



Australian
Human Rights
Commission

FREE AND EQUAL AN AUSTRALIAN
CONVERSATION ON HUMAN RIGHTS
OCTOBER 2019

Discussion paper:
Priorities for federal
discrimination law
reform



© **Australian Human Rights Commission 2019**

The Australian Human Rights Commission encourages the dissemination and exchange of information provided in this publication.

All material presented in this publication is provided under a Creative Commons Attribution 3.0 Australia, with the exception of:

- photographs and images;
- the Commission's logo, any branding or trademarks;
- content or material provided by third parties; and
- where otherwise indicated.

To view a copy of this licence, visit <http://creativecommons.org/licenses/by/4.0/legalcode>.

In essence, you are free to copy, communicate and adapt the publication, as long as you attribute the Australian Human Rights Commission and abide by the other licence terms.

Please give attribution to: © Australian Human Rights Commission 2019.

FREE AND EQUAL An Australian conversation on human rights 2019

ISBN 978-1-925917-12-3

This publication can be found in electronic format on the Australian Human Rights Commission's website at: <https://www.humanrights.gov.au/our-work/publications/>

For further information about the Australian Human Rights Commission or copyright in this publication, please contact:

Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001
Telephone: (02) 9284 9600

Email: communications@humanrights.gov.au
Website: www.humanrights.gov.au

Design and layout Dancingirl Designs
Graphics We Are 27 Creative
Photography iStock



**All human beings are born free
and equal in dignity and rights.**

ARTICLE 1, UNIVERSAL DECLARATION OF HUMAN RIGHTS





Contents

WHAT DISCRIMINATION LAWS EXIST AT THE FEDERAL LEVEL?	6
THE PURPOSE OF DISCRIMINATION LAWS	6
WHAT PRINCIPLES SHOULD GUIDE DISCRIMINATION LAW REFORM?	6
WHY IS REFORM NEEDED?	7
1 The mix of discrimination laws is complex and similar concepts operate differently across the laws	7
2 The discrimination laws have not been updated to reflect best practice approaches or to address identified concerns	8
3 There is an unnecessary level of difference and complexity between federal, state and territory laws	8
4 Court decisions have limited the scope of certain provisions in the federal discrimination acts	8
5 Discrimination laws are not comprehensive in their protection and gaps in protection have been identified	9
6 Some grounds of discrimination do not provide for an enforceable remedy	9
MAJOR REFORM PRIORITIES FOR FEDERAL DISCRIMINATION LAW	10
CONCLUSION	18



In 2019–2020, the Australian Human Rights Commission (Commission) is undertaking a national conversation on human rights to identify reform proposals to better protect human rights in Australia.¹ An issues paper guiding the process was released in April 2019.

The issues paper notes that by mid-2020 the Commission will release a final report in which it recommends, among other things:

- An agenda for federal law reform to protect human rights and freedoms fully
- Priorities for reforming federal discrimination law to make it more effective, comprehensive and fairer in its protections, and simpler to understand.

This paper sets out the Commission’s preliminary views on the priorities for federal discrimination law reform. It identifies the need for reform, the principles that should guide it, and the 11 major priority areas for reform to ensure effective protection against discrimination at the federal level.

The paper includes a series of questions to obtain the views of the community about these proposals and other issues of concern to the community.

Federal discrimination law plays a critical role in providing remedies to the most vulnerable members of our community. This paper considers how these laws can be most effective in meeting their purpose.

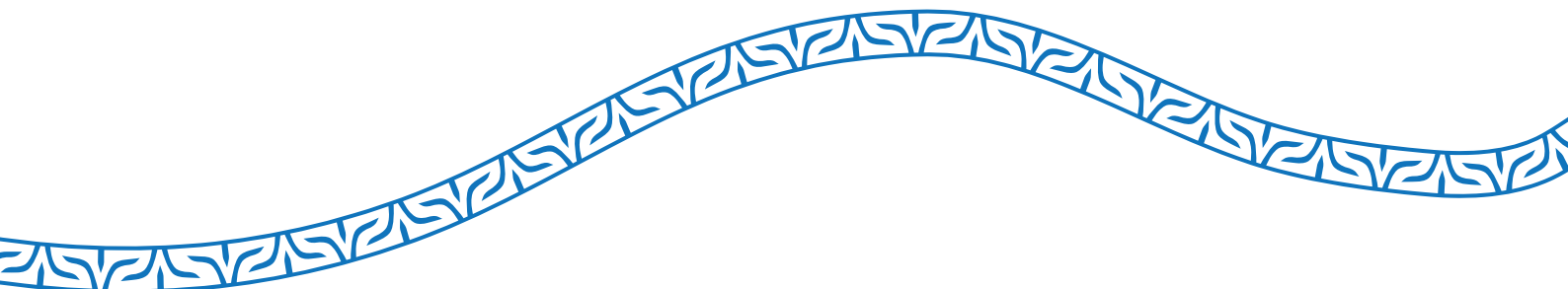
It is important to note, however, that there is an overreliance on discrimination laws to protect human rights. While systemic outcomes such as changes to policy and practice are often achieved through complaints being made, it is a dispute-focused model that is remedial rather than proactive.

Discrimination laws operate in the absence of broader human rights protections at the federal level. How to address this issue is the subject of another Commission discussion paper about enhancing human rights protections in Australia to be released in 2019.

This is the first in a series of technical papers that focus on specific law reform issues being considered through the national conversation project.

The Commission encourages members of the public, business sector, NGOs, the legal community and others to submit their views on the proposals contained in this paper, or on other discrimination law reform issues that you consider to be a priority.

The Commission will also be convening some technical workshops in 2019 to consider the need for federal discrimination law reform.



What discrimination laws exist at the federal level?

Laws prohibiting discrimination at the federal level have existed since 1975. New protections have been added every 8–10 years, but without consideration as to how effective the existing protections are, or how the different protections intersect.

The Federal Parliament introduced discrimination law protections for race in 1975, sex discrimination in 1984, disability in 1992, age in 2004 and sexual orientation, gender identity and intersex status in 2013. Other grounds of discrimination in the context of employment were introduced in 1986 (through the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act), although they do not operate in the same manner as the above unlawful discrimination grounds (the Commission's ILO 111 jurisdiction).

There is also an ability to lodge complaints for certain human rights grounds in relation to acts or practices of the Commonwealth under the AHRC Act (but without the same pathway for resolution to the courts).

In addition to these laws, there are protections against discrimination in the employment context in the *Fair Work Act 2009* (Cth) (FWA), and some crossovers with work health and safety laws.

Different protections against discrimination, definitions and processes for addressing breaches exist in the law of every state and territory in Australia.

The purpose of discrimination laws

Existing federal discrimination laws identify that the legislation is intended to achieve the following purposes:

- To eliminate discrimination as it is experienced by persons with particular attributes and where experienced in certain areas of life.

- To ensure equality before the law for everyone in the community.
- To promote recognition and acceptance within the community of the principle that all people have the same fundamental rights as the rest of the community.
- To reflect Australia's international human rights commitments to prevent discrimination and promote equality.²

The starting point for considering the effectiveness of federal discrimination laws is to reflect on how existing laws meet these objectives.

What principles should guide discrimination law reform?

The Commission is of the view that 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.

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

- **Clear:** any legislation must be readily understandable by the community, and avoid 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) 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 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.

Any reform to discrimination law should 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. The absence of additional measures at present places additional burdens on the operation of discrimination laws (as the primary legislative mechanism to resolve human rights issues).

DISCUSSION QUESTION

1. Do you agree that the above principles should guide discrimination law reform? Are there other principles that should be identified?

Why is reform needed?

Federal discrimination laws have undoubtedly contributed to the above objectives.

They have:

- contributed to changing community attitudes to the treatment of different groups in our society
- provided the basis for community awareness and education to tackle discrimination and discriminatory attitudes

- been used to resolve over 20,000 individual complaints
- addressed broader systemic issues through the use of standards (in relation to disability), temporary exemption processes (particularly relating to disability and sex discrimination) and through the complaints process, in particular group complaints in relation to racial discrimination
- promoted equality through supporting the adoption of special measures
- set a baseline for treatment of people in the community.

However, existing federal discrimination laws can be improved and be made more effective in their operation. This conversation is timely given the evolution of discrete discrimination laws over almost 45 years in accordance with Australia’s international human rights commitments. The following are key issues impeding the effectiveness of the laws.

1 The mix of discrimination laws is complex and similar concepts operate differently across the laws

The legislation that introduced protections against discrimination reflects the legal understanding and legislative drafting techniques that were in place at the time of their introduction. This means that definitions of discrimination and other central concepts span a 30 year timeframe.

The complexity of definitions within federal discrimination law is particularly problematic where someone is discriminated against on different grounds and where different legislative protections apply—sometimes referred to as ‘intersectional discrimination’. In practical terms, it means that a person who has suffered discrimination can be required to meet different legal tests for a single instance of discriminatory conduct where the discrimination arises as a result of the intersection of more than one protected attribute.

There are also some limitations on when the federal discrimination laws apply (for example, state government employees are excluded in the context of sex discrimination, but not other grounds).

This complexity creates challenges for the community to understand their rights and responsibilities under discrimination laws.

Fewer than 2% of complaints finalised by the Commission are lodged in court.

2 The discrimination laws have not been updated to reflect best practice approaches or to address identified concerns

Concerns about how the existing discrimination laws operate have been identified over time, but not fully addressed.

For example, in July 2018 the UN Committee on the Elimination of Discrimination Against Women expressed concern that the *Sex Discrimination Act 1984 (Cth) (SDA)* does not fully meet our international human rights obligations. Major reforms to the SDA were recommended by the Senate Legal and Constitutional Committee in 2008 but only some have been implemented. This means that major concerns about the effectiveness of the SDA that were identified over a decade ago have still not been fully addressed.

Other concerns about inconsistencies and limitations of the current Acts were identified in 2012 when the Government released the Draft Exposure Human Rights and Discrimination Bill 2012 (HRAD Bill). That bill did not progress to Parliament and the significant issues raised during consultations on the bill have yet to be fully addressed.

Some reforms identified in that process were introduced in 2013 by introducing new protected attributes on the basis of sexual orientation, gender identity and intersex status, and in 2017 to the AHRC Act in order to streamline the complaint handling processes. The 2017 reforms have been variable in their operation with most amendments improving the process but some creating new challenges.

3 There is an unnecessary level of difference and complexity between federal, state and territory laws

There are some grounds of discrimination that are covered in some states and territories but not at the federal level. In practical terms, this means that whether you are protected against discrimination depends on your postcode and where you experienced discrimination.

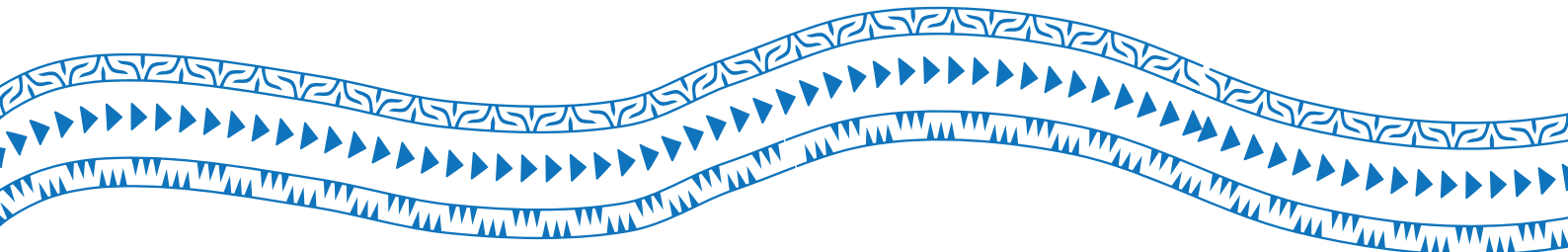
Improved consistency between the federal discrimination laws, their state and territory equivalents and Industrial relations laws would also provide greater clarity and simplicity for the community.

Harmonisation of the operation of discrimination laws at the federal, state and territory levels has long been considered desirable. Provided that it did not reduce protections for any groups in our community, harmonisation could minimise unnecessary differences in approach to similar concepts and protections. A major stumbling block to achieving this is the lack of coherence across federal discrimination law.³

4 Court decisions have limited the scope of certain provisions in the federal discrimination acts

Some court decisions have limited the scope of the legislation by confining the operation of key provisions. In particular:

- The *Sklavos* decision⁴ in 2017 has created challenges for people with disability seeking to prove discrimination given the Federal Court's interpretation of 'reasonable adjustments'
- The *Maloney* decision⁵ in 2013 has generated significant discussion about the High Court's interpretation of 'special measures' under the *Racial Discrimination Act 1975 (Cth) (RDA)*.
- Internationally, there have also been developments in the definition and understanding of discrimination and the evidentiary requirements for proving it that are simpler, easier to understand and which are arguably more effective in their protection. Consideration should be given to whether the definitions in the current legislation are outmoded and require updating.



5 Discrimination laws are not comprehensive in their protection and gaps in protection have been identified

The existing discrimination laws have gaps in protection that undermine their effectiveness.

In particular, volunteers and interns in employment contexts are not protected consistently across all grounds and there are some exemptions for employment conducted in private residences. These gaps in protection do not reflect modern work practices and mean that people who are particularly vulnerable to exploitation (such as unpaid interns) are not protected under the law.

Carers are also not fully covered in the context of disability discrimination and family responsibilities discrimination under the SDA is confined to direct discrimination in work related areas only.

The SDA does not apply to state government employees, whereas all other federal discrimination law protections do.

The Religious Freedom Review of 2018 has also highlighted the limited protection of religious freedom and belief in federal discrimination law. In particular:

- The lack of a stand alone provision protecting against discrimination on the basis of religious belief (with only a limited subset of religious groups covered as ethnic groups under the RDA)
- A need to consider how existing permanent exemptions in the SDA (on the basis of religion) intersect with other grounds of discrimination
- A lack of review as to the continued need for all exemptions to continue after 35 years of operation.

There are also emerging challenges to protect individuals from algorithmic bias, through the application of artificial intelligence (AI) to decision making processes.

Algorithmic bias can unfairly disadvantage certain categories of individuals, and sometimes those categories can be defined by reference to protected attributes, such as race, age or gender. Where this occurs, it may amount to unlawful discrimination.

As such technologies are increasingly used in decision-making systems that affect our human rights, this challenges our law's capacity to protect against unlawful discrimination. Among other things, it will be necessary to consider how federal discrimination law should deal with the potential problems of algorithmic bias, and whether it should also address the specific accountability challenges that arise with AI-informed decision making.

6 Some grounds of discrimination do not provide for an enforceable remedy

Complaints brought under the AHRC Act in relation to discrimination in employment are treated differently from complaints brought under the four federal discrimination laws.

While complaints can be investigated and conciliated, a complainant does not have a right to go to court if this process is unsuccessful. There is no justifiable reason for this more limited process to exist. This relates primarily to complaints in relation to discrimination in employment or occupation on the grounds of:

- Religion
- Irrelevant criminal record
- Trade union activity
- Political opinion.

DISCUSSION QUESTIONS

2. What are the key factors relevant to the need for federal discrimination law reform? Please provide any comments on the Commission's observations in the six dot points above.
3. Are there other major challenges that exist with federal discrimination law that require reform?



Major reform priorities for federal discrimination law

The Commission has identified the following issues as priorities requiring specific attention. We invite comment on whether we have identified the major issues of concern to the community about the operation of federal discrimination law.

• Definitions

Across the federal discrimination laws, there are a number of different and complex definitions. This includes the definitions of discrimination, victimisation, special measures and reasonable adjustments. A more uniform approach should be considered for definitions that are applicable across all areas.

• Protected attributes – what is covered by federal discrimination law

To meet international standards and uphold community expectations, discrimination laws should be comprehensive in their coverage. This requires considering what attributes are protected under the discrimination laws and in what areas of public life.⁶

The Commission has identified two situations for reform:

- Addressing limitations in coverage of existing protected attributes
- Addressing gaps in protection (through introducing new protected attributes).

(a) Addressing limitations in coverage of existing protected attributes

There currently exists gaps in coverage for **carer's responsibilities**. In the SDA family responsibilities discrimination is limited to direct discrimination in work related areas only. Claims about work practices not accommodating a person with family or carer's responsibilities currently need to be considered as complaints of indirect sex discrimination. In practical terms, this increases the level of complexity in providing protection for people with carer's/family responsibilities and provides limited coverage for men with family responsibilities. Some coverage is also provided in the *Disability Discrimination Act 1992* (Cth) (DDA) for people who are associates of a person with a disability.

Consideration should be given to the SDA being amended to cover family responsibilities/carer responsibilities both in terms of direct and indirect discrimination and applying to all areas of public life. This would be consistent with the coverage of other grounds in the SDA.

The Commission notes differences in discrimination law with the coverage of carers in the FWA and state and territory legislation. Section 97 of the FWA covers employees who have caring responsibilities for immediate family members or household members. The *Discrimination Act 1991* (ACT) also covers discrimination based on parent, family, carer or kinship responsibilities.

Consideration should be given to clarifying the definition of carers consistent with these definitions.

As noted above, the SDA does not apply to **employees of state governments**. There is no logical reason for this exclusion, which does not exist in any other federal discrimination law. This limitation should be removed.

There is a similar gap under discrimination laws for **volunteers and interns**, who are not covered within the definition of employment. As modern work practices have changed, these exclusions have become less justifiable.

For example, internships are commonly part of higher education courses and can be critically important for young people seeking to enter the workforce. Leaving such a vulnerable cohort of people excluded from protections against discrimination and sexual harassment is unacceptable.

The Commission receives and resolves a similar number of complaints under its ILO 111 jurisdiction as it does under the *Age Discrimination Act 2004* (Cth) (ADA).⁷ Despite this, ILO 111 complaints do not have the same pathway for resolution of complaints with no access to remedy outside of a conciliation and, for some cases, a reporting process. This means that if a complaint does not resolve through conciliation, the affected person has no right to bring their matter to court.⁸

Irrelevant criminal record is by far the largest ground of complaint of ILO 111 discrimination under the AHRC Act. It impacts on a particularly disadvantaged group of the population, and can disproportionately affect particular groups of people such as Aboriginal and Torres Strait Islander people due to their over-representation in the criminal justice system.

The Commission consider that complaints 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.

(b) Addressing gaps in protection (though introducing new protected attributes)

The Commission is of the view that there is a clear case for including a new protected attribute on the basis of **thought, conscience or religion**. There is an existing protection on the basis of religion in relation to employment under the Commission's ILO111 jurisdiction. However, this does not provide remedies through access to the courts and is limited only to employment or occupation.

There may also be some limited protection of religion under the RDA where the courts of other jurisdictions have found that members of particular groups/faiths such as Sikhs and Jews are covered on the ground of 'ethnic origin'. Other religious groups, such as Islamic and Christians, have been found not to constitute a group with a common 'ethnic origin' in other jurisdictions.

The lack of comprehensive coverage of all people based on their religion or belief, and the lack of coverage in significant areas of public life, is a shortcoming of existing federal discrimination law.

The Commission notes that **other potential protected attributes** have been raised in the past or are covered under different state and territory laws. For example:

- The *Discrimination Act 1991* (ACT) includes **accommodation status** and **subjection to domestic or family violence** as protected attributes. Both of these potential protected attributes have been raised in the past in federal consultation processes.

- There is limited protection of the following protected attributes under the Commission's ILO111 jurisdiction (i.e., without judicial pathway for resolution of disputes): **trade union activity, political opinion and irrelevant criminal record**. The Commission notes that industrial activity is covered more broadly in s 347 of the FWA, and that the FWA may provide a more appropriate pathway for protection in this area.

DISCUSSION QUESTIONS

4. What, if any, changes to existing protected attributes are required?
5. What, if any, new protected attributes should be prioritised?

• The operation of permanent exemptions in federal discrimination law

The SDA, DDA and ADA each contain permanent exemptions to the operation of discrimination law.

Permanent exemptions have the effect of 'freezing in time' community standards in relation to sex, age, disability, sexual orientation and gender identity. Accordingly, what was appropriately exempted from the operation of discrimination law 35 years ago (in the case of the SDA) or 27 years ago (in the case of the DDA) may no longer be appropriate today.

The Commission considers that all permanent exemptions need to be considered in light of the overall purpose of discrimination law to promote equality and fair treatment.

There has been limited consideration of the necessity or appropriateness of the existing permanent exemptions and their scope. The permanent exemptions under the SDA, for example, have only had very minimal changes since their introduction in 1984.

In 2018 and 2019, there has been significant debate about the appropriateness of permanent exemptions in s 38 of the SDA relating to educational institutions established for religious purposes as they relate to LGBTI students and staff.

The Australian Law Reform Commission is currently conducting an inquiry considering:

- what reforms should be made to Australian law to limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos; and what reform should be made to remove any legal impediments to the expression of a view of marriage as it was defined in the *Marriage Act 1961* (Cth) before it was amended by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), whether such impediments are imposed by a provision analogous to section 18C of the *Racial Discrimination Act 1975* (Cth) or otherwise.⁹

The following permanent exemptions have operated without review or limitation since they were introduced in the legislation:

- Section 13 of the SDA provides that the legislation does not apply to state instrumentalities in employment—this is the only such restriction anywhere in federal discrimination law.
- Section 14(3) of the SDA and s15(5) of the RDA provide that protections against discrimination in employment do not apply to employment in a personal residence—consideration should be given to whether this is appropriate given the rise of the ‘gig economy’ and in home, task based employment services, as well as the expansion of home based aged care services and services for people who have a disability under the National Disability Insurance Scheme.

- There are exemptions in the ADA and SDA for voluntary bodies—consideration should be given to the appropriateness of this, especially in light of the contracting out of services to the voluntary sector by the government.¹⁰

The Commission is of the view that all permanent exemptions should:

- **only exist in a permanent form in circumstances that are strictly necessary and which result in the minimum intrusion on people’s rights that are required**
- **be regularly reviewed to ensure that they reflect community standards and appropriately balance competing rights.**

PROPOSED REVIEW PROCESS

In light of the lack of review of permanent exemptions over an extended time period, the Commission considers that, as a priority, the federal government should review all existing exemptions to consider whether individual exemption clauses should:

- a) remain
- b) be time limited and regularly reviewed on an ongoing basis to assess the ongoing relevance and necessity of the exemption
- c) be sunsetted as they no longer reflect community standards or balance rights appropriately.

Consideration should also be given to be whether a general clause for ‘justifiable conduct’ should be introduced. This would provide flexibility into the future to ensure that the legal definition of unlawful discrimination is able to adapt so that legitimate actions do not constitute discrimination. It would, however, be dependent on judicial interpretation over time.

DISCUSSION QUESTIONS

6. What are your views about the Commission's proposed process for reviewing all permanent exemptions under federal discrimination law?
7. Are there particular permanent exemptions that warrant particular scrutiny?

- **Promoting compliance and providing clarity about legal obligations under federal discrimination law**

At present, there are limited measures in federal discrimination law that assist the business sector, organisations and individuals to comply.

The Commission considers that any reform of federal discrimination law should involve the introduction of additional measures that can assist people and organisations to understand their responsibilities under the law and to provide increased certainty to them when seeking to comply.

The need for a mix of mechanisms within an overall compliance framework is not uncommon to ensure that diverse circumstances covered by the legislation are appropriately addressed. For example, the *Competition and Consumer Act 2010* (Cth) and work health and safety laws provide models of varied mechanisms situated within a broader compliance framework.

Federal discrimination laws deal with a particularly wide spectrum of situations presenting different compliance challenges.

For example, employment discrimination and harassment issues may arise in the course of many millions of human interactions occurring everyday in Australian businesses. Support for compliance in this context needs to be accessible to a broad range of stakeholders. At the other end of the spectrum, the compliance mechanisms to ensure disability access to railway public transport services are far more technical in nature, targeted to a handful of people who can and do all meet in one room.

At present, the Commission administers the following compliance mechanisms:

- Issue of guidelines on the operation of various discrimination laws, providing practical tools to assist decision-making and compliance. These are non-binding and do not provide a defence in any subsequent legal action, although they do have an educative value and are able to reflect best practice approaches to various issues.
- Publication of action plans that are developed by organisations outlining how they intend to comply with disability discrimination laws. The Commission merely publishes plans that are lodged with it, and is not required to assess their rigour. The benefit of such plans is that they act as a public statement to the community of the commitments and actions to be taken by an organisation.
- Issue temporary exemptions to sex, disability and age discrimination laws. These are administratively reviewable decisions, undertaken with public consultation processes.

There is also a legislative process to guide the **development of standards** setting out technical details of compliance with disability discrimination laws. Standards are legislative instruments, made by the Attorney-General and reviewed every five years. Where they apply, compliance with the standards is both necessary and sufficient for compliance with the DDA. Further, the standards displace State and Territory laws to the extent that they deal with the same subject matter. Standards have been introduced under the DDA for Accessible Public Transport, Access to Premises and Education.

The Commission considers that the above compliance measures have had variable outcomes. While there have undoubtedly been positive outcomes achieved through each of these measures, there are also limits to what they can achieve. This is especially so for those measures that are purely advisory in nature or which solely provide for the publication of a document (without an assessment of its quality).



In relation to **disability standards**, these provide detailed technical advice on measures that will be understood to comply with disability discrimination laws. They are able to convert general legal principles into measurable, outcome-focused requirements. There is, however, a need for greater awareness-raising activities and possibly industry support to promote compliance. There is also a need for robust review processes to measure the effectiveness of the standards and to assess the extent to which relevant stakeholders are moving towards full compliance with disability discrimination laws over time.

In relation to **temporary exemptions**, the Commission notes that in the absence of other compliance measures, organisations occasionally seek to rely upon temporary exemptions in circumstances that were not intended.

In particular, the Commission will periodically receive requests to issue a temporary exemption under one of the relevant discrimination laws for activities that are intended to be a 'special measure'. A special measure is a form of positive discrimination whereby an action is proposed that confers a benefit on a group of people in order to redress their experience of inequality.

A special measure does not amount to discrimination, and therefore it is not appropriate for the Commission to 'exempt' such activities from the operation of federal discrimination law. What is instead required is a process to certify that the activity amounts to a special measure and therefore is conducted lawfully under discrimination law.

Despite all federal discrimination laws providing for special measures, there exists no process for such certification. The Commission has consistently heard from the business sector that the absence of a compliance function for the Commission to issue **special measures certifications** contributes to greater uncertainty about the operation of the law, and potentially affects the willingness of organisations to take positive measures to promote equality and eliminate discrimination due to fear that they may have discrimination actions brought against them.

This is an example of a compliance mechanism that should be considered for introduction into federal discrimination law. The Commission considers that such a provision, if introduced, should be administratively reviewable, to ensure appropriate oversight, particularly for complex applications.

In addition, the Commission considers that the following compliance measures would assist in promoting greater compliance and understanding of federal discrimination law:

- Voluntary audits- the power to conduct reviews of policies or programs of a person or body to assess compliance with human rights and federal discrimination laws. The Commission would only be able to conduct a review if the person or body requests it to do so.
- General inquiry function- a broader inquiry function to inquire into issues of systemic discrimination.
- Positive duties- as discussed further below.

Any new compliance mechanisms should be considered alongside existing mechanisms to ensure that they work together to provide a spectrum of options that is effective and efficient.

DISCUSSION QUESTIONS

8. How can existing compliance measures under federal discrimination law be improved?
9. What additional compliance measures would assist in providing greater certainty and compliance with federal discrimination law?

- **Positive duties**

One compliance measure of particular note is the introduction of a positive duty, either on all organisations or specifically focused on public officials and organisations exercising public functions. This is distinguished from the above compliance measures as it requires people exercising public responsibilities to proactively take measures to eliminate unlawful discrimination and harassment and advance equality.

Positive duties may cover a number of distinct elements as seen through the experience of the United Kingdom and Victorian jurisdictions:

- The *Equality Act 2010* (UK) contains a general duty to have due regard to the need to eliminate unlawful discrimination, harassment and victimisation and to advance equality of opportunity and good relations between different groups. This general duty applies to key public authorities and to private bodies carrying out a public function. The general duty is supported by specific duties set out in regulations.

Authorities are required to publish information demonstrating their compliance with the equality duty, and to set themselves specific, measurable equality objectives. There is no requirement for organisations to provide evidence of their compliance to the Equality and Human Rights Commission (EHRC).

The EHRC is responsible for assessing compliance with the positive duties, and for their enforcement. The EHRC can use its statutory powers to assess the extent to which an organisation has complied, to issue a compliance notice if it believes an organisation has failed to comply and to apply to the courts for an order requiring compliance.

- The *Equal Opportunity Act 2010* (Vic) contains a positive duty requiring all organisations covered by the Act—including government, business, employers and service providers—to take measures to eliminate discrimination, sexual harassment and victimisation. The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) assists organisations to comply with the positive duty in a number of ways:
 - » promoting awareness about the law and good practice
 - » delivering education and training workshops, and
 - » reviewing an organisation's policies and practices.

- An individual cannot make a complaint to VEOHRC regarding a breach of the positive duty. However, VEOHRC has the power to investigate suspected cases of serious and/or systematic non-compliance with the positive duty. VEOHRC can ask the Victorian Civil and Administrative Tribunal (VCAT) to compel evidence for an investigation that it is conducting. After an investigation has been conducted, VEOHRC may take certain action, including entering into an agreement with the entity in question about action required to comply with the positive duty, referring a matter to VCAT, making a report to the Attorney-General, or reporting on the matter to Parliament.

Consideration should be given to introducing a positive duty to ensure that more consideration is given to preventing discrimination in the first place.

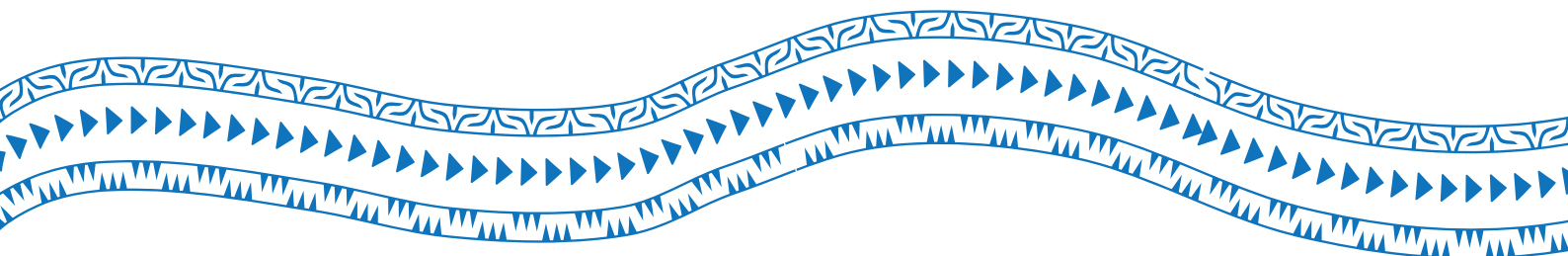
DISCUSSION QUESTIONS

10. What form should a positive duty take under federal discrimination law and to whom should it apply?

- **Ensuring the complaint handling process is accessible to the most vulnerable in the community**

Discrimination law protects everyone in society, but it is of particular importance for the most vulnerable members of the community who are more likely to experience discrimination and inequality.

Processes for making complaints to the Commission and subsequently going to court should operate in a manner that ensures the availability and accessibility of the process.



Some provisions guiding the process for handling complaints and the functioning of the Commission itself warrant further consideration in this regard. In particular:

- There is no specific time frame in which a complaint must be lodged with the Commission. However, the President can terminate a complaint if the complaint is lodged more than 6 months after the alleged act, omission or practice takes place. There has been concern expressed that 6 months is too short for complex disputes and creates a disincentive for people who have experienced sexual harassment and persons with a disability to raise concern or make complaints.
- There is a need for clarity about the operation of victimisation provisions in proceedings before the Federal Court and Federal Circuit Court to ensure that civil proceedings can be brought.
- Greater clarity should be provided about the ability for representative actions to be brought, enabling a greater focus on systemic discrimination issues and placing less pressure on individual complainants.
- Greater clarity should be provided enabling protective cost orders to be made for matters brought to the court stage, to limit the amount of costs that can be ordered against a party, in order to ensure that affordability does not become a fundamental barrier for the hearing of complaints.

Consideration should also be given to whether there should be any change to discrimination laws regarding the evidentiary onus of proof.¹¹

The Commission would also benefit from submissions from the legal community about whether the existing rules around the awarding of costs are equitable in the circumstances, or whether consideration should be given to parties bearing their own costs for discrimination proceedings in the Federal Circuit Court or Federal Court, with leave for the court to depart from this principle in certain circumstances.

There are other technical matters that affect the efficiency of the complaint process that should be addressed. These include:

- Adjusting the mandatory and discretionary termination grounds and leave-seeking obligations that apply to certain termination grounds

- Removing the requirement to notify people subject to adverse allegations but not named as respondents.

DISCUSSION QUESTIONS

11. What, if any, reforms should be introduced to the complaint-handling process to ensure access to justice?
12. What, if any, reforms should be introduced to ensure access to justice at the court stage of the complaints process?

• Paris Principles compliance

The Australian Human Rights Commission is an 'A status' national human rights institution. This means that we meet internationally accepted minimum standards (the Paris Principles) to ensure that the Commission operates in a manner that is robust, independent from government influence, with a breadth of functions and diversity of leadership.¹²

Some improvements could be made to the AHRC Act to promote compliance with the Paris Principles, as follows:

- Specify that all commissioner appointments can only be made following a clear, transparent, merit-based and participatory selection and appointment process.¹³
- Including a reference to the Paris Principles in the objects clause of the legislation acknowledging that the AHRC is intended to be a Paris Principles compliant national human rights institution
- Including a definition of human rights in the AHRC Act that references all of Australia's international human rights obligations
- Specify that all Commission functions may be exercised independently of government authorisation – at present, the Commission's function to intervene in court matters is not completely unfettered.

Consideration should also be given to whether additional measures are required to ensure that the Commission can meet the Paris Principle that it has ‘an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding.’ Indicators of inadequate funding may include: backlogs in complaints, with an impact on timeframes for resolution of complaints, staffing levels to support statutory commissioners to undertake their mandates and funding for commissioners drawn from across the country.

- **Enhanced protections against harassment and vilification**

The adequacy of protections against harassment and vilification in federal discrimination law is a matter that warrants consideration for reform, but which would require additional and more targeted consultation and consideration.

Federal discrimination laws cover harassment in different ways, but with gaps in protection on certain grounds. There are protections for sexual harassment, disability based harassment and racial vilification.

The Commission is currently finalising its national inquiry into sexual harassment in workplaces, which will provide more detailed guidance on reforms to the SDA to eliminate the experience of sexual harassment. This inquiry follows the Commission’s national prevalence data which shows that high rates of sexual harassment persist in Australian workplaces.

In relation to vilification, federal discrimination law does not offer as comprehensive protection as state and territory laws.

All states and territories in Australia (with the exception of the Northern Territory), have introduced civil and/or criminal provisions to protect people from vilification on the basis of certain protected attributes, most commonly including race, religion or belief, and sexual orientation.

There are minor deviations between states and territories on how they protect against vilification, with the definition of ‘vilification’ being remarkably uniform across all jurisdictions. Each relevant act or section refers to acts that occur in public, that incite hatred, serious contempt or severe ridicule of the person (or group) with the protected attribute, and contain exceptions that balance this protection against the competing right to freedom of opinion and expression.

There is presently an absence of quantitative data that identifies the prevalence of vilification experienced on grounds such as religion or belief, sexual orientation, gender identity or intersex status. The Ruddock report into religious freedom recommended that prevalence research be commissioned to address this lack of knowledge.

DISCUSSION QUESTIONS

13. Is there a need to expand protections relating to harassment and vilification on the basis of any protected attributes?



Conclusion

The following text box provides a summary of the priorities for federal discrimination law reform that have been identified by the Commission in this discussion paper. We seek your input on these priorities and any other key issues for reform.

SUMMARY—PROPOSED PRIORITIES FOR FEDERAL DISCRIMINATION LAW REFORM

1. Simplify and make consistent definitions of discrimination, victimisation, special measures and reasonable adjustments across federal discrimination law.
2. Address limitations in coverage of existing protected attributes by expanding protections for carer/family responsibilities, state government employees, volunteers and interns.
3. Address gaps in protection by introducing new protected attributes for religion or belief, as well as considering the need for other new protected attributes and the transition of other grounds under the Commission's ILO111 jurisdiction, in particular irrelevant criminal record, as well as trade union activity/industrial activity, and political opinion.
4. Review all permanent exemptions under discrimination law to ensure that they are strictly necessary and result in the minimum intrusion on people's rights, transition certain exemptions to being periodic in nature or sunseting those that are no longer required or fail to meet community standards.
5. Consider introducing a 'general provisions' clause for 'justifiable conduct' as an alternative to permanent or temporary exemptions.
6. Revamp review processes for standards under the Disability Discrimination Act and consider industry support package to build awareness and compliance with the standards.
7. Provide greater certainty for industry by empowering the Commission to issue special measure certifications on a fee for service basis.
8. Broaden the Commission's functions to enable voluntary audits and inquiries into systemic issues.
9. Introduce a positive duty to proactively take measures to eliminate unlawful discrimination and harassment and advance equality.
10. Amend the complaint handling processes of the Commission to ensure access to justice, especially for vulnerable people, and to improve efficiency of the process.
11. Amend the AHRC Act to ensure the independent operation of the Commission, confirming its operation as a Paris Principles compliant national human rights institution.

DISCUSSION QUESTIONS

14. Are there other issues that you consider should be a priority for discrimination law reform? If so, please describe the issue and your thoughts on proposed solutions.



Endnotes

- 1 For more information about the Free and Equal project see: <https://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/free-and-equal-australian-conversation-human-rights>.
- 2 See further section 3 of the Age Discrimination Act 2004, Sex Discrimination 1984, Disability Discrimination Act 1992 and preamble, Racial Discrimination Act 1975.
- 3 Any reform to federal discrimination law must also meet different constitutional requirements to reforms at the state and territory levels.
- 4 *Sklavos v Australasian College of Dermatologists* [2017] 347 ALR 78.
- 5 *Maloney v The Queen* [2013] 298 ALR 308.
- 6 Consideration will have to be given to the constitutional basis when considering any new or amended protected attributes.
- 7 in the most recent financial year, the Commission has received 137 complaints of age discrimination and 110 complaints of discrimination in employment under the ILO 111 jurisdiction
- 8 See further: Croucher, R, *Righting the relic: Towards effective protections for criminal record discrimination*, Law Society of NSW Journal, September 2018.
- 9 See further: <https://www.alrc.gov.au/inquiries/review-framework-religious-exemptions-anti-discrimination-legislation>.
- 10 This list of issues is illustrative and not intended to be comprehensive.
- 11 The Fair Work Act has a different evidentiary onus for establishing proof for certain elements. Previous attempts to reform discrimination law, such as the Human Rights and Discrimination Bill of 2012 have proposed changes to the evidentiary onus.
- 12 The United Nations Principles relating to the Status of National Institutions (Paris Principles) were endorsed by the UN General Assembly in 1993: UN Doc A/RES/48/134 and can be accessed online at: <https://www.ohchr.org/en/professionalinterest/pages/statusofnationalinstitutions.aspx>.
- 13 The Global Alliance of National Human Rights Institutions has a Sub-Committee on Accreditation that sets out requirements for how NHRIs will be assessed as meeting the Paris Principles. For selection processes see section 1.8 of GANHRI Sub-Committee on Accreditation, *General observations of the Sub-Committee on Accreditation*, Adopted 21 February 2018, available online at: https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf.



Australian
Human Rights
Commission

FREE + EQUAL

AN AUSTRALIAN CONVERSATION ON HUMAN RIGHTS

