relations Victoria on restricting the use of non-disclosure agreements (NDAs) in workplace sexual harassment cases.
2. In the experience of ALA members and their clients, NDAs can be used to avoid addressing harmful workplace cultures and, as a result, NDAs do not facilitate justice for victim survivors of workplace sexual harassment.
3. It is crucial to acknowledge, however, that some victim survivors may want to sign an NDA to protect their own privacy and so that other people – namely, their employer and/or alleged harasser – cannot talk about that victim survivor’s experiences and trauma.
4. Any reforms that are ultimately progressed by the Victorian Government must honour the reality of how victim survivors heal, consider the power imbalances between employers and employees, and properly reflect how legal processes work (including that the NDA is inextricably linked with the deed of release/settlement).
5. The ALA’s submission will respond to Industrial Relations Victoria’s discussion paper *entitled Restricting Non-Disclosure Agreements in Workplace Sexual Harassment Cases* (‘Discussion Paper’) by addressing the following matters:
 - a. what NDA legislation in Victoria should include;
 - b. the scope of this reform; and
 - c. compliance with and enforcement of future laws.

What NDA legislation in Victoria should include

6. The ALA supports the development and enactment of a standalone piece of legislation to restrict the use of NDAs in Victoria in matters concerning alleged workplace sexual harassment (or similar conduct).
7. This section of the ALA’s submission will address the potential features of future legislation outlined in the Discussion Paper.

Prohibiting NDAs unless requested by the complainant

8. Future legislation should, in the ALA's view, prohibit NDAs except if the victim survivor has actively initiated the drafting of an NDA. That request must be made in writing.
9. This is essential for empowering victim survivors in the context of an existing power imbalance between employers and employees, and in order to prevent the misuse of NDAs by an employer and/or the alleged harasser.

Independent legal advice

10. Victim survivors signing up to an NDA should be offered free, independent and quality legal advice. The legal advice must be free for the victim survivor (i.e. at the employer's expense) to reduce the barrier to access; independent, so that the risk of influence by the employer and/or alleged harasser is mitigated; and quality, to ensure that the victim survivor is acting on sound and accurate advice.
11. The ALA notes that employers can insure themselves fully or at least in part against this kind of litigation.
12. We also submit that a victim survivor should be able to select which lawyer or firm they engage to obtain the relevant legal advice. Funding should be provided by the Victorian Government to existing services, such as Women's Legal Service Victoria and Working Women's Centre Victoria, so that they also have the capacity to provide legal advice on NDAs.
13. In general, the legal advice should centre around the content and effect of the NDA. However, the ALA submits that the legislation should consider instances where legal advice could be extended to advice on negotiating the terms of an NDA for certain victim survivors (for example, particularly vulnerable victim survivors).

Undue pressure or influence on victim survivors to enter an NDA

14. Victim survivors must be protected from undue pressure or influence from employers, who may seek to intimidate victim survivors into signing an NDA containing certain provisions that may not be in victim survivors' interests to sign.

15. The ALA submits that future legislation in Victoria, or any relevant explanatory materials and regulations, should outline what may constitute undue pressure or influence in this context. This could be derived from the definition of similar concepts in other legislation, such as the definition of “unconscionable conduct” under the *Australian Consumer Law*.²
16. We note that it would be difficult to create an exhaustive list of what would or would not be undue pressure or influence. It is also difficult to ensure that any choice is entirely free, noting the inherent power differences between employers and employees – especially when an employee has been sexually harassed at work.
17. However, guidance as to what could be undue pressure or influence would be very helpful for victim survivors.
18. The ALA submits that the ability for victim survivors to seek free, independent and quality legal advice before signing an NDA (discussed further above) could also serve as a way to protect victim survivors from undue pressure or influence from their employer to sign an NDA.

Ensuring an NDA does not adversely affect others

19. The ALA notes that nothing – including the signing of any number of NDAs – undermines or negates employers’ obligations to ensure that their workplace in Victoria complies with health and safety requirements, as well as employers’ positive obligation to prevent sexual harassment in their workplaces in Victoria.³
20. There may need to be a carve out in any future legislation in Victoria for criminal proceedings, depending on the matter and whether there are ongoing investigations or a likelihood of future investigations proceeding.

² See: *Australian Consumer Law*, in *Competition and Consumer Act 2010* (Cth) sch 2 ss 20–22.

³ See: *Equal Opportunity Act 2010* (Vic).

Ability to waive an NDA

21. The ALA supports the inclusion of an option in NDAs for victim survivors to initiate a waiver of that NDA. Only victim survivors can initiate that waiver; employers and/or the alleged harasser should not be able to initiate a waiver.

Maximum duration for an NDA

22. If a maximum duration for an NDA is included in Victoria's future legislation, the ALA supports that maximum duration being 10 years and, further, that only the victim survivor can make disclosures after that point in time unless the victim survivor formerly releases the employer from the NDA.

Review and a 'cooling off period'

23. Victim survivors may want to opt-in to a 'cooling off' period in order to review, seek legal advice, process and potentially amend the NDA. This should, in the ALA's view, take about between 10 and 14 business days.
24. If a victim survivor needs more time to secure an appointment with a lawyer and then meet with that lawyer, the legislation must provide a way for more time within the 'cooling off period' to be afforded to the victim survivor.

Permitted disclosures

25. The ALA supports the inclusion in Victoria's future legislation of provisions which permit the disclosure of information by victim survivors about the sexual harassment complaint in certain circumstances.
26. We would support including a detailed list of permitted disclosures to ensure that victim survivors are provided proper guidance in this respect. The ALA understands that Maurice Blackburn has provided an appropriate list which builds on the Discussion Paper's proposed list of permitted disclosures.

Prescribed form of an NDA and mandatory provisions

27. A template of an NDA could be included in Victoria's future legislation, containing the core provisions which must be included in a valid NDA and also noting what elements require amendment based on the facts/details of the case.
28. The ALA also supports including the full list of permitted disclosures as part of the mandated form of an NDA. The ALA invites further consultation on the template or form of an NDA prescribed under Victoria's future legislation, as well as on any proposed legislation generally.

Duty to report on NDA use and actions taken to address the conduct of alleged harassers

29. The ALA submits that Workplace Gender Equality Agency (WGEA) style reporting should be adopted and required, including the number of complaints and settlement outcomes for every employer. These matters could also be reported to Victorian Equal Opportunity and Human Rights Commission.
30. An employer should be required to disclose what action was concerning the alleged harasser. More often than not alleged harassers stay within companies/organisations, receive little more than a slap on the wrist for their conduct, and then often offend again.
31. It is our hope that requiring employers to disclose the above matters will incentivise employers to address the issue at its core and bring about real change.

Scope of reform

32. This section of the ALA's submission addresses the potential scope of these reforms, and the elements raised in the Discussion Paper.

Parties to an NDA

33. The ALA submits that any relevant party should be involved with negotiations regarding an NDA and then bound by that NDA.

34. In some cases, that would be the employer, alleged harasser and victim survivor (i.e. there would be three parties involved); in other cases, the employer is the alleged harasser and so the following two parties would be bound by an NDA in this instance: the employer/alleged harasser and the victim survivor.
35. Any future framework in Victoria should not restrict an NDA to binding a victim survivor and their alleged harasser only, as the employer should also be involved in circumstances where the employer is not the alleged harasser.
36. Likewise, there should not be a separate NDA between the employer and the alleged harasser, as the victim survivor should not be affected directly or indirectly by a legal document into which they have had no input or the opportunity to approve.

Non-disparagement clauses

37. The ALA would support the model in the Irish Bill as the preferred approach to non-disparagement clauses. Mutual non-disparagement is standard practice in all employment-related deeds.

Defining the 'workplace'

38. The ALA contends that there is no reason why contractors or volunteers should be excluded from the application of Victoria's future legislation regarding restricting the use of NDA, as they have employee-like rights under various pieces of legislation, including the *Fair Work Act 2009* (Cth) and the *Occupational Health and Safety Act 2004* (Vic).
39. Introducing a tiered system will create uncertainty and unfairness which does not reflect the expectations of discrimination law in Victoria – as per the *Equal Opportunity Act 2010* (Vic), for example, which covers volunteers.
40. In order to encourage a culture of safety and openness in workplaces, the ALA submits that different types of people cannot treat differently. This would also undermine the policy intent underpinning these reforms.

41. The ALA, therefore, recommends that any definition of terms like ‘worker’ or ‘employee’ in Victoria’s future legislation will need to be defined in the broadest terms so that employees, contractors and volunteers are all included.

Compliance and enforcement

42. The ALA supports the inclusion of a civil penalty regime in Victoria’s future NDA legislation. We contend that the enforcement of NDAs would be ineffective without a civil penalty regime.

43. In this civil penalty regime, the victim survivor, employer and any relevant government agency should all have standing to bring a complaint for NDA non-compliance.

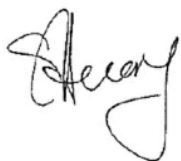
44. The ALA also submits that published guidelines and helpful materials (for example, the NDA template discussed above), as well as public awareness campaign, will all be key to ensuring the success of these reforms.

45. Additionally, the Victorian Government could ensure or encourage the inclusion of modules about NDAs in compulsory training programs for all government agencies/employees and for a variety of industries.

Conclusion

46. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input to Industrial Relations Victoria on restricting the use of NDAs in workplace sexual harassment cases.

47. The ALA is available to provide further assistance on the issues raised in this submission.



Susan Accary

President, Victoria Branch Committee

Australian Lawyers Alliance