Reviewing Non-Disclosure Agreements in Workplace Sexual Harassment Matters

Discussion Paper



Government of South Australia
Attorney-General's Department

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The Attorney-General's Department acknowledges Aboriginal people's ongoing connection to the land and waters of South Australia. We recognise the importance of Country to Aboriginal identity, community and wellbeing. We pay our respects to Elders, past and present, and recognise the key role they play in caring for Country, community and culture.

A message from the Attorney-General

Tackling sexual harassment and ensuring that victims have a voice is a paramount concern for the South Australian Government. That is why the Government committed to consulting on legislation to regulate the use of non-disclosure agreements (NDAs) in workplace sexual harassment cases.

NDAs are commonly used by employers to resolve disputes about alleged sexual harassment in the workplace, however, there has been growing scrutiny of this practice where in some cases, it can contribute to a culture of silence and enable perpetrators to avoid accountability for their actions.

We have seen, through high-profile examples such as the Harvey Weinstein case at the centre of the #MeToo movement, how NDAs can silence victims of workplace sexual harassment and enable repeat offending by preventing allegations from coming to light. While NDAs can serve an important role to help resolve legal disputes and to give victims closure, when they are misused, they can be incredibly harmful and cause continued distress long after the alleged harassment has taken place.

This Discussion Paper provides an overview of options to reduce the possibility for NDAs being misused, and to ensure that any use of NDAs is regulated so that they are only ever entered into in appropriate circumstances and where all parties are fully aware of what they are agreeing to.

Any South Australian who has had experience in this area is strongly encouraged to review the Discussion Paper and have their say on potential reforms to the way NDAs operate.



Hon Kyam Maher MLC

Deputy Premier
Attorney-General
Minister for Industrial Relations

Content warning

This discussion paper discusses sexual harassment, including sexual assault. Some readers may find this disturbing or distressing.

Should this paper cause you distress, the following services are available.

If you are experiencing sexual harassment, the following supports are also available.

If you require immediate assistance:

- Call South Australia Police on 000
- Call Lifeline Crisis Support on 13 11 14
- Call 1800RESPECT (national domestic family and sexual violence counselling service) on 1800 737 732

If you have experienced sexual harassment in the workplace you can report the incident. There are a range of options available to you. These may include:

- Speaking with your manager or human resources department
- Visting your local police station
- Contacting the Legal Services Commission (LSC). LSC has a Sexual Violence Legal Service which can be contacted on 1300 366 424
- Calling the Yarrow Place Rape and Sexual Assault Service on 1800 817 421
- Contacting the Australian Human Rights Commission on 1300 656 419
- Contacting Equal Opportunity SA (EOSA) on 7322 7070 or email Equal@sa.gov.au
- Contacting the Fair Work Ombudsman on 13 13 94
- Contacting the Fair Work Commission on 1300 799 675

Reform Overview

Addressing workplace sexual harassment is a priority for the South Australian Government. The Government has made a commitment to consult on legislation to regulate the use of non-disclosure agreements (NDAs) in workplace sexual harassment cases.

This discussion paper sets out a number of key questions the South Australian Government will consider in approaching this reform, and is intended to encourage the community to provide comment and information in response to these questions.

The Government considers there are two key policy priorities:

- To give victims of workplace sexual harassment greater agency over when NDAs are used in the resolution of disputes and the circumstances in which those restraints apply. The current entrenched use of NDAs may be disempowering to victims and result in perpetrators[1] that have committed sexual harassment in the workplace avoiding accountability for their actions, which enables the perpetuation of this misconduct.

- To ensure that reforms are not so inflexible that they effectively prevent complainants,[2] who genuinely wish to use an NDA to reach a settlement of a workplace sexual harassment matter. Overly restrictive reforms may be disempowering to complainants and result in complainants facing a litigation pathway they would wish to avoid.

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1 The discussion paper uses 'perpetrator' to describe the individual who has committed, or is alleged to have committed, workplace sexual harassment.

2 The discussion paper uses the term 'complainant' to describe an individual who has made a complaint about sexual harassment in the workplace. However, it is acknowledged that the term 'complainant' may not capture all people who have experienced sexual harassment in the workplace.

How to make a submission

Submissions in response to this discussion paper can be made until 17 December 2026. Individuals and organisations can make a submission (confidentially if desired) by email to LLPsubmissions@sa.gov.au.

Submissions and confidentiality

Please be aware that, unless a request for confidentiality is made, information contained in any submission may be referred to publicly or published. Any material identified as 'confidential' is still subject to the *Freedom of Information Act 1991* (SA) and, while efforts will be made to keep the material confidential, in some circumstances it may be disclosed under that Act.

Where disclosure of information may identify you attempts will be made to consult with you under the *Freedom of Information Act 1991* (SA) before the documents are disclosed.

Next steps

The Government will carefully consider all submissions provided in response to this discussion paper when determining an appropriate form of draft legislation for further public consultation, prior to introduction to Parliament.

Reform context

Workplace sexual harassment

Sexual harassment is any unwelcome conduct of a sexual nature, where it is reasonable to expect that the other person would be offended, afraid or humiliated.[3]

Sexual harassment can include:[4]

- commenting on a person's appearance
- unwelcome touching or kissing
- staring or leering
- sexual pictures, objects, emails, text messages or literature
- propositions (whether direct or implied) or requests for dates
- asking about a person's sexual activities or sexual history.

Sexual harassment can occur any time a person is undertaking a work-related activity. For example, it can occur:[5]

- in the normal place of work, such as the office
- when attending appointments or meetings at another workplace
- during corporate and social events
- during travel for work.

Although the exact prevalence of sexual harassment in the workplace is unclear, evidence suggests it is a significant problem. The Australian Human Rights Commission (AHRC) administered the 2022 National Survey on sexual harassment in Australian workplaces which found that 19% of workers have been sexually harassed at work in the past 12 months, while 33% had been harassed at work in the past five years.[6] This included sexual harassment that was experienced at work, a work-related event or while searching for work.[7]

More women than men experience workplace sexual harassment. The AHRC found that 41% of women in comparison to 26% of men had been sexually harassed at work in the past five years.[8]

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3 Equal Opportunity SA, *Sexual Harassment* (Web page) <https://www.equalopportunity.sa.gov.au/discrimination/types-of-discrimination/sexual-harassment>.

4 Ibid.

5 Ibid.

6 Australian Human Rights Commission, *Time for Respect: Fifth National Survey on Sexual Harassment in Australian Workplaces* (Report, November 2022) 47 <https://humanrights.gov.au/__data/assets/file/0026/46817/2022.11.25_time_for_respect_2022_final_digital.pdf>.

7 Ibid 48.

8 Ibid.

The Australian Bureau of Statistics (ABS) reported that 320,200 women in the 2021–22 financial year experienced sexual harassment at work.[9]

The impacts on those who experience workplace sexual harassment are significant. Two-thirds (67%) of the respondents of the 2022 National Survey of the AHRC who had experienced workplace sexual harassment reported experiencing negative mental health impacts.[10] This was higher for women (71%) than men (59%). Other common effects of workplace sexual harassment the AHRC identified included a negative impact on self-esteem and confidence, decreased commitment to the organisation and decreased job satisfaction.[11]

9 Australian Bureau of Statistics, *Sexual Harassment* (Web page, 23 August 2023) <https://www.abs.gov.au/statistics/people/crime-and-justice/sexual-harassment/2021-22>.

10 Australian Human Rights Commission (n 6) 97–8.

11 Ibid 98.

What are non-disclosure agreements (NDAs)?

Complaints of workplace sexual harassment are often settled out of court.

When parties settle such complaints, they often do so by using a settlement agreement or a deed of release that sets out the terms of the settlement.

These agreements release the respondent(s) from liability of the conduct the subject of the workplace sexual harassment complaint. In return, the complainants receive some kind of 'benefit'. Typically, this is the payment of a financial sum and/or receiving an apology from the perpetrator. The terms of the settlement can also include 'non-disparagement clauses'. These are terms of the agreement that prohibit any or all of the parties (which can include the complainant) from making negative comments about each other in the future.

As part of the settlement of the workplace sexual harassment complaint, the parties may also sign an NDA. An NDA is an agreement that requires one or more of the parties to the agreement to keep certain information confidential. The complainant, employer and perpetrator can all be parties to the NDA. The details that the NDA may require to be kept confidential include:

- information that may reveal the identity of the perpetrator and/or complainant
- the details of the complaint
- the circumstances leading up to the complainant making the complaint.

Although it is not mandatory to have an NDA, they are extremely common in the settlement of workplace sexual harassment complaints to the extent they are considered a standard term. A survey of 145 sexual harassment lawyers across Australia found that:[12]

- around 75% of respondents had *never* resolved a sexual harassment complaint without a 'strict'[13] NDA
- many of the respondents considered NDAs to be standard.

There is growing attention to the widespread use of NDAs in the settlement of workplace sexual harassment cases.

NDAs can sometimes help to finalise workplace sexual harassment matters. They may also provide complainants with closure.

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[12] 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) 1 <https://rlc.org.au/sites/default/files/2024-04/Let%27s%20talk%20about%20confidentiality_24%20April%202024.pdf>.

[13] A strict NDA was defined to mean 'confidentiality and non-disparagement obligations that are not time capped and allows for only disclosures at law (e.g. financial advisers)': ibid 28.

Having the ability to settle matters out of court would be important for complainants for various reasons. This includes balancing the complainant's own personal circumstances and wellbeing against the inherent stresses of litigation. Additionally, due to the quality and availability of the evidence, some workplace sexual harassment cases have stronger prospects of success in court than others, such that an out-of-court settlement, in some cases, may be in the interests of complainants.

However, NDAs can also be used to shield perpetrators from accountability, inhibit workplace learning and leave victims silenced and disempowered. These negative consequences can perpetuate sexual harassment and violence and contribute to the underreporting of such conduct in the workplace.

The existence of these concerns emphasises the need to have laws that aim to prevent the misuse of NDAs.

NDA reforms in Australia

In Australia, the use of NDAs in workplace sexual harassment cases has traditionally been addressed in guidelines rather than legislation.

One example of such guidelines is the *Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints* which the AHRC released in 2022.[14] The AHRC's Guidelines recommend an approach that can be adopted to guide the use of confidentiality clauses in settlement agreements. This approach includes considering if a confidentiality clause is needed on a case-by-case basis, limiting the duration and scope of the confidentiality clause as much as possible, and drafting the confidentiality clauses in a clear, fair and plain English manner.[15]

In 2025 Victoria became the first jurisdiction in Australia to pass laws that restrict the use of NDAs in workplace sexual harassment matters. Victoria introduced the *Restricting Non-disclosure Agreements (Sexual Harassment at Work) Act 2025* (Vic) (the Victorian Act) which commenced operation on 1 July 2026. The Victorian Act sets out various requirements that must be met before an NDA can be entered into. If any one of these requirements is not met, then an NDA is not 'enforceable' (i.e. it is not legal) against the complainant. In these circumstances, the NDA cannot prevent a complainant from disclosing details about the conduct constituting the workplace sexual harassment.

[14] Australian Human Rights Commission, *Respect@Work: Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints* (2022) <https://humanrights.gov.au/__data/assets/file/0023/47345/Guidelines-Use-of-Confidentiality-Clauses-Resolution-Workplace-Sexual-Harassment-Complaints.pdf>.

[15] Ibid 9.

International examples

Several jurisdictions overseas have also introduced reforms to restrict the use of NDAs. These reforms have attempted to move away from a strict NDA being a standard part of the settlement. Some examples are provided below.

Canada

The province of Prince Edward Island has introduced laws to restrict the use of NDAs.[16] These laws apply in harassment and discrimination cases (not only workplace sexual harassment matters) where an NDA is sought. An NDA can only be entered into if certain requirements are met. The NDA must also provide complainants with an opportunity to decide to waive their own confidentiality in the future and the agreement must be of a set and limited duration.

In Ontario laws passed in 2022 limit the use of confidentiality agreements in sexual misconduct matters within higher education institutions.[17]

Ireland

In Ireland, laws that commenced in 2024 generally make an NDA null and void (i.e. not legal) if the agreement attempts to prevent a worker from disclosing allegations of discrimination, harassment, sexual harassment or victimisation.[18] However, there are some exceptions that exist. These exceptions include where an NDA meets all of the following requirements:

- the complainant requested the employer to enter into an NDA
- prior to entering into the NDA, the complainant received independent legal advice[19]
- the NDA is written in clear language that is easily understood and in a format that is easily accessible
- the complainant has a right to withdraw from the NDA after a certain period of time
- the NDA does not prohibit the complainant from making certain permissible disclosures to certain persons.

The NDA must also be of an 'unlimited duration' other than where the complainant elects otherwise.

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16 *Non-Disclosure Agreements Act 2021* (PEI).

17 *Strengthening Post-secondary Institutions and Students Act*, 2022, S.O. 2022, c 22.

18 *Maternity Protection, Employment Equality and Preservation of Certain Records Act 2024* s 5.

19 The employer must pay for the reasonable legal costs and expenses of the legal practitioner who provided the advice to the complainant.

United Kingdom

In 2023 reforms were passed in the United Kingdom (UK) that prohibited higher education providers from using NDAs that prohibit the publication or disclosure of complaints involving bullying or harassment, including sexual abuse, sexual harassment or sexual misconduct.[20] The prohibition on the use of NDAs applies to staff, students, members of the providers and visiting speakers. If such an NDA is entered into, it will be void.

Although reforms are yet to be introduced, the UK Government completed a consultation process in July 2026 on regulations aimed to prevent the misuse of NDAs in harassment or discrimination matters in the workplace.[21]

United States

Several States in the US have introduced laws to regulate NDAs in response to the #MeToo Movement. This includes California. In 2018, California passed the *Stand Together Against Non-Disclosures Act* (STAND Act). The STAND Act prohibits NDAs that prevent the disclosure of factual information that relates to specified claims, including sexual assault and harassment. In 2021, California passed the *Silenced No More Act* which expanded on the STAND Act. In particular, the *Silenced No More Act* places restrictions on the use of confidentiality and non-disclosure provisions that prevent complainants from speaking about workplace harassment, retaliation and harassment.

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20 *Higher Education (Freedom of Speech) Act 2023* (UK).

21 UK Government, *Make Work Pay: Non-Disclosure Agreements (NDAs)* (Consultation on regulations to prevent the misuse of NDAs in cases of workplace harassment or discrimination) (15 April 2026) <https://assets.publishing.service.gov.uk/media/69de4a68b0b0b93055e04f7e/make-work-pay-consultation-on-misuse-of-ndas.pdf>.

Key issues to be addressed

The South Australian Government is considering introducing legislative reforms that restrict the use of NDAs in workplace sexual harassment matters. This part of the discussion paper outlines **five key issues** to be resolved to inform the drafting of the South Australian legislation.

1. Disclosures that are permissible despite an NDA

Allowing complainants to be able to disclose certain information about the workplace sexual harassment, despite the presence of an NDA, can enable complainants to receive appropriate assistance and support where required and mitigate adverse consequences of an NDA while preserving the settlement of proceedings.

Reforms in other jurisdictions permit disclosures to be made to specified persons and bodies in some circumstances. The purpose of enabling these disclosures is to allow complainants to seek professional and personal support in relation to the workplace sexual harassment.

Victoria distinguishes between 'material information' and 'protected information' both of which can be disclosed by a complainant in certain circumstances.

- *Material information* is defined to mean the identity of the perpetrator and any details about the conduct constituting the workplace sexual harassment. The Victorian Act provides a long list of persons and organisations who can receive material information, despite the presence of an NDA. This list includes Victoria Police, a family member or friend who has agreed to keep the information confidential (for the purpose of obtaining personal support), a lawyer (for the purposes of obtaining legal advice), a registered medical practitioner (for the purpose of receiving medical treatment), and a mental health and wellbeing professional (for the purpose of obtaining mental health support).

- *Protected information* means the amount of the financial compensation payable to the complainant in relation to the workplace sexual harassment and the identity of the perpetrator (if the perpetrator was under 18 years at the time of the sexual harassment). A complainant is allowed to disclose the amount of the financial compensation received to Centrelink, a financial advisor (for the purpose of obtaining financial advice) and a tax agent (for the purpose of receiving tax advice).

Examples also exist internationally in relation to disclosures that are permitted despite the presence of an NDA.

- In **Prince Edward Island (Canada)** NDAs cannot prevent communication relating to the harassment or discrimination between the complainant and a medical practitioner, psychologist, registered nurse, social worker, friend, family member or personal supporter as approved or specified in the NDA.

- **Ireland** has similar provisions that an NDA cannot prohibit a complainant from making a disclosure to certain persons acting in the course of their duties (such as a lawyer,

registered medical practitioner, mental health professional and union officer) and other persons who are specified in the NDA.

Considerations for South Australian reforms

If the approach taken in other jurisdictions were followed in South Australia, then complainants would not be prevented from disclosing details about the workplace sexual harassment to certain people and organisations if the disclosure is for the purpose of the complainants receiving personal or professional support.

In the South Australian context, some persons and organisations who could receive permitted disclosures may include:

- family members, friends and support persons (who are required to keep the information confidential)
- lawyers (for the purpose of receiving legal advice)
- medical and mental health professionals (for the purpose of receiving medical or mental health support or treatment)
- union officials (for the purpose of obtaining assistance or advice regarding the workplace sexual harassment)
- prospective employers (for the purpose of the complainant obtaining work)
- ministers of religion (for the purpose of obtaining religious guidance and support)
- tax agent and financial advisor (for the purpose of receiving tax or financial advice)
- South Australia Police
- Office of the Director of Public Prosecutions
- Equal Opportunity SA and Australian Human Rights Commission
- Fair Work Ombudsman
- Centrelink
- any other person or organisation as agreed to in the NDA by the parties.

Further consideration is required in relation to the appropriate list of disclosures in the South Australian context and any risks associated with permitting such disclosures, including whether any further confidentiality obligation applies to persons who receive a permitted disclosure.

Discussion questions



1. What are your views in terms of the appropriateness of this preliminary list of permitted disclosures?
2. What are the risks associated with allowing this permitted disclosure and how could such risks be managed?

2. Procedural safeguards

Setting out procedural safeguards in legislation that must be complied with before an NDA can be entered into can help ensure complainants voluntarily enter into NDAs and that they fully understand the terms of the NDA before they sign it.

The presence of these safeguards can also address concerns about the power imbalance between the employer and the complainant which can result in complainants feeling pressured to enter into an NDA.

Several jurisdictions set out requirements that must be met before parties can lawfully enter into an NDA.

In **Victoria**, the Victorian Act sets out six requirements:

- it must be the complainant who requests the NDA
- it is the complainant's wish and preference to enter into an NDA
- the complainant was provided with an NDA information statement[22]
- the complainant was provided at least 21 days to review the NDA before signing it (unless the complainant waived that review period or asked for a shorter period)
- each of the parties to the NDA acknowledge that the above four requirements have been met
- the complainant did not experience undue influence or pressure to enter into the NDA.

Procedural safeguards similar to those in Victoria are found in international jurisdictions.

- In **Prince Edward Island (Canada)** the procedural safeguards include that it is the express wish and preference of the complainant to enter into an NDA, the complainant has had a reasonable opportunity to receive independent legal advice and there is no undue influence.
- The laws in **Ireland** also set out a number of procedural requirements (listed above) which, similar to Victoria, include that the complainant received independent legal advice.

Considerations for South Australian reforms

In the South Australian context, potential safeguards that could assist to ensure complainants voluntarily enter into NDAs and understand its contents and effect may include the following four requirements:

- The complainant received independent legal advice in relation to the scope and effect of the NDA; and
- The complainant was provided with an information sheet about NDAs made available by the South Australian Government; and
- The complainant was provided with a 'cooling off period', which could be waived at the complainant's request; and

[22] The information statement must provide information about what requirements must be met before an NDA can be entered into and when the complainant can terminate an NDA.

- There is signed confirmation by all parties to the NDA that all statutory requirements in the making of the NDA have been met.[23]

Written affirmation that these procedural requirements have occurred may assist to provide certainty and finality, and minimise the risk of a subsequent dispute arising about whether that one or more of the procedural safeguards were met.

Discussion questions

3. Would any or all of these four requirements be adequate to demonstrate that a complainant voluntarily entered into an NDA and on an informed basis?
4. If there is a requirement that the complainant receive independent legal advice how should that cost be borne?

3. Only the complainant may request an NDA

Some jurisdictions have introduced the requirement that an NDA can only be entered into if it was the complainant who sought to enter into this agreement. This prevents a perpetrator from raising an NDA in settlement negotiations unilaterally.

For example, in **Victoria** and **Ireland** it must be the complainant who requests the NDA. The rationale for introducing this requirement is that an NDA is entered into only when the complainant wants to enter into one.

Considerations for South Australian reforms

A requirement that an NDA may only be requested by a complainant in settlement negotiations may serve to reduce the perceived pressure on a complainant to enter into an NDA they are not comfortable with, and thereby empower the victim.

However, this may also introduce a degree of artificiality into out-of-court settlement negotiations by preventing parties from putting forward settlement options they would be prepared to agree to resolve a dispute. That may result in cases where a matter was capable of settlement, but legislative requirements restrained the parties from putting forward or fully discussing those options.

Restraints on which party may propose an NDA may be unnecessary if reforms (such as those outlined in Question 2 above) provide sufficient procedural safeguards to ensure complainants enter an NDA on an informed and voluntary basis.

[23] A potential model is the process for entering into a redemption under the *Return to Work Act 2014*, which requires that a standard-form certificate must be signed by a legal practitioner confirming that a client has been advised of the effect of entering into a redemption before it can take effect.

That is, permitting appropriate disclosures and imposing procedural safeguards appear sufficient to guard against NDAs being entered into or used in circumstances where it is not in the complainant's interests. A complainant would be able to accept, reject or negotiate the terms of the NDA regardless of the party who proposed it.

Discussion questions



5. If the South Australian reforms permit the complainant to make appropriate disclosures and contain procedural safeguards, should the reforms also require that the request to enter into an NDA must come from the complainant and not the perpetrator?
6. If yes, what evidence would need to be provided to substantiate that it was the complainant who requested the NDA?

4. Revocation of the NDA by complainants

Jurisdictions vary on whether they restrict the period which an NDA is enforceable and whether the complainant can revoke the NDA.

For example, in **Victoria**, a complainant may unilaterally terminate their confidentiality obligations after 12 months of entering into an NDA by providing seven days' notice to the other parties. The effect of terminating the NDA is that the complainant would be able to disclose 'material information' (i.e. the conduct constituting the workplace sexual harassment and identity of the perpetrator if they were an adult at the time of the sexual harassment).[24]

In **Ireland**, the NDA must provide the complainant the right to withdraw from the NDA without penalty no later than 14 days from the date on which the agreement is entered into.

Considerations for South Australian reforms

Allowing a complainant to revoke an NDA ensures that they cannot be held to the terms of the agreement against their will.

However, if an NDA is unilaterally revocable, this may create a significant disincentive for parties to enter into an NDA in the first place. This is because the NDA cannot provide certainty and finality about the subject matter of the dispute. This may in turn may make it more difficult for parties who wish to resolve workplace sexual harassment matters out of court from doing so.

In the context of reforms that enable complainants to make appropriate disclosures and contain procedural safeguards, allowing complainants to revoke the NDAs after a period of time may not be necessary.

[24] However, this does not extend to 'protected information' as defined in the Victorian Act.

Discussion questions



7. Should South Australian reforms allow complainants to be able to revoke an NDA that was otherwise lawfully entered into?
8. If so, what terms and conditions should apply to that revocation?

5. Dispute resolution

There may be cases where parties disagree about whether an NDA is enforceable or whether the procedural safeguards for entering an NDA have been met.

This would require the determination of whether the complainant is legally bound to comply with the NDA and whether there is a legal process to follow if a complainant alleges that one or more of the procedural safeguards were not met.

Jurisdictions regulate non-compliant NDAs in different ways.

- In **Victoria**, an NDA is not enforceable against a complainant if the procedural safeguards set out in Victorian Act have not been met. An unenforceable NDA means that the agreement cannot prevent a complainant from disclosing material information. If a complainant thinks that the procedural safeguards have not been met, they can contest the enforceability of the agreement in the Industrial Division of the Magistrates' Court of Victoria.
- In **Ireland** and **Prince Edward Island (Canada)** an NDA is 'null and void' (i.e. not legal) if it does not comply with certain legal requirements. In Prince Edward Island an employer or perpetrator also commits a criminal offence if an NDA is not made in accordance with requirements set out in the legislation.

Considerations for South Australian reforms

A key issue is how disputes over the enforceability of an NDA (e.g. whether it meets any statutory procedural requirements) are resolved. There are broadly two options.

The first option is that there is no special jurisdiction.

If a legal dispute emerges about compliance with the terms of an NDA, and one of the parties alleges that the purported NDA was not validly entered into and is therefore unenforceable, then that issue can be dealt with by a Court in the resolution of the dispute. This may occur for example in an action to enforce the terms of the NDA.

A downside of this approach is that a victim cannot obtain clarity on whether an NDA is enforceable or not without being the subject of a legal complaint. The inability of a victim to obtain legal clarity on this issue is likely to have a silencing effect.

The second option is that specific jurisdiction is created to resolve disputes.

For example, jurisdiction could be given to the South Australian Employment Court to make a declaration about whether an NDA is enforceable or not. This would allow a victim to apply for a declaration to clarify the status of an NDA.

For example, the victim may seek a declaration from the Court as to the enforceability of the NDA to confirm whether they are able to speak freely about the workplace sexual harassment, before making any statements which may expose them to legal action if the NDA were enforceable.

Discussion questions



9. If an NDA is entered into that does not meet procedural safeguards specified in the reforms, should the NDA be unenforceable, meaning that it could not prevent a complainant from making disclosures about the conduct of the workplace sexual harassment?
10. What should be the legal process involved if a complainant wishes to dispute the enforceability of an NDA?