6 September 2024

Industrial Relations Victoria
Department of Treasury and Finance
1 Treasury Place
Melbourne VIC 3002

Dear Colleagues

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

The Justice and Equity Centre ('JEC'), formerly the Public Interest Advocacy Centre, welcomes the opportunity to make this submission to the Discussion Paper on Restricting Non-Disclosure Agreements in Workplace Sexual Harassment Cases ('Discussion Paper').

The JEC is a leading social justice law and policy centre. Our work focuses on tackling systemic barriers to justice and fairness experienced by marginalised communities. We work with clients from a diverse range of backgrounds, including Aboriginal and Torres Strait Islander people, people with disability, young people, people from culturally and linguistically diverse backgrounds and people who have experienced trauma.

We have significant experience in discrimination and human rights matters in the Australian Human Rights Commission ('AHRC') and in the Federal Court of Australia. In particular, we have experience representing people with disability in securing equal access to services such as education, public transport, digital and emerging technologies and housing, across a range of Australian jurisdictions.

We also have a long history of involvement in public policy development and advocacy promoting the rights and equal participation of people with disability, working in consultation with disability advocates and representative organisations. We bring this expertise to law reform processes in order to modernise and strengthen legal frameworks for non-discrimination and human rights protection.

Through our work, we have seen the prevalence and overreliance on non-disclosure agreements ('NDAs') by respondents in settlements of disability discrimination matters, and the impact of NDAs on access to justice outcomes for people with disability.

We are pleased to see the Victorian Government take steps to address the overuse of NDAs in workplace sexual harassment cases. We highlight in this submission how similar concerns about the impacts of NDAs apply to other cases of discrimination. In our view, law reform in

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this area presents an opportunity to address the use of NDAs in all types of discrimination under the *Equal Opportunity Act 2010 Act* (Vic) ('Equal Opportunity Act').

Use of NDAs in discrimination cases

In our experience, NDAs are a standard term of agreements to resolve disability discrimination matters. In addition to the terms of the settlement agreement being required to remain confidential, including the fact of financial and non-financial outcomes for our clients, respondents have also attempted or succeeded in requiring our clients to keep confidential and/or not say anything disparaging in relation to:

- the complainant's personal circumstances related to the discrimination;
- the facts and circumstances leading to discrimination, including the respondent's policy or practice whether systemic or not;
- the steps taken by the complainant to complain about the alleged discrimination, such as any complaint made directly to the respondent, the specifics of a complaint to a human rights body, and any documents filed to pursue the complaint in a federal court;
- the complainant's suggestions for reforms to address the respondent's systemic policy or practice;
- the impact of the discrimination on the complainant; and
- the fact of coming to a settlement agreement.

Our clients oppose these confidentiality obligations, but respondents have often resisted; typically advising that an NDA in some form is non-negotiable. The respondent's insistence on an NDA stifles negotiations. As the Discussion Paper recognises, our clients in disability discrimination matters face a significant power imbalance pursuing complaints against well-resourced government or corporate actors. Because of the power imbalance, as well as the resources and risk of continuing litigation, our clients have felt compelled to agree to NDAs.

Our clients make complaints with a view to achieving an outcome to address a systemic issue. NDAs can serve to intimidate and silence our clients, limiting or preventing their advocacy to change the systemic discriminatory practice the subject of their complaint. If a settlement includes systemic outcomes such as changes to an organisation's policy or procedure and a respondent fails to fulfil its obligations, NDAs can prevent the complainant from publicly holding the respondent to account. This may mean the complainant's only recourse is to enforce the settlement agreement in court, which is stressful, time-consuming, costly and financially risky. Additionally, because of the NDA, any systemic outcomes or improvements agreed to in the settlement agreement cannot be disclosed to or used by other potential complainants who might benefit from those outcomes. As the Discussion Paper recognises, research from the UK found that NDAs effectively cover up unlawful discrimination and

harassment, allowing organisational culture or discriminatory practices to continue unchallenged.[1]

For many of our clients, confidentiality obligations arising from NDAs have not only stifled their advocacy on systemic issues relating to their complaint, but there is also an ongoing concern about breaching confidentiality obligations in perpetuity. As has been said '[t]he fear of breaching an NDA is real, regardless of whether the respondent would pursue remedies for a breach.'[2]

We are pleased to see the Victorian Government take steps to address recommendations of both the AHRC's landmark Respect@Work: Sexual Harassment National Inquiry Report ('Respect@Work Report') and the Ministerial Taskforce on Workplace Sexual Harassment ('Taskforce'); that NDAs are often misused to silence victims, protect reputations, avoid liability and hide repeat offending.[3] The same can be said for settlement of other types of discrimination complaints.

Question 1: A Victorian framework should prohibit NDAs unless requested by the complainant

We welcome legislative reforms to restrict NDAs in the context of sexual harassment and assault in the workplace, and stand with the voices and lived experiences of victim-survivors of sexual violence, and the organisations and individual advocates that have tirelessly campaigned for reform in this space.

We also acknowledge an NDA may align with the preferences of a complainant for a number of reasons, including anonymity and privacy. Therefore, in our view, the legislative reforms must take a complainant-centric approach, ie the inclusion of an NDA in a settlement agreement should be at the complainant's discretion and choice. Additionally, any proposed reforms must recognise individuality and choice of complainants as to the terms of the NDA – including carve-outs enabling disclosure by the parties, clauses defining the duration of the NDA and the complainant's ability to waive confidentiality at any time.

The Victorian Government should also establish a compliance and enforcement regime to support the legislative framework and ensure the efficacy of the reforms.

We recognise the Discussion Paper sought views to inform potential reform on the use of NDAs in workplace sexual harassment cases specifically. We also acknowledge the Taskforce was set up in response to the Respect@Work Report to 'develop reforms that will

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1 Industrial Relations Victoria, *Restricting Non-Disclosure Agreements in Workplace Sexual Harassment Cases* (Discussion Paper, 12 August 2024) 7 ('Discussion Paper').

2 Regina Featherstone and Sharmilla Bargon, *Let's talk about confidentiality: NDA use in sexual harassment settlements since the Respect@ Work Report* (Report, 6 March 2024) 48.

3 Discussion Paper (n 1) 5.

better prevent and respond to sexual harassment in workplaces,'[4] and specifically recommended amendments in the context of workplace sexual harassment and assault.

However, in our view, introducing legislative reform to restrict NDAs in workplace sexual harassment cases in Victoria presents an opportunity to extend the restrictions to all types of discrimination and areas of public life under the Equal Opportunity Act.

The Equal Opportunity Act and the case for restricting NDA use broadly

The Equal Opportunity Act prohibits sexual harassment and is the governing legislation for a complaint of sexual harassment in Victoria.

The Equal Opportunity Act is also Victoria's governing anti-discrimination legislation, setting out 21 attributes protected from discrimination, including sex, race, disability, age, gender identity, and sexual orientation ('Attributes'). It makes discrimination based on the Attributes unlawful in various areas of public life; being employment[5] and employment-related areas,[6] education,[7] the provision of goods and services,[8] accommodation,[9] by clubs and club members,[10] and in sport.[11] Not only is sexual harassment and discrimination prohibited in areas of public life, but the Equal Opportunity Act also imposes a positive duty on anyone with responsibilities under the Act to eliminate discrimination, sexual harassment or victimisation in these contexts.[12]

As the Discussion Paper explains, workplace sexual harassment is prevalent in Australia. The Discussion Paper reiterated the findings of the AHRC's 2022 National Survey on sexual harassment in Australian workplaces ('AHRC National Survey') that one in three workers have been sexually harassed at work in the last five years, with women experiencing sexual harassment at work more than men.[13] It further confirmed that certain communities experience sexual harassment at work at even greater rates, including people who identify as gay, lesbian, bisexual, pansexual, queer, asexual, aromantic, undecided, not sure, questioning or other, people with intersex variations, people with disability and Aboriginal and Torres Strait Islander people.[14]

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4 Victorian Government, 'Ministerial Taskforce on Workplace Sexual Harassment' (Webpage, 11 July 2022) <https://www.vic.gov.au/ministerial-taskforce-workplace-sexual-harassment>.
5 *Equal Opportunity Act 2010* (Vic) Part 4, Division 1.
6 Ibid Part 4, Division 2.
7 Ibid Part 4, Division 3.
8 Ibid Part 4, Division 4.
9 Ibid Part 4, Division 5.
10 Ibid Part 4, Division 6.
11 Ibid Part 4, Division 7.
12 Ibid ss 14, 15.
13 Australian Human Rights Commission, *Time for respect: Fifth national survey on sexual harassment in Australian workplaces*, (Report, 30 November 2022) 12, 48.
14 Ibid 39-42.

People with multiple of these identities or characteristics experience sexual harassment at greater rates than the general population, but also face further discrimination. The Australian Institute of Health and Welfare estimates that one in six people with a disability aged 15-64 have experienced disability discrimination in the past year.[15] In 2022-23, disability discrimination complaints under the *Disability Discrimination Act 1992* (Cth) made up 46% of all complaints received by the AHRC.[16]

When examined alongside the AHRC's National Survey data, people with disability are experiencing high rates of both disability discrimination, and sexual harassment, in the workplace and other areas of public life. At times, there may be multiple grounds of discrimination in a single instance as evidenced by the AHRC's data. In 2022-23, the AHRC received 2,562 individual complaints containing 5,569 grounds of discrimination under the federal discrimination frameworks,[17] meaning on average complaints had at least two grounds of discrimination each.

This data demonstrates a significant and overlapping nexus between identities that experience discrimination and sexual harassment. In other words, it would be entirely plausible a complainant could complain of sexual harassment and discrimination on any of the 21 Attributes under the Equal Opportunity Act in an individual complaint.

Reforms that address misuse of NDAs must recognise these intersecting experiences. Under the proposed reforms, a person complaining of both sexual harassment and, for example, racial or disability discrimination in an individual complaint under the Equal Opportunity Act, would only have the benefit of restricted NDA use in relation to their sexual harassment complaint. This complainant could then still be bound by oppressive NDA and non-disparagement terms in relation to their non-sexual harassment complaint.

It would therefore be appropriate for legislative reforms restricting NDAs in sexual harassment cases, to also apply to the settlement of complaints relating to any Attribute under the Equal Opportunity Act. This approach aligns with the broader restriction seen in Ireland's Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021. An even broader application is provided for in Prince Edward Island's *Non-disclosure Agreements Act 2021* ('PEI NDA Act')[18] and Ontario Bill No. 124, Stopping the Misuse of Non-Disclosure Agreements Act 2023 ('Ontario Bill'),[19] where restrictions on NDAs extend to all forms of harassment or discrimination protected by their respective human rights and anti-

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15 Australian Institute of Health and Welfare, 'Disability discrimination' *People with disability in Australia* (Web Page, 23 April 2024) <https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/contents/justice-and-safety/disability-discrimination>.

16 Australian Human Rights Commission, *Complaint Statistics 2022-23* (Data, 6 November 2023) 11.

17 Ibid 9.

18 Non-disclosure Agreements Act, RPEI 1988, c N-3.02. cl 1(e) definition of 'party responsible', 4(1) ('PEI NDA Act').

19 Stopping the Misuse of Non-Disclosure Agreements Act, O 2023, cl 5 ('Ontario Bill').

discrimination legislation. Specifically, in those Canadian provinces, NDA restrictions apply in circumstances where 'a person who has an obligation in law to take reasonable steps to prevent harassment and discrimination in the place where the harassment or discrimination occurred or is alleged to have occurred'.[20] This 'obligation in law' is comparable to the positive duty in the Equal Opportunity Act and would support legislative reforms to restrict NDAs more broadly in Victoria ie in any of the specified areas of public life.

In our view, Victoria's existing anti-discrimination and harassment framework can be used by the Government to introduce legislative reforms that would apply to a broader group of people and contexts that are subject to the misuse of NDAs.

This approach would also align with domestic and international human rights frameworks. The *Charter of Human Rights and Responsibilities Act 2006* (Vic) imposes obligations on public authorities to act compatibly with human rights, including the right to recognition and equality before the law; to enjoy human rights without discrimination and the right to equal and effective protection against discrimination.[21] Article 5 of the United Nations Convention on the Rights of Persons with Disabilities underpins the rights of people with disability to live without discrimination.

Question 4: The Victorian framework should include a requirement that a complainant is offered independent legal advice prior to entering an NDA

We agree with the best practice approaches adopted in Ireland, Prince Edward Island and Ontario that restricts NDA use only where a complainant has obtained independent legal advice and there has been no undue influence by the other parties. For the complainant to make an informed choice about the inclusion of an NDA, they must have access to independent legal advice.

The strict confidentiality regimes imposed on our clients in settling disability discrimination matters (as referred to above), comprised complex and intricate clauses. Representing people with disability in the context of complaints against powerful and well-resourced respondents, legal advice was even more pertinent to our client's understanding of their confidentiality obligations. Additionally, our legal expertise was relevant and necessary to negotiate (where possible) with the respondent about the terms of the proposed NDAs.

Question 33: NDA restrictions should also extend to non-disparagement clauses

The JEC submits that any framework to restrict NDAs should also include non-disparagement clauses. Where we have represented clients in settling their disability discrimination matters, non-disparagement clauses have also been a standard term, with a similar effect of silencing our clients, and limiting or preventing their systemic advocacy. As the Discussion Paper

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20 PEI NDA Act (n 18) cl 1(e) definition of 'party responsible', 4(1). See also, Ontario Bill (n 19) cl 5.

21 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 1(2)(c), 4(1), 8(2), (3).

recognises, if non-disparagement clauses are not covered by NDA restrictions, it may create a loophole where confidentiality can still be obtained.[22]

Including non-disparagement clauses within the meaning of an NDA, would also align with international approaches in Ireland,[23] Prince Edward Island,[24] Ontario,[25] federally in the US,[26] and in the state of California.[27]

Please do not hesitate to contact me if you would like to discuss any of the matters raised in our submission.

Yours sincerely

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22 Discussion Paper (n 1) 20.
23 Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021 (Ireland) cl 2(12).
24 *PEI NDA Act* (n 18) cl 4(9).
25 *Ontario Bill* (n 19) cl 5.
26 *Speak Out Act*, 42 USC § 19401(4)(1) (2022).
27 *Settlement and non-disparagement agreements Act* 638 Cal Gov Code § 12964.5, 2 (2021).