

Submission to the Restricting Non-Disclosure Agreements in Workplace Sexual Harassment Cases Discussion Paper

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For enquires: mwc@migrantworkers.org.au

1 Introduction

- 1.1 The Migrant Workers Centre (MWC) welcomes the opportunity to make a submission to the Victorian Government's discussion paper on restricting non-disclosure agreements (NDAs) in workplace sexual harassment cases (hereafter 'the Discussion Paper').
- 1.2 The MWC is a community legal centre that connects migrant workers with one another and empowers them to understand and enforce their workplace rights. The MWC collaborates with unions and community partners to organise grassroots campaigns, deliver education sessions on workplace safety and rights, and advocate for long-term solutions to the exploitation of migrant workers in Australia. The MWC advocates for all workers who were born overseas and work in Australia, irrespective of their migration status.
- 1.3 The MWC commends the Victorian Government for committing to landmark legislative reform to restrict the use of NDAs in workplace sexual harassment cases. The widespread misuse of NDAs contributes to the concealment of sexual harassment in the workplace. NDAs enable perpetrators to avoid accountability and employers to evade their health and safety responsibilities, including their duty to prevent harassment from occurring.¹ This contributes to a culture of impunity, whereby sexual violence in the workplace is never addressed and victim-survivors are silenced, limiting their ability to find closure and seek support.
- 1.4 Victim-survivors with multiple intersections of lived experience, including women from migrant and refugee backgrounds, may be disproportionately affected by NDAs due to their overrepresentation in insecure, casualised work, which exposes them to greater safety risks, including workplace exploitation. The misuse of NDAs can be particularly detrimental to migrant workers, who are more vulnerable to coercion due to insecure visa status, language and knowledge barriers, lack of access to legal services, and difficulty navigating legal processes. Many may be pressured into signing NDAs that are not in their best interests to avoid jeopardising their employment, visa status, and/or settlement plans.
- 1.5 **We strongly endorse the Victorian Trade Hall Council's (VTHC) submission and urge that its recommendations be implemented in full.** The Victorian Government must adopt the strongest possible reform to address the pervasive issue of sexual harassment in the workplace, ensuring that NDAs are not misused by employers to evade their occupational health and safety responsibilities. In this submission, we highlight the need for a victim-centered approach that considers the specific needs of migrant workers, who face intersectional forms of disadvantage and increased precarity in the workplace.

¹ *Sex Discrimination Act 1984* (Cth) s 47C; *Equal Opportunity Act 2010* (Vic) s 15.

2 Sexual harassment and ‘migrant precarity’

- 2.1 Sexual harassment is pervasive in Australia, with 1 in 3 workers (33%) reporting being sexually harassed in the workplace in the past five years.² Disclosure rates continue to be low, with only 18% of victim-survivors making a formal complaint.³ Although limited, research indicates that overlapping factors, such as race, disability, gender, visa status, and sexuality, can compound vulnerability to sexual harassment in the workplace.⁴ Migration status has been recognised as a key “marker” of precarity; it can further reinforce vulnerability to sexual violence within and beyond the workplace due to the additional effects of legal and/or economic insecurity.⁵
- 2.2 Increased attention has been drawn to migrant and refugee women’s experiences of workplace sexual harassment. Research shows that cultural and social attitudes can profoundly affect how these workers experience and respond to sexual harassment.⁶ Cultural norms, lack of English language proficiency, and distrust of authority may affect how victim-survivors prioritise their rights, make disclosures, and seek access to support – potentially inhibiting them from ‘speaking out’.⁷ Sexual harassment may also manifest differently, such as where sexual comments are racially targeted or are based on racial stereotypes.
- 2.3 A recent national study found that 68% of 701 self-identified migrant and refugee women experienced sexual harassment in the past five years, with 46% facing it at work.⁸ Informal disclosures outside the workplace were more common (88%) than those made within the workplace (45%), and 33% were threatened or advised not to complain. Follow-up qualitative data showed that migrant and refugee women frequently experienced sexual harassment alongside workplace exploitation, racial discrimination, and unsafe conditions.⁹ Many felt responsible for the harassment, often perpetrated by men in senior positions, and were hesitant to make formal complaints. Barriers to reporting included uncertainty about what to do, fears of job repercussions, doubts that the behaviour would be recognised as abusive, and skepticism that any action would be taken after witnessing unaddressed complaints.
- 2.4 Research exploring the intersections of visa status and sexual harassment indicates that visa conditions influence both the occurrence and reporting of sexual violence. Undocumented workers, and workers with temporary or sponsored visas may choose not to report harassment, fearing repercussions for their visa status. Additionally, work hour restrictions may be leveraged by employers to threaten visa cancellation and silence workers, which can have dire consequences for those aspiring for permanent residency. Migration and industrial settings, alongside other intersecting factors, thus create a heightened form of precarity for migrant workers.¹⁰

² Australian Human Rights Commission (AHRC), *Time for respect: Fifth national survey on sexual harassment in Australian workplaces* (Report, November 2022) 12.

³ Ibid 14.

⁴ Stefani Vasil, “‘I Came Here, and It Got Worse Day by Day’: Examining the Intersections Between Migrant Precarity and Family Violence Among Women with Insecure Migration Status in Australia” (2024) 30(10) *Violence Against Women* 2482.

⁵ Anna Boucher, ‘Migrant Sexual Precarity through the Lens of Workplace Litigation’ [2024] *Gender, work, and organization*.

⁶ AHRC, *Everyone’s business: Fourth national survey on sexual harassment* (Report, September 2018).

⁷ Sandy Welsh, Jacqui Carr, Barabara MacQuarrie, and Audrey Huntley, “‘I’m Not Thinking of It as Sexual Harassment’: Understanding Harassment across Race and Citizenship” (2006) 20(1) *Gender & Society* 87.

⁸ Marie Segrave, Rebecca Wickes, Chloe Keel, and Shih Joo Tan, *Migrant and Refugee Women in Australia: A Study of Sexual Harassment in the Workplace* (Report, ANROWS, August 2023).

⁹ Marie Segrave, Shih Joo Tan, Rebecca Wickes, Chloe Keel and Nuria Alarcón Lopez, *Migrant and refugee women: A national study of experiences of, understandings of and responses to sexual harassment in the workplace* (Report, ANROWS, August 2024).

¹⁰ Kingsford Legal Centre, Redfern Legal Centre, Women’s Legal Service NSW and National Association of Community Legal Centres, *#MeToo: Legal Responses to Sexual Harassment at Work* (Report, April 2019) 41.

- 2.5 Our survey of 1,002 migrant workers supports these findings, showing that those feeling unsafe in their workplaces report higher rates of discrimination, bullying, and verbal abuse.¹¹ These conditions often escalate to wage theft and persistently unsafe work environments, which are endured by migrant workers to preserve their employment and visa status. **Case Study 1** illustrates how these forms of abuse are interconnected, reinforcing each other in a cycle where sexual harassment serves as an extension of the power and control employers exert. This control can be maintained through silencing mechanisms such as NDAs, which can trap workers in unsafe conditions.

Case study 1. Sarah

Sarah secured a sponsored job after finishing her degree. Early on, her boss displayed predatory behaviour, asking her to stay late alone or join him on overnight business trips. When she refused, he threatened her with losing her job and visa sponsorship. Hoping to endure until she became eligible for permanent residency (PR), Sarah tolerated underpayment and harassment for over three years. However, after filing for her permanent visa, the harassment escalated to unwanted physical contact.

Fearing for her visa and future, Sarah went to the police but lacked evidence. Later, her boss fired her by text and came to her house, yelling at her that she was not being cooperative. With the help of a lawyer, she negotiated a deal where her **boss agreed to keep her on the books for five more months, allowing her to qualify for permanent residency in exchange for her silence about the sexual harassment.**

However, due to visa processing delays during the pandemic, Sarah's boss reported her termination to the government after five months, leading to the cancellation of her temporary visa and the rejection of her PR application.

3 Responses to the Discussion Paper

- 3.1 The evidence points to the need for a more nuanced and considered approach to NDAs that addresses the underlying power dynamics and causes of inequality at work. For migrant workers, migration status can be an additional coercive element in the NDA process. Misused, these agreements may disproportionately silence them, compounding their precariousness in the workplace. A growing body of evidence also highlights the detrimental personal and mental health effects of remaining silent about harassment.¹² For migrants, who may already face additional, intersecting challenges such as language barriers, isolation and precarious legal status, these impacts can be even more severe.¹³
- 3.2 We commend the Victorian Government for following the lead of international frameworks for ending the misuse of NDAs. In this section, we address some of the questions raised in the Discussion Paper. We endorse the VTHC's recommendations that the Victorian Government adopt the strongest possible reform

¹¹ Migrant Workers Centre, *Insecure by Design: Australia's migration system and migrant workers' job market experience* (Report, March 2023) 46.

¹² Susan Rees, Lisa Simpson, Clare McCormack, Batool Moussa and Sue Amanatidis, 'Believe #metoo: Sexual Violence and Interpersonal Disclosure Experiences among Women Attending a Sexual Assault Service in Australia: A Mixed-Methods Study' (2019) 9(7) *BMJ open* e026773; Katherine Lorenz and Erin O'Callaghan, "'I Realized That I Couldn't Act Normal': A Qualitative Study of Sexual Assault Survivors' Experiences of Workplace Disclosure' (2022) 37(2) *Journal of Family Violence* 381.

¹³ Claire Sullivan, Cathy Vaughan and Judith Wright, *Migrant and refugee women's mental health in Australia: a literature review* (Report, University of Melbourne, October 2020).

to end the misuse of NDAs. We propose additional safeguards to address the unique challenges that migrant workers face at work and in navigating the legal system.

Prohibit NDAs unless requested by the complainant

- 3.3 **NDAs should be prohibited where sexual harassment or discrimination has occurred or is alleged to have occurred, unless expressly requested by the victim-survivor.** This approach prevents NDAs from being misused as a default or coercive tool by employers. It also empowers victim-survivors, giving them control over their privacy and the terms of resolution to their harassment claims. This sets a threshold that must be met before the enforceability of an NDA is considered.
- 3.4 As per the VTHC's submission, requests for confidentiality (on part of the victim-survivor) often take place informally in the workplace following a complaint, typically without the presence of lawyers. Evidence that the NDA was expressly requested by the victim-survivor should be assessed on a case-by-case basis. The Explanatory Memorandum could provide examples of evidence that may demonstrate the genuine wishes of the victim-survivor. This may include written or verbal statements, and subsequent verification by their legal representative. However, any such evidence should not restrict the victim-survivor's right to waive an NDA in the future. This will help ensure that the choices of victim-survivors are respected and upheld.
- 3.5 Attention should also be given to cultural factors that may influence how a victim-survivor perceives and responds to sexual harassment. Cultural and social attitudes can significantly affect how migrants experience and react to such incidents.¹⁴ For instance, migrants might choose not to 'speak out' due to fears about repercussions from authorities or government agencies, reflecting a deep-rooted fear of legal or social consequences. Enforceable guidelines that emphasise the need for a culturally sensitive and intersectional approach must be published to assist employers and legal practitioners comply with the new legal framework and better support the diverse needs of victim-survivors.

Complainants are offered independent legal advice

- 3.6 **NDAs should be enforceable only if the complainant has received independent legal advice about the terms and implications of the NDA.** This advice would assist victim-survivors to clearly understand their rights and make an informed decision. We endorse the model proposed by the VTHC, which provides that: *'[t]he opportunity to seek legal advice would relate only to the NDAs enforceability once the threshold requirement of initiating and expressly wishing and preferring the NDA was met'*. This means that once the above threshold requirement as to the genuine wishes of the victim-survivor is met, the enforceability of the NDA is contingent upon the victim-survivor having the opportunity to seek independent legal advice.
- 3.7 Victim-survivors should have the right to seek their own legal representation. They should also always be afforded the opportunity to have a support person of their choice, including a union official, to assist in discussions about sexual harassment, discrimination, or NDA negotiations.
- 3.8 However, victim-survivors should have the option to request that the cost of legal advice be covered by their employer. Many migrant workers face barriers to accessing legal advice, such as financial constraints, knowledge and language barriers, restrictive eligibility for free legal services, and lengthy waiting lists for assistance. Requiring employers to cover the costs of legal advice may help alleviate these barriers.

¹⁴ AHRC (n 6).

- 3.9 A potential risk with employer-funded legal advice is the potential for compromised independence. Employers may seek to limit the scope of the legal advice or delay resolution of the matter. As aforementioned, evidence shows that sexual harassment in the workplace often occurs alongside other abuses like labour exploitation. Employers reliant on migrant labour may attempt to misuse NDAs to silence workers and circumvent new prohibitions on certain employer conduct under the *Migration Act 1958 (Cth)*, violations of which could bar them from hiring migrant workers for a set duration. Potential safeguards include:
- 3.9.1 To avoid conflicts of interest, employers must contribute to an independent fund that disburses payments for legal advice in a timely manner.
 - 3.9.2 Require legal practitioners to assess whether other legal issues are potentially enlivened (e.g., under employment, migration or discrimination law) and refer victim-survivors to appropriate legal services. Failure to do so could render the NDA voidable.
 - 3.9.3 Legal practitioners who are engaged at the employer's expense must be specifically trained on the impacts of NDAs. This could include completing Continuing Professional Development (CPD) training based on existing guidelines that emphasise a trauma-informed, culturally sensitive, and intersectional approach to negotiations.¹⁵

Ability to waive an NDA

- 3.10 We strongly endorse the VTHC's position that the option to waive an NDA provides the strongest protection for victim-survivors. Testimonials provided to the VTHC show that NDAs often exacerbate trauma and impede recovery, with many regretting their decision to enter an NDA. The needs of victim-survivors are individual, complex, and evolve over time; this is especially true for migrant workers who may acquire a more secure visa status, gain greater awareness of their rights, experience changes in personal circumstances, or choose to extend their stay to pursue a related legal claim under a [Workplace Justice Visa](#). The acute stress of an unsafe workplace, coupled with additional stresses of legal and social precarity, may have limited the victim-survivor's capacity to make an informed decision at the time of entering an NDA.
- 3.11 As such, the legislation should allow a victim-survivor to opt out of their confidentiality by providing 7 days' notice to the employer. This should **not** automatically waive the employer's obligation to maintain privacy unless they are expressly released in writing by the victim-survivor.
- 3.12 The option to waive an NDA simplifies the process of ending or contesting an NDA, minimising litigation and providing an accessible mechanism for victim-survivors to change their decision as their needs evolve. It also offsets the need for cooling off periods or time limits to be legislated and diminishes the potential for any undue influence and/or pressure exerted by employers to enter an NDA.
- 3.13 The flexibility afforded by the ability to opt out of their confidentiality – without automatically waiving the employer's obligations to maintain privacy – is crucial in supporting the autonomy and recovery of victim-survivors, allowing them to speak out when they feel ready and safe to do so, without being bound by rigid procedural requirements.

¹⁵ AHRC, *Guidelines on the use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints* (Report, 2022).

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

- 3.14 **Mechanisms to prevent undue pressure and/or undue influence must be incorporated into the legislation.** NDAs should not be enforceable if victim-survivors were unduly pressured or influenced to enter an NDA. Due to their insecure status, migrant workers may be more likely to experience the impacts of undue influence and receive lower financial settlements. To clarify the intent of the legislation, the Explanatory Memorandum should include examples of what could constitute undue influence or pressure in the context of NDAs, as well as examples of permissible conduct.
- 3.15 For example, undue influence may be presumed in circumstances where the employer has significant control over the complainant's livelihood or legal status (including visa sponsorship). This is particularly relevant in industries such as horticulture, where employers often provide migrant workers with essential services like live-in accommodation, transport, and other amenities. Under these circumstances, the burden of proof would shift to the employer to demonstrate that consent for the NDA was freely given and not the result of undue influence.
- 3.16 Placing the burden of proof on the employer provides an additional layer for protection against coercion for workers who may be inescapably bound to the employer, and whose ability to make an informed decision is constrained. Employers must demonstrate that reasonable steps were taken to minimise undue influence in such circumstances. Failing that, the NDA should be voidable at the victim-survivor's discretion. Coupled with the ability to waive confidentiality, this diminishes the ability of employers to exert undue influence and/or pressure, and disincentivises the use of legal action to enforce NDAs.
- 3.17 We concur with the VTHC that a proscriptive model that explicitly prohibits any form of undue influence or pressure could be detrimental as it places the onus on victim-survivors to prove that they were unduly influenced or pressured. As outlined above, it is crucial that victim-survivors have the ability to waive an NDA, enabling them to rescind it unconditionally at any future point should they wish to do so.

Prescribed form or mandatory provisions

- 3.18 Prescribing the form and terms of an NDA should be considered to provide consistency for victim-survivors. NDAs should incorporate key elements outlined in the VTHC's submission, including the right for the victim-survivor to waive their confidentiality and a list of permitted disclosures. As to their prescribed form, NDAs should be drafted in plain English and in a consistent format. Translation and interpreting services should also be provided as required to aid comprehension of the scope and terms of the NDA. Accessibility requirements should also be prescribed, allowing for NDAs to be provided in alternative formats, such as large print, easy English, or audio.

4 Conclusion

- 4.1 Sexual harassment in the workplace is a pervasive issue that requires collective action. Ending the misuse of NDAs is a crucial step towards treating sexual harassment as both a public policy concern and a workplace safety issue. We strongly endorse the VTHC's submission and acknowledge their efforts in leading advocacy efforts to end the misuse of NDAs. Legal reform should be as strong as possible to ensure that employers do not use NDAs to shirk their obligations to maintain safe workplaces.

- 4.2 Importantly, reform must be victim-centred and intersectional, ensuring that victim-survivors who face compounding forms of disadvantage are empowered to choose how their harassment claims are resolved. We emphasise the need for systems-level change that also considers the unique needs of migrant workers, who face increased precarity and significant power differentials, exposing them to a greater risk of sexual harassment and other abuses in the workplace.

5 Recommendations

Recommendation 1. That the Victorian State Government implement the recommendations of the Victorian Trade Hall Council's (VTHC) submission in full. Those discussed in this submission include:

- Prohibiting NDAs unless expressly requested by the victim-survivor.
- Ensuring NDAs are only enforceable if the victim-survivor had the opportunity to seek independent legal advice.
- Allowing victim-survivors to waive their confidentiality without automatically waiving the employer's obligation to maintain privacy.
- Standardising NDAs to include specific elements like confidentiality waivers and permitted disclosures.

Recommendation 2. Enforceable regulations and guidelines must be published to aid with compliance with the legislation must emphasise the need for a culturally sensitive and intersectional approach to better support the diverse needs of victim-survivors.

Recommendation 3. Victim-survivors should choose their own legal representation but should have the option to have legal costs covered by their employer, especially if they face barriers to accessing legal services. To ensure the independence of the legal advice:

- Employers must contribute to an independent fund to disburse payments for legal advice.
- Legal practitioners must assess and refer victim-survivors to appropriate services for potential issues under other areas of law. Failure to do so can render the NDA voidable.
- Legal practitioners must complete training about the impacts of NDAs, incorporating trauma-informed, culturally sensitive, and intersectional approaches.

Recommendation 4. Incorporate mechanisms to prevent undue influence and/or undue pressure, including a presumption of undue influence in circumstances where employers have significant control over a worker's livelihood or legal status.

Recommendation 5. NDAs should adhere to a prescribed form that requires them to be:

- Drafted in plain English and maintained in a consistent format;
- Made fully comprehensible to victim-survivors through translation and interpreting services, if required; and
- Available in alternative formats such as large print, easy English, or audio.

Recommendation 6. Legal reform must be appropriately resourced to effectively address occupational health and safety issues such as sexual harassment. Training programs must be developed to promote understanding and compliance, incorporate a trauma-informed and culturally appropriate approach, and address sexual harassment and gender-based violence as issues requiring systems-level responses.