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

1. Thank you for the opportunity to provide a submission in response to the *Restricting Non-Disclosure Agreements in Workplace Sexual Harassment Cases Discussion Paper* (**Discussion Paper**). The Young Workers Centre welcomes the Victorian Government's decision to progress legislative reform to restrict the use of non-disclosure agreements (**NDA**s) in workplace harassment cases.
2. It is our strong view that the Victorian Government should adopt the Recommendations set out in the Submission of Victorian Trades Hall Council (**VTHC**), and the positions adopted therein.
3. The YWC seeks, in this submission, to provide you with some additional perspectives unique to young workers, to reinforce the position to restrict the use of NDAs in workplace harassment cases.

*Trigger warning: this submission discusses themes of, as well as specific instances of sexual harassment and sexual assault.*

### **The Young Workers Centre**

4. We're a one-stop-shop for young workers who want to learn more about their rights at work or who need assistance in resolving workplace issues. Our team of lawyers, organisers, educators and researchers seek to empower young people working in Victoria with the knowledge and skills needed to end workplace exploitation and insecurity at work.
5. The Young Workers Centre is an accredited community legal centre in Victoria. We provide free advice and representation to young people, under the age of 30 with employment law issues. We provide personalised advice for young people who have come across issues at work such as unfair dismissal, bullying and harassment.
6. Our vision is a state in which young people are safe at work, do not suffer harassment or bullying, and are provided their legal entitlements. For this vision to be realised, we must encourage young people to speak up without fear and join with other young workers to make change and improve their workplaces and communities.
7. To this end, our education and outreach program is specifically designed to address the issues that young workers face when heading into the workplace for the first time, including a module on "Bullying and discrimination at work". This module gives

students an understanding of what constitutes workplace bullying and discrimination, including sexual harassment. Students gain practical tools for responding to these issues when they arise.

8. We have also represented dozens of young workers in relation to sexual harassment claims. Our level of assistance ranges depending on the needs of the client. Some of those matters include giving one-off, *ad hoc* advice, others include assisting clients through to judgment. We will elaborate on some of those matters throughout this submission.
9. As practising solicitors who exclusively represent workers, we have a unique perspective on the use of NDAs.

### **YWC matters involving sexual harassment**

10. We share just five of our clients' stories. While each of these clients have consented to sharing their story, we are of course prohibited from identifying them on account of the NDA they signed. Accordingly, we have anonymised the worker's name and limited disclosure to the industry within which they operate.
11. Their stories are told throughout this submission.

### **Impact of sexual harassment on young workers**

12. Sexual harassment can have range of damaging impacts on workers. The following are common among YWC clients:
  - a. Feeling degraded, humiliated, destabilised, unsafe, worthlessness;
  - b. Physical symptoms such as sleepless nights, nausea, nightmares, sweating;
  - c. Impacts on mental health including anxiety, depression, eating disorders, post-traumatic stress disorder and suicide ideation and suicide attempts;
  - d. Inaction because of a genuine fear of reprisal action;
  - e. Reprisal action such as further harassment, bullying and termination of employment;
  - f. Experiencing diminished performance at work, including absence from work, withdrawal, often leading to performance management plans, misconduct allegations or termination of employment, which exacerbate feelings of worthlessness and victim-blaming;
  - g. Having no choice but to resign the employment, which leads to financial insecurity, feelings of resentment and injustice, especially when the perpetrator continues employment without consequence;
  - h. Experiencing isolation in the workplace, ostracising behaviours, especially from supervisors and colleagues.
13. In 2021, the Young Workers Centre represented a young worker to judgment of a sexual harassment claim in the Victorian Civil and Administrative Tribunal.<sup>1</sup> We recommend that the Government review closely the evidence given in that hearing, and the findings made by the Tribunal member.

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<sup>1</sup> *ZBL v Olivo (Human Rights) (Corrected)* [2021] VCAT 850.

14. These experiences are exacerbated for a young worker. They are starting in their career, developing skills and experience. They might be in an interim job, they might be starting their careers. Either way, it can make young women see the workplace differently, it can turn them off their careers and make them have to rethink their entire future and career path. This has lifelong consequences, and are with them for the rest of their working lives.
15. The incidence of precarious employment (mainly casual employment) in young workers also limits the freedom to complain about, or attempt to cease the sexual harassment, because of reprisal action. It is not difficult for an employer to simply stop giving an employee shifts.
16. The most troubling part of our clients' experience is that there is an *expectation* that they will be sexually harassed at some point – like it is just part of the job. That is an indictment on our workplaces and society that we would not do everything to change that. A person's quiet enjoyment of work ought not be harmed.

### **There is prevalence of a misuse of NDAs**

17. The YWC echoes the work of Bargon and Featherstone,<sup>2</sup> that NDAs have become "standard" in resolving sexual harassment claims. It is very common in our practice that employers expect that an NDA will necessarily follow an agreement to release the employer from liability.
18. In our experience, some employers can "re-use" the settlement agreement they have obtained from a law firm by simply crossing out the names of the workers. This means that some employers do not consider each matter on a case by case basis, but are resistant to change the settlement agreement because it was "drafted by the lawyers".
19. We also face scenarios where some employers, particularly internal personnel departments, who do not have authority to negotiate different terms of a settlement agreement and refuse to escalate decision-making to someone with authority. This can lead to intractable disputes.
20. The problem with confidentiality conditions is that it means keeping things *secret*. Secrets are where shame lives. The impact of keeping secrets is that victim-survivors live with the shame of what happened to them. They can't shed light on this issue, they cannot talk about the prevalence of sexual harassment, they can't warn others about what might happen to them, they cannot talk through what happened to them to heal and reclaim their life. And our clients have nothing to be ashamed of.
21. In our experience, the inability of employers to conceive the payment of a settlement sum as adequate consideration for a release from liability is a key driver of the misuse of NDAs.

#### Cath's story

Cath was a 20 year old worker in the fast food industry. She experienced months of unwanted sexual comments from her manager. She was employed casually, so did not raise any issues until he sexually assaulted her

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<sup>2</sup> 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

during one shift. She developed anxiety, cried all the time and her relationship was impacted. She eventually raised the complaint internally. Her shifts were immediately cut. She was told not to discuss the matter with anyone, because the employer “did not want anyone to know about the incident”. She followed that direction. She withdrew socially, and developed a distrust in men generally.

The manager was dismissed, but Cath was keen to continue to progress the matter because the manager had told everyone at the store that she had complained, and she was humiliated. Her co-workers bullied her for speaking up.

A few months later, she had left the workplace, but progressed with a legal claim. She wanted it not to happen to anyone else. The matter was settled for an amount under \$20,000. For this, Cath experienced months of sexual harassment, a sexual assault, one-sided confidentiality, bullying and humiliation, and she gave up the right to not just sue the employer, but to make any complaint or participate in any investigation by a government agency, among many other things, and not just in relation to the sexual harassment - “for every entitlement, right or Claim...arising out of the Employment” (that is, she gave up any entitlement to pursue, for instance, a wage theft claim). She was not able to achieve what she wanted - compensation and systemic change at this employer.

In the 8-page deed, more than one page was devoted to confidentiality and non-disparagement. She is prohibited from speaking about the existence of the deed (among other things) to anyone, with very limited exceptions. She can speak to her immediate family (as defined in the FW Act), but only on the condition that they be informed of the need of confidentiality. She cannot speak to her friends, her former partner, or alarmingly, a counsellor or psychologist. She was 20, and these confidentiality conditions are with her her entire life.

22. A lengthy, strict and tightly controlled NDA was unnecessary in Cath’s case. In her case, the workforce already knew of the sexual harassment (despite Cath herself being subject to a direction not to tell anyone). The harasser had been dismissed. Cath’s goal was to ensure that the employer changed its behaviour to ensure this didn’t happen to anyone else. The harasser was out of the workplace, but coworkers and HR were not equipped with bystander reporting, or trauma-informed complaint handling, or victimisation. There is no cogent reason for such a tightly controlled NDA.
23. The YWC recommends restricting the use of NDAs to only when requested by the complainant. There may be circumstances where the worker has disclosed sensitive medical information or does not wish for their most vulnerable moments to be broadcast within an organisation. As the Discussion Paper identifies, evidencing this request may be difficult, but when coupled with the waiver (see below), is the best way to ensure that victims voices are heard.

### **Employer reputation and workers’ silence**

24. YWC’s view is that one of reason employers seek strict NDAs is to protect their own reputation. On one level, that is understandable because many businesses are dependant upon reputation within their community. On another level, it deprives society, government agencies and workers, of the knowledge of the impact of sexual harassment: the circumstances in which it occurs and the impact it has. This has a flow

on effect in that sexual harassment is hidden, and therefore is left to thrive. The YWC adopts the AHRC findings<sup>3</sup> with respect to prevalence of sexual harassment, but observes that collecting this statistic has so far not reduced the incidence of sexual harassment.

#### Dahlia's story

Dahlia was a 15 year old worker at a supermarket. Her immediate supervisor (a man almost three times her age), over the course of two months, touched her, embraced her, massaged her, isolated her from her coworkers, used sexual innuendos and made sexual advances. The matter was settled with Dahlia being paid an amount of money, as well as:

- The employer being completely released from any and all employment claims (including claims unrelated to the sexual harassment);
- If Dahlia tried to bring a claim that was unrelated to the sexual harassment, she would have to pay back the compensation, as well as pay the supermarket all of the loss (including legal fees) in defending the claim;
- Confidentiality from every single person including her family, friends and counsellor (that wasn't associated with legal or financial advice).
- A non-disparagement clause in relation to the entire employment, but also the supermarket in general which is likely to injure the business's commercial reputation - that is, she could not speak about the supermarket in a negative way *at all*. If Dahlia shopped at the supermarket and was dissatisfied with the products, she cannot say so. She could not, for instance, be involved in any price-gouging inquiry that was not contemplated at the time of the deed. The agreement specifically includes a ban on social media.
- An express agreement not to speak to the media not only about the sexual harassment, but about her entire employment, or the supermarket.

25. It is not common for a worker to want to speak with media about their experience. Speaking to friends, colleagues and family, however, can be very important to be able to heal and recover. In Dahlia's case, she can do neither.

26. It must also be said that implied in these positions is that speaking to the media is somehow wrong. It isn't. There are adequate calibrations within the law to prevent inadvertent harm. Australia, including Victoria has some of the strictest defamation laws in the world. The media would not report on something that was false, for fear of a defamation lawsuit. It is therefore challenging for us, that employers would prefer to keep sexual harassment a shameful secret than to take every precaution that it doesn't happen at all - even if this is at the "expense" of its reputation.

27. In attempts to resolve matters in a mutually agreeable way, YWC has attempted to negotiate express agreements not to speak to media, in lieu of an NDA. This has not been successful.

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<sup>3</sup> Australian Human Rights Commission (AHRC), Time for respect: Fifth national survey on sexual harassment in Australian workplaces, November 2022

28. Even in light of the *Respect@Work: Sexual harassment National Inquiry Report (2020)* and the AHRC Guidelines<sup>4</sup> and the VEOHRC Guidelines,<sup>5</sup> this has not shifted employers from refusing to settle without an NDAs.

#### Neesa's story

Neesa was a 21 year old gym instructor. She was casually employed. A client of the gym made several attempts to date her and stalked her at work and outside of work.

Neesa spoke to her manager who told her to "manage it", because the perpetrator was a client. Neesa tried to, but the harassment continued. She raised it with her managers several times, including human resources, but they refused to assist her in managing the perpetrator's behaviour. Ultimately, Neesa resigned because she could not continue working there. She was upset and angered by the way her employer had failed to support her, failed to provide her with a safe workplace and dismissed her concerns as unwarranted.

She lodged a complaint in the Victorian Civil and Administrative Tribunal, and the matter was settled with a deed of release. The employer was represented by legal practitioners. The settlement was finalised in late 2023. The deed of release included a payment of less than \$15,000, an extremely broad release applying not just to the complaint, but also the employment, and as against the employer, "its related bodies corporate, office bearers, employees, agents, [and] successors".

In addition to the release, Neesa cannot making any derogatory, disparaging or defamatory comments about the employer, *in general*. That means that not just she couldn't speak about the sexual harassment and the employer in the same sentence, but she couldn't ever speak adversely about the employer *at all*.

The NDA is extremely strict. It prevents Neesa from speaking to "any person, corporation or other entity" about the discussions leading to the Deed, any aspects of the Deed, and/or the complaint or the Proceedings. The only exceptions are where required by law or for the purpose of obtaining legal or financial advice. She is restricted from speaking to a doctor about what happened to her at all.

29. The YWC therefore recommends restricting the use of NDAs in sexual harassment cases.

### **Risk to third parties and requirement to report**

30. One of the driving reasons for our recommendation to restrict the use of NDAs is that where sexual harassment is secret, it is seen as shameful and puts the blame on victims. Moreover, where the perpetrator remains employed or at the workplace, it creates a risk of harassment recurring, putting other workers at risk. Mostly, victim-survivors don't want what happened to them, to happen to anyone else.

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<sup>4</sup> Australian Human Rights Commission, *Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints*, 2022

<sup>5</sup> Victorian Equal Opportunity and Human Rights Commission, *Guideline: Preventing and responding to workplace sexual harassment - Complying with the Equal Opportunity Act 2010*, August 2020



### Willow's story

Willow was a 25 year old consultant. She worked in a small firm and was sexually harassed by her boss, the director of the firm, after a staff party. The dispute resulted in a deed of release.

It included an agreement for the employer to pay (an amount less than \$50,000) and to attend sexual harassment training, and for the employer to implement policies and procedures to comply with its positive duty obligation in the Equal Opportunity Act. Willow's employment was terminated, and she agreed to release the employer and the director from any liability and agreed not to sue them. The deed also included a confidentiality and non-disparagement clause which applied to the sexual harassment and the terms of the deed. The confidentiality clause included an exception for Willow to speak with medical practitioners and to immediate family, but only on the "condition that the person must have expressly agreed to not disclose such information to any other person".

31. One of the greatest risks of sexual harassment recurring is where the perpetrator remains at the workplace. This can sometimes happen when an employer does not substantiate allegations against them, or the business finds it preferable (usually financially preferable to it) to keep the perpetrator at work. Or, like in Willow's case, the employer and the perpetrator are the same. Willow was forced out of a job that she was good at and enjoyed doing, but the employer and the perpetrator remain. Willow's ability to insist upon training and a review of policies was remarkable and staunch. But there is no way to stop the perpetrator from harassing another young worker that he hires.
32. The YWC recommends that the legislation includes a requirement to report on the use of NDAs. YWC recommends that where an employer agrees to an NDA, it must report to either WorkSafe or the Victorian Equal Opportunity and Human Rights Commission. Reporting periods could be flexible, but no less than once per year. YWC recommends either government agency being required to identify which employers have signed NDAs. The agency could then consider the frequency of NDAs and determine whether to investigate the workplace to discover what systemic issues might be identified and rectified at that workplace.
33. In addition to a positive obligation to report the use of NDAs, YWC recommends that the Victorian Government could implement other ways to monitor the use of NDAs. For example, in order to tender for government work (e.g. building and construction, legal work), as well as in issuing licenses (such as liquor licensing) or to register to employ apprentices.

### **Independent legal advice**

34. YWC recommends all workers being *required* to seek advice from legal representatives before signing any legal document. Most workers will not be legally represented.
35. In our experience, many settlement agreements contain a clause that effectively, the parties have all had the opportunity to obtain legal advice. Without a *requirement* (as opposed to an *offer or opportunity*) for workers to obtain advice, they are not making an informed decision before signing the settlement agreement.

36. For instance, it would be easy for an employer to present a settlement agreement which includes a release and bar against all employment claims, but the worker does not realise this would include matters unrelated to sexual harassment, for example, wage theft.
37. It is also important for workers to be fully informed about what NDA (if any) they are agreeing to. It can be quite alarming to our clients when we inform them the proposed settlement agreements means they cannot speak to their parents about what happened.
38. As a community legal centre, it is our recommendation that CLC's are best placed, subject to funding from the Victorian Government, to provide that advice, whether it be one-off discrete advice or be engaged to negotiate a settlement agreement. CLC's guarantee independence. But who the worker seeks advice from should be a matter for them. If they would prefer to receive advice from their union, or a private law firm, then they should be able to do that.

### **Undue pressure or influence, permitted disclosures, cooling off, time limits and waiver**

39. In YWC experience, we are often witness to the power imbalance between employee and employer. This power imbalance is always exacerbated when the worker is in distress, emotionally vulnerable and stressed about their safety and their future. The pressure felt by workers can also be compounded if they have lodged a claim in a court or tribunal. YWC has some cases open where the sexual harassment occurred in 2021 and are still only at the mediation phase in VCAT. The extended timeframes of litigation can contribute to a worker simply agreeing to an NDA to finalise the process.
40. The Young Workers Centre recommends that the ability to waive an NDA is the most important aspect of the proposed legislation. Having a waiver means that the scheme need not contemplate evidence of the absence of pressure or influence, or cooling off periods or times limits. It means that the decision to speak about what happened to them is entirely the victim-survivors'.
41. The Young Workers Centre recommends that the waiver be exercised by simply sending a notice to the employer at its registered address or place of business.
42. The Young Workers Centre also recommends specifying permitted disclosures to third parties. While the list included in the discussion paper is a helpful start, the Young Workers Centre recommends ensuring that medical and mental health professionals include counsellors, social workers and physiotherapist/osteopaths. Many young people cannot afford to attend a GP or psychologist and need to seek help through free services, and they should also be a permitted disclosure.

### **Summary and recommendations**

43. The Young Workers Centre makes the following recommendations:
  - a. That the Victorian Government adopt the Recommendations of the Victorian Trades Hall Council submissions;
  - b. That NDAs are restricted except in the case of when requested by the complainant;



- c. That the Victorian Government require employers to report on the use of NDAs;
- d. That the Victorian Government implement ways to monitor the use of NDAs through other government measures;
- e. That all workers are required to seek advice from legal representatives before signing an NDA;
- f. That the scheme includes an unlimited ability to waive any NDA, at any time
- g. That there be an identified list of permissible third party disclosures.

Young Workers Centre