

# Ai GROUP SUBMISSION

Free and Equal  
Australian Human Rights Commission

**Discussion paper: priorities for  
federal discrimination law reform**

13 December 2019

**Ai**  
GROUP

## **About Australian Industry Group**

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

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## EXECUTIVE SUMMARY

Ai Group welcomes the opportunity to provide a response to the *Discussion Paper: Priorities for federal discrimination law reform*, released by the Australian Human Rights Commission (AHRC) as part of its Free & Equal conversation on human rights.

Along with the broader community, businesses play an important role in protecting and maintaining human rights. Employers must observe anti-discrimination legislation and other statutes based on human rights principles. For this reason, a human rights framework that is simple to understand, not overly complex and recognises that employers can comply in different ways is needed to ensure that human rights legislation is practical, fair and complied with.

It is important that the priorities for federal discrimination law consider and address the needs of duty-holders as well as vulnerable and socially marginalised people in the community.

Ai Group opposes increased regulation on duty-holders given the current over-regulated and complex web of federal and state discrimination laws and broad General Protections in the *Fair Work Act 2009 (Cth)* (FW Act).

A simpler and easier to understand framework is needed.

Further, given the growing jurisdiction of the FW Act's General Protections, priorities for federal discrimination law should consider the role other jurisdictions have played in regulating employer obligations on discrimination and human rights.

Ai Group supports a discrimination law framework that:

- Is nationally consistent without increasing or duplicating obligations on duty-holders, having regard to the growing role of other jurisdictions such as the FW Act;
- Ousts State and Territory laws dealing with the same grounds of discrimination, rather than operating concurrently to avoid imposing further red tape on businesses and facilitating multiple forums for complaints;
- Is practical and workable for duty-holders to engage with and comply with;
- Is sensitive to the regulatory burden on duty-holders.

## INDUSTRY'S ENGAGEMENT WITH HUMAN RIGHTS

Ai Group has recently made submissions as part of the Federal Government's consultation on its Religious Freedom Bills and the Sex Discrimination Commissioner's National Inquiry into Sexual Harassment at Australian Workplaces. These submissions are below:

- [Ai Group Submission – National Inquiry into Sexual Harassment at Australian Workplaces, March 2019](#)

- [Ai Group Submission – Religious Freedom Bills, October 2019](#)

In respect of the National Inquiry into Sexual Harassment in Australian Workplaces, Ai Group's Chief Executive, Innes Willox, has been appointed as a member of the Inquiry's Reference Group and we have filed a detailed [submission](#) proposing important reforms to support businesses in preventing and responding to sexual harassment. We look forward to the Sex Discrimination Commissioner's Final Report.

In respect of the AHRC's work in human rights and technology, Ai Group has contributed a [submission](#) in response to the AHRC's joint consultation with the World Economic Forum Whitepaper about AI Governance and Leadership.

We are also working closely with our members in respect of reporting requirements under the *Modern Slavery Act 2018 (Cth)* and sharing best practice initiatives.

### **PREVIOUS REVIEWS OF FEDERAL DISCRIMINATION LAW**

In 2012 the Australian Government released a Discussion Paper proposing to consolidate federal discrimination laws. Ai Group made a detailed submission in response to the Discussion Paper raising a number of major concerns about the impact of a proposed consolidation bill on duty-holders. While the Australian Government elected not to pursue the consolidation of federal discrimination laws, a number of Ai Group's concerns raised in 2012, are also relevant to some of the proposals contained in the AHRC's Free & Equal Discussion Paper.

In this submission we have responded to many of the questions set out within the Discussion Paper. We have not responded to every question but rather those that have direct relevance to the area of employment.

### **PRIORITIES AND KEY FACTORS FOR DISCRIMINATION LAW REFORM**

The diverse experiences and capacities of duty-holders should be considered in any review of Federal anti-discrimination legislation as part of informing an improved legal framework.

Ai Group considers that the principles identified in the Discussion Paper, narrowly relate to direct beneficiaries of anti-discrimination legislation, rather than the interests and capacities of duty-holders. The broader community benefits from laws that can be easily and realistically complied with by all stakeholders.

Ai Group considers that the relevant policy principles relating to federal discrimination law should:

- Be clear and easy to understand;
- Be nationally consistent without increasing or duplicating obligations on duty-holders, having regard to the growing role of other jurisdictions such as the FW Act;

- Oust State and Territory laws dealing with the same grounds of discrimination, rather than operating concurrently to avoid imposing further red tape on businesses and facilitating multiple forums for complaints;
- Be practical and workable for duty-holders to engage with and comply with;
- Be sensitive to the regulatory burden on duty-holders;
- Be effective;
- Be accessible; and
- Be remedial.

Ai Group does not consider that federal discrimination legislation needs be *comprehensive* when other legislation, such as the *Fair Work Act 2009* (Cth) (and the steady increase of claims under its General Protections provisions)<sup>1</sup> have for the last decade created a wide ability for employees to seek remedies for alleged adverse action, including discrimination relating to their employment. The broad scope of the General Protections is already burdensome on employers.

Similarly, Ai Group sees no basis for federal discrimination law to duplicate protections already provided by State and Territory anti-discrimination legislation. The regulatory burden on businesses in requiring compliance with duplicate and overlapping Federal and State laws is already high.

### **AUSTRALIA’S CURRENT FRAMEWORK IS ALREADY COMPLEX AND OVER-REGULATED**

Anti-discrimination legislation is excessively over-regulated with a complex web of Federal and State and Territory laws.

Anti-discrimination law is found at the Commonwealth, State and Territory levels. In total, 12 pieces of principal legislation prohibit discrimination on multiple grounds in various areas of employment. These include:

- *Age Discrimination Act 2004* (Cth) (‘ADA’);
- *Disability Discrimination Act 1992* (Cth) (‘DDA’);
- *Racial Discrimination Act 1975* (Cth) (‘RDA’);
- *Sex Discrimination Act 1984* (Cth) (‘SDA’);
- *Anti-Discrimination Act 1977* (NSW);
- *Equal Opportunity Act 2010* (VIC);

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<sup>1</sup> [Fair Work Commission, Annual Report, 2018-2019, General Protections, Table 5](#)

- *Anti-Discrimination Act 1991 (QLD)*;
- *Equal Opportunity Act 1984 (WA)*;
- *Equal Opportunity Act 1984 (SA)*;
- *Anti-Discrimination Act 1998 (TAS)*;
- *Discrimination Act 1991 (ACT)*;
- *Anti-Discrimination Act (NT)*.

Aspects of anti-discrimination law are also found in the FW Act which is the principal piece of legislation regulating workplace relations in Australia. Specifically, Part 3-1 – General Protections, of the FW Act currently provides comprehensive protections in section 351. The test for discrimination under section 351 of the FW Act is inherently different to the tests for discrimination under Commonwealth, State and Territory anti-discrimination laws. To prove a claim of discrimination under section 351 of the FW Act a complainant merely needs to show that they were treated adversely by the employer for the reason that they possess a protected attribute, leaving the employer with the difficult task of disproving the claim.

Further, the *Australian Human Rights Commission Act 1986 (Cth)* establishes the Australian Human Rights Commission and regulates the processes for dealing with complaints made under the ADA, DDA, RDA and SDA.

It is clear that the area of anti-discrimination is overregulated. Any reform of federal discrimination law will not make the law clearer and more consistent for employers if the State and Territory anti-discrimination laws are allowed to continue to apply in areas covered by the Federal laws. It will only complicate matters for employers by duplicating their statutory obligations and increasing red-tape. It will also allow complainants to continue to access multiple complaint forums based on a more favourable outcome for their claim. This is inappropriate and unfair for duty-holders, such as employers, who must ensure compliance with multiple laws covering the same subject matter, requiring different actions to comply and exposing them to different remedies.

Federal anti-discrimination legislation should oust the operation of State and Territory laws dealing with the same grounds of discrimination.

## **THE ROLE OF COURTS**

The role of Courts in interpreting and enforcing anti-discrimination legislation is a dynamic one. At times Courts will determine limitations on the scope of certain legislative provisions, at other times Courts expand the commonly understood application of provisions. Ai Group does not agree that particular Court decisions should alone trigger an expansion of anti-discrimination laws.

## ADDITIONAL PROTECTED GROUNDS

Ai Group does not support the expansion of anti-discrimination obligations on duty-holders to include the grounds of criminal record, trade union activity and political opinion.

Protections for trade union activity and political opinion are already covered by the FW Act's General Protections. Section 346 of the FW Act states:

### 346 Protection

A person must not take adverse action against another person because the other person:

- (a) is or is not, or was or was not, an officer or member of an industrial association; or
- (b) engages, or has at any time engaged or proposed to engage, in industrial activity within the meaning of paragraph 347(a) or (b); or
- (c) does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of paragraphs 347(c) to (g).

In respect of political opinion, section 351 states: (emphasis added)

### 351 Discrimination

- (1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

The concept of adverse action, as defined in section 342 of the FW Act, is broader than the definitions of discrimination that appear in federal discrimination law, providing greater protection and coverage.

In respect of protecting persons with irrelevant criminal records, Ai Group considers that the Federal Government's recent amendment to the *Australian Human Rights Commission Regulation 2019* strikes the appropriate balance. That amendment provides clarity to employers by establishing it is now unlawful for an employer to discriminate against a job applicant on the basis of their criminal record if the applicant has an '*irrelevant criminal record*', rather than previously demonstrating that the applicant's criminal record was irrelevant to the inherent requirements of the job.

## Religious Freedoms

The protection of religious freedoms is currently being addressed by the Federal Government with the release of three exposure draft bills for public consultation. Ai Group supports the right to freedom of religion, and the right not to be religious in the Australian community. Businesses, of course manage a combination of multi-faith and non-religious workforces while striving to ensure that their operations are viable, productive, competitive and harmonious.

Ai Group has provided a [submission](#) as part of this consultation that identifies some significant problems for employers if the Bills were to be passed into law.

Ai Group is not opposed to religious freedom protections in the form of direct discrimination. However, Ai Group has called for the Bill's provisions relating to indirect discrimination, statement of belief provisions and the reverse onus of proof to be removed.

Further, there are already comprehensive protections in place to protect religious freedoms. The Australian Constitution protects freedom of religion and State anti-discrimination laws in nearly all States and Territories provide protection against discrimination on the basis of religious beliefs and activities. The Religious Freedom Bills would add to the existing complex web of Federal and State anti-discrimination laws that Australian businesses need to comply with.

### **Family and Carer's Responsibilities**

The FW Act's General Protections provide protection to persons with family and caring responsibilities: (emphasis added)

#### **351 Discrimination**

- (1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Similarly, the FW Act's right to request flexible work arrangements significantly contribute to the rights of carers and employees with family responsibilities to remain in the workforce. Also, the exercise of workplace rights to request flexible work arrangements, and other workplace rights such as the FW Act's entitlement to carer's leave or unpaid parental leave, are protected by the General Protections.

Ai Group considers it inappropriate for caring and family responsibilities to appear in the SDA as a provision aligned with sex discrimination. Caring and family responsibilities are, and should be, gender neutral responsibilities and relevant protections are more appropriately provided for in the FW Act. The apparent gap identified by the Discussion Paper in the SDA's coverage has in many ways been covered by the General Protections in the FW Act. As such Ai Group is not convinced that additional indirect discrimination provisions in the SDA for persons with family and caring responsibilities are appropriate or necessary.

## **PERMANENT EXEMPTIONS**

The permanent (and temporary) exemptions are an important aspect of anti-discrimination laws as they permit businesses to lawfully discriminate for legitimate purposes. Any review of permanent exemptions in discrimination laws should consider the impact on duty-holders that rely on them. Ai Group does not support a regulated sunset approach to exemptions.

The benefit of permanent exemptions is that their familiarity provides immediate certainty to duty-holders about the nature and limit of the exceptions available to them. This is particularly important for employers that need to assess the needs of the person possessing the protected attribute and whether those needs can reasonably be accommodated.

## **COMPLIANCE MECHANISMS MUST BE APPROPRIATE**

The AHRC's development and use of compliance mechanisms should be appropriately flexible and targeted to assist employer compliance with their obligations.

### **Guidance Materials**

Ai Group would welcome the development of further voluntary guidance material to assist duty-holders to comply with their obligations under Commonwealth anti-discrimination laws. Guidance materials need to be flexible so that they are suited to the needs of different workplaces.

The importance of guidelines and educative materials to assist employers should not be underestimated. Small to medium enterprises, in particular, that typically have no internal HR staff are greatly assisted by free, quality online resources.

Organisations such as the Fair Work Ombudsman and the Workplace Gender Equality Agency regularly publish guidelines on the practical application of various provisions of relevant legislation.

The Sex Discrimination Commissioner's recently revised guidelines on Special Measures under the SDA is a further example of an effective resource to assist businesses that wish to adopt a targeted approach to achieve greater gender equality in their organisations.

Guidelines and best practice models are more effective if they are developed with feedback and input from industry. Ai Group regularly provides this when resources are being developed by various regulatory bodies.

### **Action Plans**

The DDA makes available the opportunity to duty-holders to develop and enter into voluntary action plans with the Commission to help them achieve a level of compliance with the Act.<sup>2</sup> Ai Group does not see a need for this mechanism to be extended to other attributes, but if the Government chooses to do so, the action plans need to remain voluntary and non-binding on the duty-holder.

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<sup>2</sup> See Part 3 of the DDA.

## **Special Measures**

In relation to special measures, Ai Group notes the AHRC's proposal for a certification process to achieve greater certainty for businesses that wish to pursue targeted or positive discrimination in their organisations. Ai Group sees that there is merit in this approach but suggests that such a certification process be offered on a voluntary basis and that organisations remain free to rely on the special measure provisions as they currently stand.

We also consider it important that the timeframes for delivering certification be clearly communicated to organisations and are not unduly extensive. In our experience, businesses have been deterred from adopting positive measures if there are extensive timeframes or perceptions of delay in issuing decisions. This has been an issue for a number of our members in relation to applications for exemptions under NSW anti-discrimination laws.

## **Codes of Practice**

Ai Group does not support additional Codes of Practice or Standards, beyond those that already exist in disability discrimination law. Additional Codes and Standards would add to the existing complexity of anti-discrimination legislation for duty-holders and unfairly constrain the varying capacities and ways in which employers can comply with their obligations.

## **Expanded Powers**

Ai Group strongly opposes any proposals to expand the Commission's role to include initiating investigations into unlawful discrimination and bringing actions for breaches of anti-discrimination law in the Federal Court or Federal Magistrates Court. Any such expansion would clearly conflict with the Commission's function as an impartial conciliator and would cause duty-holders defending an anti-discrimination claim to lose faith in the system.

## **ADDITIONAL POSITIVE DUTIES WOULD INCREASE COMPLEXITY**

Ai Group does not support increased regulation on employers by introducing new positive duties under anti-discrimination laws. Such a proposal is likely to add to existing preventative obligations on employers under the FW Act's General Protections and Work Health and Safety laws; both of which significantly overlap with various anti-discrimination obligations.

An increased regulatory burden on employers, particularly small to medium enterprises, would achieve very limited community gain and lead to further confusion about rights and obligations of duty-holders.

## **Harassment and vilification protections**

As referred above, Ai Group is actively involved in the National Inquiry into Sexual Harassment in Australian Workplaces and is a member of the National Inquiry's Member Reference Group.

Ai Group sees no basis to adopt a 'levelling up' of federal discrimination laws to the protections provided by State anti-discrimination laws. Employers would be subject to an increased regulatory burden when protection is already provided by State anti-discrimination laws.

## **CONCLUSION**

It is important for any federal discrimination law reform to consider the capacities and interests of duty-holders.

Australia's current discrimination law framework is overly complex and, when combined with State discrimination laws and the FW Act, imposes a high regulatory burden on employers.

Simplification rather than increased regulation is what is needed.

Ai Group welcomes further discussion with the AHRC as part of its Free & Equal review.



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