FREE+EQUAL
AN AUSTRALIAN CONVERSATION ON HUMAN RIGHTS

Australian Human Rights Commission

Free & Equal

A reform agenda for federal discrimination laws

Summary report

Free & Equal: A reform agenda for federal discrimination laws – Summary Report

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Free & Equal: A reform agenda for federal discrimination laws

Summary report

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President's foreword

On Human Rights Day 2018, I announced that the Australian Human Rights Commission would conduct a National Conversation on Human Rights. My goal was for the Commission to develop a roadmap that would guide government action and community partnerships to fully realise human rights and advance equality in Australia.

It was aspirational, and forward-looking, setting targets to address inequality. I anticipated that we would develop a reform agenda in three parts. For the first part of our human rights reform agenda, we chose to focus on federal discrimination law.

Federal discrimination law protections have been the predominant implementation tool for protecting human rights in Australia in giving effect to our international obligations. But the lack of more positive and comprehensive rights protection means that significant gaps in protection remain. The need for other, complementary positive protections of human rights, is addressed in the second Position Paper, advocating a model for a Human Rights Act for Australia.

Reforms that have occurred to federal discrimination law over the past 40 years have tended to occur on an issue-specific basis, by adding in new protected attributes – either within existing legislation or by creating a further Act. Reforms have tended to be discrete and not focused on the operational effectiveness of the overall legislative scheme, and federal discrimination law still relies on the regulatory framework as it was in the 1980s to address today's challenges.

So, while discrimination laws remain the foundation stone of human rights protection in Australia, questions about their overall effectiveness need to be addressed.

This Summary Report distils the Commission's Position Paper on federal discrimination law reform. We set out 38 recommendations covering every aspect of our federal discrimination law system, to ensure: that it offers robust protection against discrimination, provides better support for businesses and organisations to do the right thing, and is simpler to use.

I commend the proposals in the Position Paper as the first major contribution in the Free & Equal conversation.

Emeritus Professor Rosalind Croucher AM FAAL
President

December 2021

1 Why do we need reform?

Australia's discrimination laws are outdated and difficult to use. Some of these laws have remained substantially untouched since they were introduced over 30 and 40 years ago. They do not respond to the challenges of modern life and are often unsuccessful as a means of remedying discrimination, let alone *preventing* it.

Australia was a world leader on discrimination protections when the *Racial Discrimination Act* (Cth) was introduced in 1975. The *Sex Discrimination Act 1984* (Cth) and *Disability Discrimination Act 1992* (Cth) were also considered international best practice at the time they were introduced.[1]

What was best practice in the second half of the 20th century is not so in the 21st century. Australia has fallen behind other comparable jurisdictions in providing protection against discrimination and the transformation that has occurred in other jurisdictions in advancing equality.

Numerous reviews have identified the need for reform of federal discrimination laws – and over a long period of time. This includes parliamentary committee inquiry reports, a major Productivity Commission review and an ambitious attempt to consolidate all discrimination laws into one cohesive framework in 2011–12.[2]

There are a number of key problems.

First, addressing discrimination is heavily reliant on individuals to bring complaints, rather than on more systemic approaches to building cultures of prevention – within businesses, services and the institutions of public life.

The focus should shift to *preventing* discrimination, rather than reacting to it, after the fact.

Secondly, the regulatory framework is out of date and needs strengthening. There *should* be a full range of regulatory responses available to target discrimination of different kinds, at different levels of severity, and to engender understanding and certainty about legal obligations. Federal discrimination laws do not provide adequate support to the business sector to take proactive efforts to address potential discrimination.

Thirdly, the discrimination system, while offering a range of options, can be difficult to navigate, and legal remedies difficult to access, with the result that many meritorious claims may not be pursued in the courts. Individuals need the tools to obtain access to justice.

Fourthly, with, for now, four sets of federal discrimination laws, alongside state and territory instruments – *and* overlapping regimes such as Fair Work – the mix of discrimination laws is complex and sometimes inconsistent, which leads to difficulties in applying the law. There are also gaps in protection, so some people are *not* protected at all by discrimination laws, or are unable to obtain access to a remedy for discriminatory conduct.

There are also unaddressed reforms that have been identified as necessary for federal discrimination laws going back over decades. They are now in need of a significant overhaul.

The limitations that exist in the legislative scheme as it stands mean that:

- protections are less accessible than they should be, meaning that people who experience discrimination are not being fully protected
- the business sector is not being supported as well as it should be to take steps to prevent discrimination, or to have confidence that they will be supported when they confront discrimination head on
- addressing discrimination is heavily reliant on individuals bringing complaints, rather than more systemic approaches to building a culture of prevention.

2 Framework for reform

Discrimination laws, as a major component of human rights protection in Australia, should positively contribute to a reduction of discrimination in society and the greater realisation of equality on a continual basis. These laws should contain the tools to support effective regulation.

In order to achieve this, federal discrimination law should be:

- **Clear:** any legislation must be readily understandable by the community, and avoid unnecessary complexity.
- **Consistent:** key definitions should be consistent across different grounds of discrimination, unless there is a distinct or unique aspect to one ground that must be accounted for.
- **Comprehensive:** our discrimination laws should be comprehensive in their coverage by protecting all individuals and communities.
- **Intersectional:** protections for different attributes must be able to work together easily – having different tests for different attributes (such that a person has different elements of proof) and having to litigate discrimination in relation to each attribute separately is burdensome and less effective.
- **Remedial:** where someone has experienced unlawful discrimination, there should be effective remedies for breaches of their rights.
- **Accessible:** discrimination laws provide remedial support to people in vulnerable situations – the operation of these laws should aid access to justice rather than creating barriers to such access.
- **Preventative:** while discrimination law is currently largely remedial in focus, requiring a dispute before coming into operation, greater consideration should be given to mechanisms that require law and policy makers to prevent discrimination and promote equality of treatment and equal opportunity as the ultimate goals.
- **Predictable:** there has been a limited number of cases that have made their way to the federal courts over the past twenty years. While this points to the success of the conciliation process to informally resolve matters, it has left a dearth of knowledge about key elements of these laws. A lack of precedent was cited as a major inhibiting factor to the effective operation of federal discrimination laws, and the need for different options to provide non-judicial guidance.
- **Trusted:** The community should have confidence in the law as a reliable means by which discrimination can be prevented and remedied.

Any reform to discrimination law should also improve protection across the community. It should not involve creating new forms of discrimination against any sector of society.

Discrimination law should be accompanied by other protections and mechanisms to promote equality and respect for human rights – especially through the introduction of a Human Rights Act in Australia. The absence of additional measures at present places additional burdens on the operation of discrimination laws, as the primary existing legislative mechanism to resolve human rights issues.

3 The reform agenda

In the Position Paper the Commission sets out four integrated sets of reforms to improve the effectiveness of federal discrimination laws, built on four pillars:

- **Building a preventative culture**
- **Modernising the regulatory framework**
- **Enhancing access to justice**
- **Improving the practical operation of laws**

The Commission's proposals are practical, building on past reform exercises and lessons learned. We propose that reforms be staged.

Some reforms are urgently needed to address existing, known problems with the operation of federal discrimination laws. These reforms can be implemented immediately and are well overdue. Some reforms require process responses, such as by embedding a periodic review of exemptions to ensure they remain appropriate at all times.

Other reforms are transformational, moving beyond the limitations of the existing model. These are focused on modernising the regulatory framework:

- turning it into a more proactively focused system that is less disputes-focused and encourages business confidence and innovative business practice.
- by introducing more effective enforcement mechanisms, to address systemic issues or persistent non-compliance with the law.

These reforms should be accompanied by significant outreach to stakeholders, including through educative and engagement measures. As we indicate in this paper, some measures should be given time for familiarity to develop and for the adaption of policies before legal consequences flow. This can be achieved by some measures coming into effect 12 months after they are enacted.

Ultimately, the Commission considers that for our system of anti-discrimination protections to be truly effective, it must shift to focus more on prevention, with measures that will assist duty-holders to prevent discrimination from occurring in the first place.

Above all, reform should be seen as a shared endeavour, in which individuals, businesses, organisations and governments each actively contribute to and are assisted in reaching this outcome.

3.1 Pillar One: Building a preventative culture

The reforms under Pillar One seek to refocus federal discrimination law so that it encourages, and indeed expects, action to prevent discrimination from occurring in the first place through a positive duty to take reasonable and proportionate measures to eliminate unlawful discrimination, along with harassment and victimisation.

> Positive duties are an emerging feature of discrimination and workplace laws in Australia – and overseas – reflecting a shift to a *preventative* focus in dealing with discrimination and avoiding harm. The Commission's 2020 *Respect@Work* report into workplace sexual harassment, led by Sex Discrimination Commissioner, Kate Jenkins, recommended the introduction of a positive duty to take measures to eliminate sex discrimination, sexual harassment and victimisation. That was based on the model in Victoria that has been in place since 2010.[3] The Commission considered that the positive duty should be part of a new regulatory model in relation to the continuing problem of sexual harassment in the workplace.
>
> These are not new ideas. Work Health and Safety laws, for example, already include a positive duty for employers.

Sex discrimination in the workplace is but only one aspect of federal discrimination law.

In the Position Paper the Commission advocates that a positive duty be included in **all** discrimination laws, requiring organisations to take reasonable and proportionate measures (in accordance with their size and resourcing) to eliminate unlawful discrimination. This would place a new, significant focus on the prevention of discrimination. The duty would extend beyond the workplace, to all areas

of public life, and incorporate all protected grounds. All organisations with responsibilities under discrimination laws would be required to comply with the duty, including employers and businesses, government entities, and providers of accommodation, education, or goods and services. This would set out a clear expectation that all these responsible organisations will always act in a non-discriminatory manner and pre-emptively consider and address risks of discrimination. The Commission also recommends that the positive duty be enforceable through a range of enforcement mechanisms.

The *benefit* of positive duties is that they are focused on instituting *change*—rather than on fault. A positive duty would *support* businesses to take steps to embed non-discrimination measures into their operations. It would also *benefit* businesses by helping to prevent individual claims of discrimination from being brought against them.

The Business Council of Australia, for example, commended the approach in Work Health and Safety laws for their focus on encouraging prevention as part of the obligations imposed by those provisions. This focus – on prevention – builds a different mindset into all aspects of a business to ensure that these obligations are met.

There are also strong economic incentives for proactive measures. Deloitte, for example, estimated that sexual harassment was costing the Australian economy $3.8 billion annually.[4]

Overall, a positive duty would re-balance the discrimination law system – to focus on prevention, rather than redress – and is therefore a key measure towards improving the effectiveness of discrimination law in Australia. *Respect@Work* recognised this. In this Position Paper the Commission has taken it further as Pillar One of discrimination law reforms.

3.2 Pillar Two: Modernising the regulatory framework

The alternative dispute resolution processes used by the Commission to conciliate discrimination complaints can be an *empowering* process for complainants—and can be very effective at achieving both individual *and* systemic outcomes.

However, the compliance framework that operates alongside this is extremely limited.

Individual complainants, and the ADR process, should not bear the bulk of responsibility for ensuring compliance with discrimination laws.

The Commission's regulatory powers have remained effectively untouched since our permanent establishment in 1986. By contrast, since the introduction of the Regulatory Powers (Standard Provisions) Act in 2014, most other regulatory agencies, across the Commonwealth of Australia, have had *their* frameworks reviewed and modernised, with many tools now at their disposal to address different kinds of issues. This has also resulted in standardising some of these tools across jurisdictions, leading to greater business certainty – and simplicity.

Federal discrimination law has not been reviewed in light of these major reforms. Modernising the regulatory framework for the Australian Human Rights Commission is a neglected part of that agenda.

The Commission puts forward reforms that reflect the concept of 'responsive regulation', based on Professor John Braithwaite's regulatory pyramid. Using this theoretical conceptualisation, a range of different approaches are required to achieve compliance with the law. This includes capacity building where there is an inability to comply, *and* more coercive powers, towards the top of the pyramid, where there is an unwillingness to comply. These 'higher order' powers provide leverage – the leverage that

having such powers can bring in enforcing obligations, even when not exercised. The availability of the 'stick' can be a very effective 'carrot' to shift behaviour towards a compliance mindset.

Currently, the Commission has large gaps in its regulatory framework, particularly at the top end of the pyramid and a range of measures are recommended to fill some of those gaps, with a particular focus on *co*-regulation.

These include a new power for the Commission to conduct inquiries into systemic discrimination. As the body that receives, on average, 15,000 inquiries a year and 2,000 complaints, (pre-COVID), the Commission has particular insights into areas where systemic inquiries would be beneficial.

The proposed framework is designed to help businesses and enable certainty and support – through co-regulatory measures and enabling the Commission to work in a proactive, preventative way. These include the power to conduct voluntary reviews of policies or programs, in terms of compliance with federal discrimination laws, and to enable the Commission to issue 'special measure' certifications, where an action is proposed that confers a benefit on a group of people to reduce their experience of inequality – such as targeted recruitment of people with disability.

The powers of the Commission in unlawful discrimination matters are currently almost entirely based on persuasion, reliant on education and awareness raising and, where disputes arise, alternative dispute resolution. The regime lacks key elements to build a preventative culture to address discrimination and to ensure accountability.

In 2014, the Australian Government introduced the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (Regulatory Powers Act) to provide 'a framework of standard regulatory powers exercised by agencies across the Commonwealth'.

Regulatory powers are the suite of different tools used by government agencies to ensure individuals and industry comply with legislative requirements. The key features of the Regulatory Powers Act include monitoring and investigation powers as well as enforcement provisions, through the use of civil penalty provisions, infringement notices, enforceable undertakings and injunctions.[5]

The Regulatory Powers Act commenced on 1 October 2014, but only has effect where Commonwealth Acts are drafted or amended to trigger its provisions.

The Explanatory Memorandum for the Bill noted that it was expected that, over time, 'existing regulatory regimes will be reviewed and, if appropriate, amended to instead trigger the relevant provisions of the Regulatory Powers Bill'.[6]

Provisions in existing legislation would be replaced with references to the standard provisions as appropriate – some legislative schemes would wholly adopt these standard provisions, and some would adopt some of the provisions while maintaining their own unique provisions as appropriate.

In the period since 2014, there has been no consideration as to whether federal discrimination law should be amended by adding new regulatory provisions covered in this legislation.

Accordingly, federal discrimination law relies on the regulatory framework as it was in the 1980s to address the challenges of the 2020s. The modern approach to regulation has bypassed federal discrimination law.

The effectiveness of the Commission as a regulatory agency can be enhanced by shifting from the current reliance solely on conciliation and persuasion, to a broader suite of regulatory approaches, including co-regulatory powers and inquiry powers.

This mix of powers would assist in building greater predictability and confidence in the operation of federal discrimination law, as well as greater understanding and awareness of rights and duties.

Confidence and certainty are two foundational expectations of business and industry that the Commission has factored into its proposals to modernise the regulatory framework.

3.3 Pillar Three: Enhancing access to justice

The Commission's conciliation processes do work well. Positive outcomes, and high rates of satisfaction are the norm – from all parties involved in discrimination law matters.

But not all complaints are resolved through conciliation. The only next step is to proceed to the federal courts, which can be extremely resource and time intensive, discouraging individuals from pursuing discrimination claims in court. A number of meritorious complainants may decide not to pursue their claims because of this. Fewer than 3% of discrimination matters finalised by the Commission ever proceed to court.

To improve access to justice outcomes for individuals, the Commission proposes:

- reforms to how costs are calculated in the courts
- reforms to address difficult evidentiary issues for claimants, without shifting the overall onus of proof, and
- reforms to enable representative actions taken on behalf of a group of claimants.

Until 2000, the Commission *had* an adjudicative function to make determinations in discrimination matters that could not be resolved by conciliation or negotiation. But this function was removed following the High Court decision in *Brandy v HREOC* in 1995 ((1995) 183 CLR 245). The amendment was intended to address problems raised by a process that had been introduced of registering determinations of the Commission *as if* they were judgements of the Federal Court.

This raised a constitutional issue, but the solution went much further than addressing that question, by removing *all* the Commission's adjudicative hearing powers. In the Position Paper, this is referred to as the 'Brandy myth' – that the removal of the adjudicative powers from the Commission went beyond what was necessary.

Indeed, since the *Brandy* decision, other federal regulatory agencies have been granted – or retained – similar kinds of powers, such as the Fair Work Commission and Fair Work Ombudsman. New powers have also been developed in accordance with the Regulatory Powers Act. For example, the Office of the Information Commissioner, which itself used to be part of the Human Rights Commission, has seen its regulatory framework expand over time.

By comparison, the Commission's powers have gone backwards—to the detriment of all.

Moreover, the lack of 'middle layer' adjudication for complainants further limits the accessibility and availability of remedial options. For this reason, the Commission recommends that the Government give serious consideration to *reintroducing* an intermediate adjudicative process to bridge the gap between voluntary conciliation and federal court litigation. This could take the form of a tribunal-like body, the restoration of hearing and determination functions to the Commission, the creation of an arbitral process or a different mechanism. The consideration of such mechanisms would benefit greatly from public consultation and expert advice about the best options available in today's legal landscape.

This gap over twenty plus years has not improved access to justice.

3.4 Pillar Four: Improving the practical operation of laws

There are many different recommendations within this Reform Pillar about 'improving the practical operation of laws'.

Australia's discrimination laws are complex and include some operational quirks; have gaps in their coverage; and, in some cases, have been limited or further complicated by judicial decisions.

Recommendations put forward in this chapter seek to enhance the operation of discrimination laws as they currently are, but also pave the way for further consideration of long term and substantial reforms.

A number of them are technical in nature, designed to improve clarity and consistency across the various discrimination laws and in their practical applications, and to reduce the level of complexity across the system overall.

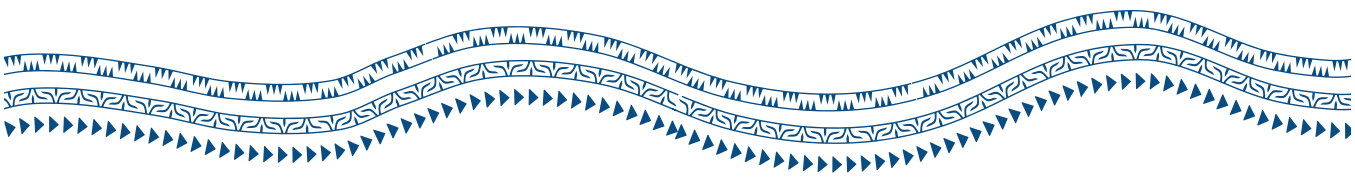
Importantly, the Commission also recommends measures to close the existing gaps in discrimination law coverage, to ensure that everyone is protected from discrimination – including supporting the introduction of a new federal ground of unlawful discrimination based on freedom of thought, conscience and religion, to be appropriately balanced alongside existing discrimination grounds in accordance with Australia's international obligations.

The Commission also recommends a ground to prevent discrimination based on a person's irrelevant criminal record. This is one of the grounds of discrimination in our Act relating to an ILO Convention. As the ground is not, currently, 'unlawful discrimination', there is no pathway to judicial consideration, or enforceable remedies. And yet, we receive a significant number of complaints on this ground each year and it is an area that has a disproportionate impact on some groups.

Other proposed changes would close gaps to make the law more inclusive of volunteers and interns in the workplace, and those with family responsibilities. These modest changes would reflect the realities of the modern world of work.

The Commission makes a number of specific recommendations in relation to

- ensuring discrimination law protects everyone in the world of work
- reforming ILO 111 discrimination as unlawful discrimination
- reviewing all permanent exemptions
- defining discrimination and related concepts
- managing intersectionality
- some additional technical issues.



4 Recommendations

4.1 Building a preventative culture

Positive duty

1. Existing protections against discrimination in each of the federal discrimination laws should be supplemented by the inclusion of a positive duty on all duty bearers to take reasonable and proportionate measures to eliminate unlawful discrimination.

The positive duty should include a non-exclusive list of factors that should be considered in determining whether a measure is 'reasonable and proportionate', including:

(a) the size of the person's business or operations
(b) the nature and circumstances of the person's business or operations
(c) the person's resources
(d) the person's business and operational priorities
(e) the practicality and the cost of the measures
(f) all other relevant facts and circumstances.

2. A positive duty should be accompanied by significant education and other outreach, as well as support for the Commission, legal assistance providers and business peak bodies to be able to provide clear and accessible guidance about the positive duty.

3. To ensure that there is broad understanding of the actions required as a result of a positive duty in discrimination law, and to enable organisations time to assess their current business practices, the Commission considers that it would be appropriate to stage the introduction of a positive duty by providing a 12 month period of time before it came into legal effect.

4. In its introductory phase, there should be a significant focus on co-regulatory mechanisms to embed understanding of the positive duty with new functions for the Commission such as the ability to conduct **voluntary audits**.

However, this is not adequate and there should be enforcement mechanisms that also attach to the positive duty to ensure that it is of sufficient importance to shift culture, such as the ability for the issuance of standards, the issuance of **compliance notices** and **enforceable undertakings**.

4.2 Modernising the regulatory framework

Alternative dispute resolution – sharing data

5. Consideration be given to review of s 49 of the AHRC Act to determine whether secrecy provisions with criminal sanctions are warranted, or whether s 49 should be amended to clarify that disclosing information of a de-identified nature for educative purposes does not breach the secrecy obligations in discrimination law.

6. Dedicated resourcing be provided to the Commission, as well as to academic partners, to provide publicly available information and analysis about trends in complaints on a periodic basis.

Use of non-disclosure agreements and confidentiality clauses

7. Guidance be developed on the appropriate usage of non-disclosure agreements and confidentiality provisions in discrimination

matters. The preparation of such guidance has been committed to by the Government in relation to sexual harassment complaints. This guidance should be the pilot for further guidance across all other protected attributes in federal discrimination law.

Broader range of guidance materials to be prepared

8. Dedicated funding for undertaking this preparation of guidelines function should be built into the budget of the Commission on an ongoing basis, particularly given that it is foundational in supporting all regulatory options in federal discrimination law.

The Commission should also adopt methods for engaging with key stakeholders on a periodic basis to identify emerging issues on which guidance materials would be most valued.

Action plans

9. The capacity to develop and lodge action plans under the Disability Discrimination Act should be expanded as a measure available across all federal discrimination laws. The following reforms to the action plan process should also be introduced:

- Clarify that the Commission may provide advice on the development and implementation of action plans.
- Clarify that the Commission may set minimum requirements for action plans (such as through guidelines) and not accept action plans that fail to meet these requirements.
- Introduce a set timeframe within which action plans will lapse, and require that outcomes of the evaluation of previous action plans be provided to the Commission when submitting a subsequent action plan.

Voluntary audits

10. New powers should be introduced to enable the Commission to conduct reviews of policies or programs of a person or body, upon request to the Commission, in order to assess compliance with federal discrimination laws and measures to eliminate unlawful discrimination.

Special measures certifications

11. The Australian Human Rights Commission Act should be amended to provide the Commission with a power to issue special measures certifications. Such certifications should be judicially reviewable, to ensure appropriate oversight, and time limited. The Commission should be empowered to consult relevant stakeholders when deliberating on whether to certify a special measure.

Disability Standards

12. An independent review of the existing Disability Standards should be conducted to consider their effectiveness in addressing unlawful discrimination, as well as the effectiveness of the current legislative, governance, policy and practice arrangements in place to implement and achieve compliance with the Disability Standards.

13. Consideration be given to introducing new Disability Standards in relation to employment and digital communication technology.

Own-motion investigations into systemic instances of discrimination

14. The Commission should be empowered to conduct own motion inquiries in relation to all areas of unlawful discrimination, of a systemic nature, with effective enforcement mechanisms attached.

This inquiry power should include:

- The capacity to undertake systemic inquiries – such as in circumstances where there a pattern of discrimination or suspected compliance issues becomes known to the Commission.
- Compliance monitoring – to ensure that industries, organisations, sectors or others are complying with the provisions of a positive duty.

The Commission should be empowered to inquire where it suspects there are significant breaches of federal discrimination law that affect a class of people, without the need for an individual complaint; and in relation to serious matters of public interest relating to discrimination, harassment and victimisation.

This function should be independently exercised by the Commission.

15. Consideration be given to the introduction of compliance notices and attaching the following model provisions of the Regulatory Powers (Standard Provisions) Act to the proposed inquiry function as enforcement tools:

- enforceable undertakings under Part 6 of the Act
- the ability to seek civil penalties in court under Part 4 of the Act
- a broader suite of injunctive powers, than the existing Australian Human Rights Commission Act provisions, as set out in Part 7 of the Act.

4.3 Enhancing access to justice

Costs

16. The Commission considers that the default position should be that parties bear their own costs. The AHRC Act should include mandatory criteria to be considered by the courts in determining whether costs should be varied. The list included in the Human Rights and Anti-Discrimination Bill 2012, which was based on the Family Law Act, is an instructive one, which is as follows:

(a) the financial circumstances of each of the parties to the proceedings

(b) whether any party to the proceedings is receiving assistance provided by the Attorney-General's Department, or is receiving assistance by way of legal aid (and, if a party is receiving any such assistance, the nature and terms of that assistance)

(c) the conduct of the parties to the proceedings (including any conduct of the parties in dealings with the Commission)

(d) whether any party to the proceedings has been wholly unsuccessful in the proceedings

(e) whether any party to the proceedings has made an offer in writing to another party to the proceedings to settle the proceedings and the terms of any such offer

(f) any other matters that the court considers relevant.

Evidentiary issues

17. The Commission recommends that a shifting evidentiary burden be introduced in relation to unlawful discrimination matters, while also affirming that the overall onus of proof rests with the complainant in matters that are considered in the federal courts. The Commission supports the approach taken in the Human Rights and Anti-Discrimination Bill 2012 as setting the appropriate threshold, rather than that in s 361 of the Fair Work Act.

18. The Commission develop guidance material about the kinds of matters relevant to discharging the shifting burden, to guide both complainants and respondents in relation to proof of relevant issues.

19. The Commission proposes that the standard of proof be clarified as the usual standard of proof as set out in the *Evidence Act 1995* (Cth) s140.

Representative actions

20. The Commission recommends that unions and other representative groups should be permitted to bring representative claims to court, consistent with the existing provisions in the Australian Human Rights Commission Act that allow unions and other representative groups to bring a representative complaint to the Commission.

Timeframe for termination of complaints

21. The Commission recommends that a consistent approach should be taken across the four Discrimination Acts in relation to the timeframe for the President's discretion to terminate a complaint. With the amendment to the AHRC Act in August 2021 to introduce a 24-month discretionary termination period for complaints made under the Sex Discrimination Act the Commission recommends that this apply across the four Discrimination Acts.

The Commission supports the provision of guidance in relation to the kinds of factors relevant to the exercise of the President's discretion.

Reintroducing an intermediate adjudicative process

22. The Commission recommends that the Government give serious consideration to reintroducing an intermediate adjudicative process into the federal discrimination system to bridge the gap between voluntary conciliation at the Commission and litigation in the federal courts.

23. The Commission suggests that this could take the form of

- a tribunal-like body
- the restoration of hearing and determination functions of the Commission
- the creation of an arbitral process.

4.4 Improving the practical operation of federal discrimination laws

Coverage of the discrimination laws

24. The Commission recommends that volunteers and interns be protected across all discrimination laws.

25. The Commission proposes that the Sex Discrimination Act be amended to cover family responsibilities/carer responsibilities both in terms of direct and indirect discrimination and applying to all areas of public life.

New unlawful discrimination protected attributes

26. The Commission recommends that the right to freedom of thought, conscience and religion be included as a new protected attribute; not be limited to employment; and have full access to judicial remedies.

27. The Commission proposes that complaints of discrimination in employment on the basis of irrelevant criminal record should be a fully protected attribute under federal discrimination law, meaning that they have the same pathway for resolution as discrimination complaints made under the four federal discrimination laws.

28. Subject to irrelevant criminal record in employment and the right to freedom of thought, conscience and religion being

included as protected attributes in the 'unlawful discrimination' jurisdiction of the Commission, the ILO complaints jurisdiction of the Commission should be repealed.

Review of exemptions

29. The Commission recommends that all permanent exemptions under federal discrimination law be reviewed on a periodic basis to ensure they remain appropriate. Particular focus should be given to exemptions relating to insurance, religion and domestic workers.

Definition of discrimination

30. The Commission recommends that the test for direct discrimination be simplified by removing the 'comparator test'.

31. The Commission recommends that the reasonable adjustment assessment currently in the Disability Discrimination Act be amended to clarify that the obligation is a standalone one. The Commission also recommends that the extension of the concept of reasonable adjustments beyond the Disability Discrimination Act be considered.

32. The Commissions recommends that the definition of indirect discrimination be amended 'to require only that a condition requirement or practice has the effect of disadvantaging people with a protected attribute or attributes, and of disadvantaging the particular person affected, without the further requirement that the person does not comply or is not able to comply'. The Commission also recommends that further consideration be given to replacing the 'reasonableness' test with a 'legitimate and proportionate' test.

33. The Commission recommends that the AHRC Act be amended to make explicit that any conduct that amounts to victimisation can form the basis of a civil action for unlawful discrimination, across all federal Discrimination Acts.

34. The Commission recommends that the provisions concerning 'special measures' for people with a protected attribute should be clarified so that the interpretation of what amounts to a 'special measure' be aligned with the understanding of this term under international law and, in particular, that special measures be construed as positive measures to address the protected attribute.

35. The Commission proposes a new provision be included across all federal discrimination laws to identify that discrimination may occur on the basis of a particular protected attribute 'or a particular combination of 2 or more protected attributes', including attributes across the four discrimination acts.

Technical fixes to federal discrimination laws

36. Amend s 46PF(7)(c) of the Australian Human Rights Commission Act to remove the obligation to notify individuals who are the subject of adverse allegations but who are not named respondents.

Harmonisation and standardisation of discrimination law provisions across jurisdictions

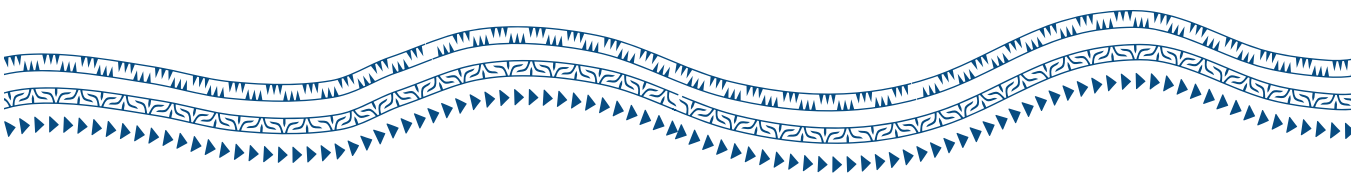
37. Amend the Australian Human Rights Commission Act as a matter of priority to ensure the Paris Principles compliance of the Commission, as follows:

- Specify that all Commissioner appointments can only be made following a clear, transparent, merit-based and participatory selection and appointment process.
- Including a reference to the Paris Principles in the objects clause of the legislation acknowledging that the Commission is intended to be a Paris Principles compliant national human rights institution.

- Including a definition of human rights in the Australian Human Rights Commission Act that references all of Australia's international human rights obligations.

The Commission also recommends that the Government periodically conduct a re-baselining review of the Commission to ensure that it has adequate resourcing to conduct its functions.

38. The Commission concludes that the major focus at this time should be on embedding the structural reforms that are proposed in this paper. Once these reforms are implemented, they should be reviewed after 5 years to consider their effectiveness and whether a broader integration exercise should be undertaken to further standardise the approach across federal, state and territory discrimination laws, as well as the Fair Work Act and work, health and safety law.



5 Implementing the reforms

Across these four reform areas, the Commission has made 38 reform proposals.

The proposed reforms will require:

- amendments to existing provisions in federal discrimination (and related) laws
- insertion of new provisions in federal discrimination laws
- new regulatory powers (inserted into the AHRC Act and/or federal Discrimination Acts) and an associated support package
- educational outreach, community engagement and preparation of guidance materials
- further review processes into some issues.

In identifying these reform options the Commission reiterates that:

- the need for reform of federal discrimination law is pressing, and consideration should be given to this as a matter of priority
- the proposed reform options are presented as a package of reforms, each which is a necessary component of addressing the current problems with the system of federal discrimination law as a whole
- effective community and business outreach will be critical to successfully implementing these reforms – implementation should be treated as a shared endeavour, with a focus on shifting the culture to a preventative one that effects a zero-tolerance approach to discrimination.

To ensure access to justice for complainants and defendants, reforms should be supplemented by sufficient resourcing of Legal Aid, community legal centres and specialist organisations to assist individuals to understand their rights, access advice and appropriate support, and effectively navigate the system.

Since publication of this position paper in December 2021, amendments to the Sex Discrimination Act 1984 have been made that introduce a positive duty in relation to sexual harassment (consistent with recommendation 1 of this position paper) as well as making a range of other technical amendments to federal discrimination law.

Some of these changes apply just to the sexual harassment provisions of the SDA, some apply more broadly in the SDA and others apply to all federal discrimination law.

These amendments have been welcomed by the Commission and are an excellent start in meeting the recommendations set out in the Commission's position paper. We look forward to working with the Government and Parliament to extend these reforms across all federal discrimination laws to ensure a truly proactive and preventative system.

Endnotes

1 For example, the *Sex Discrimination Act 1984* (Cth) 'helped redefine the role of women in Australian society': 'Defining Moments: Sex Discrimination Act' <**Sex Discrimination Act | National Museum of Australia (nma.gov.au)**>. The framework of setting up standards was 'innovative': Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (Federation Press, 4th ed, 2012), extract in Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 5, 6.

2 See Australian Human Rights Commissioner, *Position Paper: A reform agenda for federal discrimination laws* (2021) 3.4 <**https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws**>.

3 *Equal Opportunity Act 2010* (Vic) s 15(2).

4 Deloitte Access Economics, *The Economic Costs of Sexual Harassment in the Workplace* (Final Report, February 2019) 5.

5 Explanatory Memorandum, Regulatory Powers (Standard Provisions) Bill 2014 (Cth).

6 Replacement Explanatory Memorandum, Regulatory Powers (Standard Provisions) Bill 2014 (Cth) 2.

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