Working for business.
Working for Australia

Discussion Paper: Priorities for federal discrimination law reform

Submission to AHRC
November 2019

Australian
Chamber of Commerce
and Industry

Australian
Chamber of Commerce
and Industry

WORKING FOR BUSINESS.
WORKING FOR AUSTRALIA

Telephone 02 6270 8000
Email info@australianchamber.com.au
Website www.australianchamber.com.au

CANBERRA OFFICE
Commerce House
Level 3, 24 Brisbane Avenue
Barton ACT 2600 PO BOX 6005
Kingston ACT 2604

MELBOURNE OFFICE
Level 2, 150 Collins Street
Melbourne VIC 3000

SYDNEY OFFICE
Level 15, 140 Arthur Street
North Sydney NSW 2060
Locked Bag 938
North Sydney NSW 2059

ABN 85 008 391 795

Australian Chamber of Commerce and Industry

CONTENTS

Australian Chamber of Commerce and Industry

1. INTRODUCTION

1. The Australian Chamber of Commerce and Industry (ACCI) welcomes the opportunity to make a submission to the Australian Human Rights Commission (AHRC) in relation to the Discussion Paper: Priorities for Federal Discrimination Law (Discussion Paper).

2. This submission addresses issues raised in the Discussion Paper as they relate to private sector business and in their capacity as employers.

1.1 Guiding principles for discrimination law reform

3. ACCI has reviewed the proposed principles to guide discrimination law reform as set out in the Discussion Paper and has considered them in light of the purpose of discrimination laws, and the experiences of employers, small and large, in managing discrimination matters. The principles set out in the Discussion Paper seek to provide a positive foundation for sound policy and initiatives in this area, and the aspiration to be more effective in further minimising discrimination in Australian workplaces.

4. ACCI is a strong supporter of well-designed anti-discrimination laws with clear duties that balance the interests of all parties.

5. Any reform to the existing federal anti-discrimination laws should result in a **net improvement to the existing regulatory framework**, including in the capacity of employers to comply with existing anti-discrimination laws.

6. The Discussion Paper presents many issues for consideration as potential 'priority' areas for changes to the system. However, the basis for suggesting any such proposed changes was often not included and it was not evident from the Discussion Paper that the proposed changes would actually improve the system. Where there is no prevailing policy reason and sound basis for amending discrimination law, the current law should remain.

7. Confidence in discrimination law is lost if it goes beyond the boundaries of common sense and becomes unbalanced and impractical, even more so where there is no evidence-based case for change.

8. Employers lose confidence in discrimination law if it goes beyond the boundaries of common sense and is unbalanced in the content or enforcement. Employers accept their role as part of the community and acknowledge that their workplaces need to reflect the general norms and diversity of the community at large. Conversely, employers resist their workplaces being used to engineer social attitudes or to experiment with policy that is ahead of community attitudes.

9. ACCI agrees that federal discrimination law should be **clear and avoid complexity**. The Discussion Paper also provides that federal discrimination law must be 'readily understandable by the community'. This must not only include those who receive protections under the laws, but importantly, those who the legislation imposes obligations on. Discrimination law must be clearly expressed so that employers can readily identify their obligations. It is well accepted

that better understanding of the law has a positive impact on the level of compliance with those laws.

10. The Productivity Commission found that small businesses especially value (and by implication consider that effectiveness lies in):

> *"compliance requirements that are straightforward to find, understand and implement – this necessitates brevity, clarity and accessibility in the communication of compliance obligations…"*[1]

11. In order to achieve these objectives and to be effective, **regulation should be stand alone and come from a single source** without competing or overlapping jurisdictions / regulations. ACCI supports a framework which moves towards a single national anti-discrimination system, subject to the content of the legal duties and obligations being fair, reasonable and balanced / proportionate, practical. To the extent possible both complainants and respondents need a single source of law, guidance from a single source, and clarity on which regulator / jurisdiction they will need to deal with. Clarity of responsibility supports compliance, and in particular efforts to see more Australians able to work free from discrimination.

12. A further guiding principle is that federal discrimination law should be **sensitive to business size and capacities**. Businesses are not homogenous, and measures to combat discrimination need take this into account. The particular circumstances of smaller and medium-sized businesses need to be taken into account in framing and implementing the law.

13. The Discussion Paper proposes that one of the guiding principles of discrimination law is that it should be 'preventative'. It expands on this by saying the AHRC's view is that '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'.

14. This goal should be achieved through implementation, rather than additional regulation. ACCI supports policy outcomes and goals being achieved through non-regulatory measures, such as targeted education and awareness campaigns and recourse to regulation where these non-regulatory measures have failed to achieve policy objectives. There is an opportunity to be more effective in performing this function in relation to discrimination law, through enhanced **education and promotion**, rather than encouraging 'prevention' through additional regulation. This is particularly the case in relation to some aspects of discrimination law that are unclear and / or confusing. For example, many small business employers would likely be able to readily identify the obvious examples of direct discrimination, however 'indirect discrimination' is more of a grey area, particularly where competing interests such as work health and safety, and necessity to perform inherent requirements of the role exist. In this regard, one of the functions of the AHRC is "to promote an understanding and acceptance, and the public discussion, of

[1] Productivity Commission 2013, Regulator Engagement with Small Business, Research Report, Canberra, p. 38.

human rights in Australia".[2] This will go a long way towards progressing the principle that discrimination law is 'preventative'.

15. Education and promotion is also particularly important on a wider basis, given that combatting discrimination in society is a shared responsibility across the community. Employers have legitimate responsibilities in preventing and combatting discrimination within their sphere of knowledge, responsibility and control and we do not downplay those responsibilities. However, there is a real opportunity for education and promotion to improve the predetermined, ingrained attitudes Australians bring into our workplaces. Combatting discrimination requires a multifaceted approach as a community to community wide preconceptions.

16. In relation to 'promotion of equality', employers support workplaces that are free from discrimination. Many employers have put in place positive initiatives that promote equality of treatment. However, these are predominately larger workplaces, who have the resources and expertise to put in place such programs. While a noble goal for the Australian community at large, it is not and should not be the role of employers at large, particularly not small to medium sized businesses, to "promote 'equality of treatment'". The focus of a small business employer is to effectively run a business in compliance with its legislative obligations, which in turn creates employment opportunities for Australians. Many work to create a positive workplace culture supportive of this aim. However, employers should not be tasked with an additional duty, which more rightly sits with the AHRC.

[2] *Australian Human Rights Commission Act 1986*, s.11.

Australian Chamber of Commerce and Industry

2. POSITIVE DUTIES

2.1 Additional duties not warranted

18. One of the proposed "priorities for federal discrimination law reform" canvassed in the Discussion Paper is to "Introduce a positive duty to proactively take measures to eliminate unlawful discrimination and harassment and advance equality". This would require employers to "proactively take measures to eliminate unlawful discrimination and harassment and advance equality".

19. The Discussion Paper goes on to say that this positive duty could apply "either on all organisations or specifically focused on public officials and organisations exercising public functions."

20. Discrimination laws around Australia already currently place a duty on employers to take "all reasonable steps" to prevent discrimination and harassment in the workplace. Employers who fail to take all reasonable steps may be found to be vicariously liable for the actions of any employees or agent that may be in breach of the relevant discrimination law.

21. In practice, Australian employers must already actively implement precautionary measures to minimise risks of discrimination and respond appropriately when it does occur. In relation to sexual harassment for example, this is generally considered to involve having appropriate policies, procedures and training that discourage and minimise risks of sexual harassment occurring.

22. ACCI addressed the proposition of positive duties in relation to the Sex Discrimination Act in our submission to the National Inquiry into Sexual Harassment in Australian Workplaces earlier this year. ACCI's position remains that we do not agree there are insufficient incentives for Australian employers to take robust action to tackle and prevent unwanted sexual behaviours in the workplace. In addition to the legal rationale for preventing sexual harassment, there is also a clear business case: a poor organisational culture and failure to deal with sexual harassment allegations leads to employees being dissatisfied with work, having a low opinion of their managers, absenting themselves or wanting to leave. The same applies to other forms of discrimination.

23. As a result of these current duties, we do not believe there is any case for adding a new or additional duty onto employers – whether in the public or the private sector – to respond to discrimination. The current obligations are sufficient, and this Discussion Paper offers an opportunity to better promote and support them.

2.2 A better approach

24. The Discussion Paper hints at the reason behind the proposal to introduce positive duties: that "consideration should be given to introducing a positive duty to ensure that more consideration is given to preventing discrimination in the first place."

25. As a starting point, a better approach would be to improve efforts to ensure that all businesses, including small and family businesses, understand their obligations under discrimination laws.

26. JobWatch has previously suggested that many complaints under the Sex Discrimination Act were the result of employers simply being unaware of their obligations under the Act:[3]

> *[A] a lot of our callers work for small to medium enterprises. …[A] lot of these smaller employers just do not know what their obligations are. They are strapped for cash occasionally and cannot get legal advice or a lawyer to help them out with policies and procedures. …I think that much of the time the employer just does not know what their obligations are…*

27. This is particularly the case in relation to some aspects of discrimination law that are unclear and / or confusing. For example, as identified in Part 1.1, many small businesses would likely be able to readily identify the most obvious examples of direct discrimination. However, 'indirect discrimination is more of a grey area, particularly where there are competing interests at play, such as work health and safety.

28. One of the AHRC's functions is to "to promote an understanding and acceptance, and the public discussion, of human rights in Australia"[4]. There is an opportunity to be far more effective in performing this function in relation to anti-discrimination and SMEs. This should occur, and the effect monitored, before any 'positive duty' could be considered.

Recommendation 1: Ongoing information campaign

The AHRC should promote increased understanding amongst employers of what constitutes discrimination, in particular in relation to areas that may be less naturally apparent, such as indirect discrimination, their responsibilities, and what their employees are entitled to expect and not expect at work.

Given that there were over 89,000 new businesses entering the market sector in the last year on record, the campaign should be ongoing.[5]

[3] Report: Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality.
[4] *Australian Human Rights Commission Act 1986*, s.11(g).
[5] Analysis of ABS 8165 – Counts of Australian Businesses, including Entries and Exits, June 2014 to June 2018.

Australian Chamber of Commerce and Industry

3. EXEMPTIONS

3.1 Permanent exemptions

29. The Discussion Paper notes that the Sex Discrimination Act, Disability Discrimination Act and Age Discrimination Act each contain permanent exemptions to the operation of discrimination law. The Racial Discrimination Act also contains permanent exemptions.[6]

30. It is unclear whether the Discussion Paper is referring to exemptions in terms of whole groups or locations that may be exempt from application of the laws, or exemptions to what may be considered to be unlawful, for example the current exemption in the Racial Discrimination Act that section 18C does not render unlawful anything said or done reasonably and in good faith in the performance, exhibition or distribution of an artistic work.[7]

31. The Discussion Paper notes the AHRC 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".*

32. Exemptions are not included in legislation lightly, and exist for very good reason. ACCI does not support exemptions being "time limited". Those who hold duties under the law should legitimately expect that their obligations will not change frequently, in particular if they have relied on these exemptions in good faith. We also caution against an assumption that every exemption will automatically cease to be merited.

33. For example, an "exemption" under *Division 5 – Exemptions* of the Disability Discrimination Act provides as follows: [8]

> *"This Part does not render unlawful anything done by a person in direct compliance with an order of a court, or a law of the Commonwealth, State or Territory."*

34. It is difficult to envisage a situation where this exemption may no longer meet community standards and would need to be reviewed.

35. Also, the ability to decline to employ an individual who, because of their age or disability, is unable to carry out the inherent requirements of the job is a logical and critically important exemption. The example used from the AHRC website is as follows:

> *"A young person may not be able to meet the inherent requirements of a courier job if they are not yet eligible for a driver's licence."*

36. It is difficult to envisage a situation where this exemption would no longer meet community standards and need to be reviewed.

---

[6] See *Racial Discrimination Act 1975*, s.18D.
[7] *Racial Discrimination Act 1975*, s.18D.
[8] *Disability Discrimination Act 1992*, s.47.

37. A third example was touched on earlier – the exemption in section 18D of the Racial Discrimination Act, which exempts anything said or done reasonably and in good faith in the performance, exhibition or distribution of an artistic work. As the Australia Council for the Arts previously highlighted, freedom of artistic express is "an intrinsic social good" and "an essential tenet of our cultural life", and:[9]

> *…an essential precondition for public debate on issues of public interest. In the arts, the Australia Council takes the view that the freedom for people to express themselves without restraint, to engage freely in the artistic process, and to create and consume a diverse range of artistic expressions allows all Australians to develop and express their humanity, to engage with complex social issues, to question and provoke debate and contribute to the development of our vibrant cultural life and democracy. Put simply, freedom of artistic expression enriches us all.*

38. Again, it is difficult to envisage a situation where this exemption would no longer meet community standards and need to be reviewed.

39. While the Discussion Paper envisages that some exemptions could take permanent form in circumstances that are 'strictly necessary', and could encompass the exemptions in the above three examples, an examination of the other exemptions reveals that they were included for similarly good reason and continue to also remain relevant to this today.

40. The uncertainty associated with well-considered and well justified exemptions being only temporary is not desirable. Businesses should be provided with an appropriate level of certainty as to their obligations under the various Acts. Permanent exemptions (subject to normal levels of review) will also ensure businesses are not required to examine the various Acts constantly to check the exemption they may rely on still applies. That would not be practical or credible.

41. This is not to say that exemptions cannot be reviewed. ACCI supports any exemption being reviewed if and when it appears it no longer reflect community standards. There is no benefit in reviewing an exemption more frequently than that.

42. Further, if a time limit is put on an exemption, there would need to be a significant amount of publicisation when that exemption suddenly ceased, in particular if the exemptions were ceasing at different intervals. A far better approach is to review exemptions via a normal legislative process and subject to appropriate consultation.

43. Instead of reviewing all of the exemptions, it may be more appropriate as a first step to identify any exemptions that the AHRC proposes do not meet community standards, with input from interested stakeholders, and then invite feedback through a well publicised, transparent, visible consultation / engagement process. It is also important that:

    a. Sufficient time be allowed for research, consultation and submissions.

[9] Australia Council for the Arts, Submission No 30 to the Parliamentary Joint Committee on Human Rights, Inquiry into Freedom of Speech in Australia December 2016.

b. The presumption be towards the status quo (retaining exemptions) not abolishing them, unless sufficient evidence is advanced or interests engaged to justify abolition.

Recommendation 2: Retain permanent exemptions unless sufficient case for change

Permanent/ongoing exemptions to the operation of discrimination law should be retained. The presumption should be towards the status quo (retaining exemptions) rather than abolishing them, unless sufficient evidence is advanced or interests engaged to justify abolition.

If there are certain, specific exemptions the AHRC proposes do not meet community standards, with input from interested stakeholders, the AHRC should invite feedback through a well publicised, transparent, visible consultation / engagement process, with sufficient time allowed for research, consultation and submissions.

3.2 'Gig economy' / Personal residence

44. The Discussion Paper notes in particular that the following permanent exemption has operated without review or limitation since it was introduced in the legislation:

> *Section 14(3) of the SDA and s15(5) of the RDA provide that protects 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.*

45. Despite media and community interest in the 'gig economy', on-demand work remains a marginal, non-statistically significant part of the Australian labour market.

46. The Productivity Commission in October 2017 said the prevalence of the gig economy is often 'grossly exaggerated,'[10] and observed that the 'gig' economy is still in its infancy in Australia.[11]

47. Recently, the Association of Superannuation Funds of Australia in 2018 estimated that around 150,000 workers nationally utilise digital platforms to obtain work on a regular basis – which represents only 1.2% of the workforce.[12]

48. We are yet to see any significant compositional change in the labour market towards a wide take up of 'gig economy' work. The Productivity Commission has observed that 'most people gaining employment through platform websites are employed as independent contractors' and that 'the proportion of independent contractors has remained constant in recent times'.[13] Self-employed independent contractors make up less than 9% of the workforce in Australia, a figure that has remained stable for at least a decade.[14]

49. Future growth of the 'gig economy workforce is also uncertain. 2018 research found predictions that the 'gig economy' would lead to the demise of traditional employment have been greatly exaggerated, and that most employers still prefer a permanent workforce.[15]

50. Based on the scale of change at the time of its report, the Productivity Commission did not consider it appropriate to recommend changes to workplace relations regulations at this stage.[16]

---

[10] https://www.pc.gov.au/inquiries/completed/productivity-review/report/productivity-review.pdf
[11] Future of Work, citing https://www.pc.gov.au/inquiries/completed/productivity-review/report/productivity-review.pdf
[12] Andrew Craston, The Association of Superannuation Funds of Australia Limited, Superannuation balance of the self-employed, March 2018.
[13] Productivity Commission, Digital Disruption: what do governments need to do, June 2016, p 77.
[14] ABS 6291.0.55.003 (2015 onwards), ABS 6359.0.
[15] See AFR, Gig economy and casualisation threat to employment model 'a myth', expert says, 25 July 2018.
[16] Productivity Commission Research Paper, Digital Disruption: What do governments need to do? June 2016.

51. There is therefore also insufficient evidence at this point to justify attempting to take any legislative response in relation to the 'gig economy', that is, reviewing s14(3) of the Sex Discrimination Act and s15(5) of the Race Discrimination Act.

Recommendation 3: Retain exemptions relating to employment in a personal residence

The exemption in s14(3) of the Sex Discrimination Act and s15(5) of the Race Discrimination Act should be retained and be properly informed by transparent open consultations.

3.3 'Justifiable conduct'

52. The Discussion Paper also proposes that consideration be given to whether a general clause for 'justifiable conduct' should be introduced. The 'summary' at the conclusion of the Discussion Paper indicates that this could be an alternative to, not in addition to, permanent or temporary exemptions.

53. ACCI supports the idea of a general clause of 'justifiable conduct' but strongly opposes the removal of existing exemptions.

54. An exemption on its own which contains qualifying language that is open to interpretation is not preferred. Small and family business operators are not likely to be in a position to extensively consider the common law to determine what might be viewed by the courts to be 'justifiable conduct'. Particularly for small business employers, clear exemptions that they can follow and therefore know with certainty whether they are able to rely on a particular exemption and whether they have complied with discrimination law are preferred.

55. We are already seeing problems created by ambiguous language that is open to challenge in other areas of the law, for example in the Small Business Fair Dismissal Code. In its review of the Small Business Fair Dismissal Code, the Australian Small Business and Family Enterprise Ombudsman included the following recommendation:[17]

> *Remove qualifying language (i.e. references to 'reasonable belief' and 'reasonable chance') that is open to contest and interpretation. Prescribe clear steps that a small business employer can follow and therefore know with certainty whether they have complied with the Code.*

56. Including a term that is open to interpretation without any additional, concrete, exemptions appears to be at odds with the AHRC's proposed objective in this Discussion Paper, that "any legislation must be readily understandable by the community". It is also at odds with another proposed principle in the Discussion Paper, that discrimination law be "preventative". If those who hold obligations under the law are not clear on what constitutes discrimination and what does not, it is less likely that discrimination could be prevented.

57. The current approach should be retained so as to minimise the grounds upon which compliance is open to interpretation and challenge, and so the provisions are able to be navigated with as little need to seek out legal advice as possible. If the AHRC was minded to include a general exemption, this should be in addition to, rather than instead of, the existing exemptions.

[17] See Review of the Small Business Fair Dismissal Code, Australian Small Business and Family Enterprise Ombudsman, August 2019, pp. 9, 19, 20.

Recommendation 3: Retain permanent exemptions

Permanent exemptions to the operation of discrimination law should be retained.

If the AHRC was minded to include a general exemption, this should be in addition to, rather than instead of, the existing exemptions.

4. SIMPLIFICATION AND CONSISTENCY ACROSS DISCRIMINATION LAW

58. In relation to ensuring simplification and consistency across discrimination law, the Discussion Paper notes "the mix of discrimination laws is complex and similar concepts operate differently across the laws"[18] and that "there is an unnecessary level of difference and complexity between federal, state and territory laws".[19]

59. The Discussion Paper proposes as a priority for reform to address this: *"Simplify and make consistent definitions of discrimination, victimisation, special measures and reasonable adjustments across federal discrimination law."*[20]

60. ACCI agrees that there could be great benefit in ensuring simplification and consistency across discrimination law. In addition to clarity and simplicity, regulation is most effective when it comes from a single source without competing or overlapping regulation, or sending inconsistent signals.

61. Instead of making definitions consistent, to the extent possible both complainants and respondents need a single source of law, guidance from a single source, and clarity on which regulator / jurisdiction they will need to deal with. Clarity of responsibility supports compliance, and in particular efforts to see more Australians able to work free from discrimination.

62. At federal level, employers are subject to the five main federal discrimination statutes, including the *Age Discrimination Age 2004*, *Australian Human Rights Commission Act 1986*, *Disability Discrimination Act 1992*, *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984*. In addition to the five main federal discrimination laws, there remains significant duplication in legislation such as Part 3-1 of the *Fair Work Act 2009* (General Protections) and Part 6, Division 1 of the *Work Health and Safety Act 2011* (Cth) (Discriminatory, coercive or misleading conduct).

[18] Discussion Paper, p.7.
[19] Discussion Paper, p.8.
[20] Discussion Paper, p.18.

63. In addition to the obligations under federal legislation, employers are also subject to obligations under anti-discrimination statutes at the state and territory level. Concerns then arise from:

    a. Ambiguity about inconsistent obligations under federal, state and territory anti-discrimination laws (i.e. the confusions of multiple, differing obligations about the same subject matter).

    b. Confusion about the overlapping roles of law and the various regulators in relation to sexual harassment, workplace relations, health and safety law, anti-bullying, etc.

64. To the extent possible,[21] business should only have one clear set of legal duties to understand and comply with and not have to understand and comply with a cascade of different legal obligations arising from common law and federal, state or territory statutes, which applies to the same alleged conduct. This will also provide clarity to both complainants and respondents as they will have a single source of law, guidance from a single source, and clarity on which regulator / jurisdiction they will need to deal with.

65. The guidance provided by the Fair Work Ombudsman (extracted below) on where a worker can seek assistance if they think they've been discriminated against demonstrates that it is not easy for complainants to know where to turn, and it is not easy for employers to know which regulator to contact to seek guidance from:

> ## What do I do if I think I've been discriminated against in my employment?
>
> The FWO is committed to ensuring that employees and prospective employees are protected from unlawful workplace discrimination and any other adverse actions by an employer.
>
> If you believe that you and/or other employees have been unlawfully discriminated against in your employment, and the action occurred or continued to occur after 1 July 2009, you can request assistance from the FWO. You can do this by submitting and online enquiry or calling us on 13 13 94.
>
> The **FWO** investigates allegations of unlawful workplace discrimination and may initiate litigation against a national system employer for contravening the FW Act.
>
> You may also be able to lodge an application with the **Fair Work Commission** (FWC). If you have not been dismissed but allege that there has been a contravention of the unlawful discrimination protection provisions of the FW

[21] Noting the different constitutional requirements to reforms at the state and territory levels.

Act, you may make an application to the Fair Work Commission to deal with the dispute.

What do I do if I've been dismissed due to discriminatory grounds?

If you have been dismissed and you believe that it is because of one of the attributes listed above - (e.g. race, sex, age, disability, etc) you should make an application to the FWC in the first instance.

The timeframe for lodging an application to the FWC for either unfair dismissal or unlawful termination is 21 days. To find out more about matters involving termination, contact the FWC on 1300 799 675.

…

Other ways of getting help

The FWO does not have jurisdiction to deal with all unlawful discrimination complaints. Where a complaint or enquiry is outside our jurisdiction, you will be referred to the appropriate organisation. For example, if an employee is being bullied or harassed by colleagues, they will need to seek assistance from the relevant State or Territory Occupational Health and Safety Authority.

There are a range of anti-discrimination laws and you may prefer to raise your concerns with the **Australian Human Rights Commission** on 1300 369 711 or your relevant **State or Territory anti-discrimination body**. If you are a member of a trade union or employee association, they may also be able to help you.

(our emphasis)

66. Multiple sources of regulation create uncertainty and confusion, add to regulatory costs, can give rise to forum shopping and are generally a poor public policy outcome. This type of regulatory failure impacts negatively on employers and employers, causes confusion and delays, costs money and detracts from what can be done to combat discrimination. Clarity of responsibility on the other hand supports compliance, and in this context will better support diversity.

67. ACCI recommends that a priority for federal discrimination law should be to:

    a. Identify and report any ambiguities, overlap or friction between jurisdictions, law and responsibilities to the Australian Government.

b. Formally communicate this to the Council of Attorneys-General, or other intergovernmental bodies as appropriate for consideration and resolution.

68. Specifically, consideration should be given to replacing the current federal and state systems, with an effective, balanced and modern single national system. ACCI is aware of the constitutional complications that give rise to the current complications, however if we are to examine the fundamentals of our anti-discrimination system (as this review seeks to do) this must extend to consideration of a single national statute / mechanism in this area.

69. In doing so, it is particularly important that there be no scope for manipulation or forum shopping. Further, an incident or behaviour should give rise only to a single legal action in a single jurisdiction wherever possible, and not for example a sexual harassment claim, bullying claim, discrimination claim and safety claim. There should be protections for employers and employees to avoid this.

70. Jurisdiction / role clarity should extend not just in relation to claims and legal processes but also in relation to promotion, information, support for employees, legal advice, statistical collection etc to ensure the greatest return for users of the system from government spending in this area.

Recommendation 4: Identify and resolve any jurisdictional ambiguity

A priority for federal discrimination law should be to:

a. Identify and report any ambiguities, overlap or friction between jurisdictions, law and responsibilities to the Australian Government.

b. Formally communicate this to the Council of Attorneys-General, or other intergovernmental bodies as appropriate for consideration and resolution.

Jurisdiction / role clarity should extend not just in relation to claims and legal processes but also in relation to promotion, information, support for employees, legal advice, statistical collection etc to ensure the greatest return for users of the system from government spending in this area.

Australian Chamber of Commerce and Industry

5. EXPANDING COVERAGE

71. The Discussion Paper includes as a proposed priority for federal discrimination law reform:

> *Address limitations in coverage by introducing new protected attributes by expanding protections for carer/family responsibilities, state government employees, volunteers and interns.*

5.1 Carer's responsibilities

72. The Discussion Paper suggests there currently exists "gaps" in coverage of federal discrimination law in relation to carer's responsibilities. It notes that in the Sex Discrimination Act, family responsibilities discrimination is limited to direct discrimination in work related areas only and states that 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.

73. The Discussion Paper proposes that consideration be given to amending the Sex Discrimination Act being to cover family responsibilities / carer responsibilities both in terms of direct and indirect discrimination.

74. The example given on the AHRC website about the family or carer's responsibilities that may be considered indirect sex discrimination includes the following:[22]

> *Example: It could be indirect sex discrimination if a policy states that managers must work full-time, as this might disadvantage women because they are more likely to work part-time because of family responsibilities.*

75. As the Discussion Paper recognises, claims of direct discrimination are covered. See, for example, section 7A which provides:[23]

> **7A Discrimination on the ground of family responsibilities**
>
> For the purposes of this Act, an employer discriminates against an employee on the ground of the employee's family responsibilities if:
>
> (a) the employer treats the employee less favourably than the employer treats, or would treat, a person without family responsibilities in circumstances that are the same or not materially different; and
>
> (b) the less favourable treatment is by reason of:
>
> (i) the family responsibilities of the employee; or
>
> (ii) a characteristic that appertains generally to persons with family responsibilities; or

[22] https://www.humanrights.gov.au/quick-guide/12049

[23] See also s.7AA which relates to discrimination on the ground of breastfeeding.

(iii) a characteristic that is generally imputed to persons with family responsibilities.

76. Additionally, State/Territory anti-discrimination legislation renders discrimination against persons with family responsibilities unlawful.[24]

77. Some coverage is also provided in the *Disability Discrimination Act 1992* (Cth) for people who are associates of a person with a disability.

78. Those protections are in addition to the extensive range of rights that parents and carers currently enjoy under the Fair Work Act. The Fair Work Act contains entitlements which an employer must provide to employees to assist employers and employees achieve better work and family balance. These include:

a. The right to make a request for flexible working arrangements (because they are the parent, or have responsibility for the care, of a child who is of school age or younger, or are a carer (within the meaning of the *Carer Recognition Act 2010*), or provide care or support to a member of their immediate family or household, who requires care or support because they are experiencing violence from their family).[25]

b. The right to 12 months unpaid parental leave, with a right to request to extend the initial period of unpaid parental leave by a further 12 months.[26]

c. The right to 10 days paid carer's leave each year, and two days unpaid carer's leave for each permissible occasion.[27]

d. A right to refuse to work overtime on the basis of family responsibilities.[28]

79. Just last year, pursuant to a decision of the Full Bench of the Fair Work Commission, a model "family friendly working arrangements" term was inserted into all modern awards, providing employees with the right to request family friendly working hours – a change which took effect on 1 December 2018.[29]

80. Further, in addition to the above rights, an employer must not take adverse action (including for example, by discriminating and/or terminating employment) against an employee or prospective employee because they hold a workplace right (including those specified above),[30] and because of the person's family of carer's responsibilities, under the Fair Work Act.[31]

---

[24] See, for example, *Equal Opportunity Act 2010* (Vic), ss.17, 19, 22, 32.
[25] *Fair Work Act 2009*, s.65.
[26] See *Fair Work Act 2009*, ss.67-85.
[27] See *Fair Work Act 2009*, ss.95-107.
[28] *Fair Work Act 2009*, s.62.
[29] [2018] FWCFB 6863.
[30] See *Fair Work Act 2009*, ss.340-351.
[31] See *Fair Work Act 2009*, s.351.

81. As is evident, there are a substantial number of protections and rights for those with carer's responsibilities, all of which are already available under the current law.

82. In addition, there has also been a significant shift in human resources practices, with many businesses seeking to pursue greater diversity and flexible work initiatives to suit the particular needs and circumstances of employees above and beyond the requirements under the law, to ensure they are an employer of choice and can attract and retain key talent.

83. ACCI considers these current rights and protections are comprehensive, and balance the needs of those with family and carer's responsibilities with those who seek to run an effective business to ensure employment opportunities are not only retained, but grow.

84. The Discussion Paper also proposes that consideration be given to clarifying the definition of carers consistent with the definitions in the Fair Work Act and the *Discrimination Act 1991* (ACT). ACCI is in favour of consistent definitions, and supports a consistent definition in line with the Fair Work Act.

85. ACCI has earlier set out that multiple, overlapping jurisdictions are not the preferred approach, and proposes that a more beneficial way to tackle inconsistent definitions, etc, is to prioritise harmonising the discrimination laws (including overlapping Federal and State/Territory laws).

Recommendation 5: Properly balance protections in relation to carer's responsibilities

The current comprehensive rights and protections, which balance the needs of those with family and carer's responsibilities with those who seek to run an effective business to ensure employment opportunities remain and grow, should be retained.

5.2 Volunteers and interns

86. The Discussion Paper proposes to extend the coverage of discrimination laws to volunteers and interns, who are not covered within the definition of employment.

87. This is not the first time the issue of inclusion or otherwise 'voluntary or unpaid work' has been considered. When this issue was previously considered, Professors Aroney and Parkinson suggested that extending the definition of employment to include volunteer work may pose constitutional difficulties:[32]

> *[I]t is likely that the constitutional basis for this extension must rest, if anywhere, upon the International Labour Organization (ILO) conventions, in particular, the*

[32] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/antidiscrimination2012/report/c04

> *Discrimination (Employment and Occupation) Convention, 1958 (No. 111). Notably, that Convention uses the terms 'employment' or 'occupation' rather than 'work', and there is no indication whatsoever in [that] Convention that it is intended to go beyond paid employment...While the ILO may have an interest in volunteer work for statistical purposes, there is no reason to believe that volunteers are within the scope of ILO Convention 111. Indeed, the ILO makes it clear that its own definition of volunteer work for statistical purposes seeks to capture activity which is quite unrelated to the world of paid employment. Examples...include buying groceries for an elderly neighbour or driving a neighbour to a medical appointment.*
>
> *We find it difficult to see where in the federal Constitution the Commonwealth is authorised to regulate such activity (and nor can we see any sensible reason to do so).*[33]

88. Even if Australia was able to legislate to include volunteers in some other ways, it is important to highlight there are key legal differences between an employee and a volunteer. Defining a 'volunteer' as a type of 'employee' fails to recognise important distinctions between these two different types of workers, and would be very confusing for small business employers in particular, and volunteers.

89. Different legal obligations are owed by an employer to their employees as opposed to their volunteers. For example, remuneration, leave entitlements, superannuation, and conditions set out any otherwise applicable modern award.

90. Employers also generally exert different levels of direction, control and supervision over volunteers as opposed to their employees. Further, unlike employees, volunteers are under no obligation to attend the workplace or perform work.

91. There are organisations representing volunteers, and those who offer them volunteering opportunities. It is vitally important that they engage with these considerations – and if they fail to submit, the AHRC would benefit from reaching out to them and inviting their input.

Recommendation 6: Retain the status quo in relation to volunteers and interns

The current coverage of discrimination laws in relation to volunteers and interns should be retained.

[33] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/antidiscrimination2012/report/c04

6. INTRODUCING NEW PROTECTED ATTRIBUTES

92. The Discussion Paper notes a further proposed priority for federal discrimination law reform is to *"address gaps in protections by introducing new protected attributes"*.[34] This appears to be slightly at odds with what is set out earlier in the Discussion Paper, that is, any reform to discrimination law *"should not involve creating new forms of discrimination"*.[35]

6.1 'Thought, conscience or religion'

93. The Discussion Paper reveals that 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".*

94. The Attorney-General's Department recently undertook a public consultation process in relation to its proposal to legislate to make discrimination on the groups of religious belief or activity unlawful in specific areas of public life. It invited submissions on the following exposure drafts:

a. The Religious Discrimination Bill 2019, which will provide protection against discrimination on the basis of religious belief or activity and establishes a new office of the Freedom of Religion Commissioner.

b. The Religious Discrimination (Consequential Amendments) Bill 2019 which will make consequential amendments to existing Commonwealth legislation to support the introduction of the Religious Discrimination Bill.

c. The Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 which will amend the *Charities Act 2013* and Marriage Act 1961 to "provide certainty" to charities and religious education institutions.

95. ACCI, along with many other organisations and individuals, participated in the consultation process. ACCI considers this issue was appropriately ventilated during this process, which received approximately 6,000 submissions, including a submission by the AHRC, and does not consider that duplication of consideration by the AHRC is necessary.

Recommendation 7: Respect the Attorney-General's consultation process

The consultation process in relation to the Attorney-General's proposal to legislate to make discrimination on the groups of religious belief or activity unlawful in specific areas of public life should be deemed to have covered the field on this issue. Duplication of consideration by the AHRC should be avoided.

[34] Discussion Paper, p.18.
[35] Discussion Paper, p.7.

6.2 Accommodation status

96. The Discussion Paper also raises the possibility of accommodation status being a protected attribute. This again would appear to create an entirely new form of discrimination, by creating new rights for those with a certain accommodation status.

97. Those experiencing homelessness can face unique obstacles to employment, potentially including having no or limited access to a phone, no permanent address to give potential employers, not having work-appropriate (or interview-appropriate) attire, problems with resume creation and distribution (including regular computer access), gaps in and/or inadequate employment history / skills, difficulties with obtaining access to financial institutions, etc.

98. An additional protected attribute of 'accommodation status' may see employers faced with practical difficulties such as in some cases not being able to contact their employee, or notify them in writing of specific matters required by legislation within the required timeframe – some of which carry civil penalties for breaching. This may include, for example, pay slips (which have to be given to an employee within 1 working day of pay day, even if an employee is on leave),[36] the Fair Work Information Statement (which must be provided before, or as soon as practicable after, the employee starts employment),[37] a copy of the Notice of Employee Representational Rights (which must be provided no later than 14 days after bargaining has commenced for an enterprise agreement).[38]

99. Employers face another difficulty when it comes to the abandonment of employment, in meeting their requirements to contact the employee, and take an 'active step' to terminate employment.

100. ACCI supports initiatives to ensure those who wish to work, including those experiencing homelessness, are provided with the opportunity to. However, the unique challenges to employment faced by those who are homeless would perhaps be more effectively addressed by increased access to programs and initiatives to reduce some of the difficulties homeless people face when trying to gain employment, and providing positive incentives to offer employment to those who are homeless.

[36] *Fair Work Act 2009*, s.536.
[37] *Fair Work Act 2009*, s.125.
[38] *Fair Work Act 2009,* s.173.

Recommendation 8: Retain the status quo in relation to 'accommodation status' and discrimination law, in favour of more appropriate avenues to address homelessness

The status quo in relation to 'accommodation status' should be retained, in recognition of more appropriate initiatives to ensure those who wish to work, including those experiencing homelessness, are provided with the opportunity to.

6.3 Subjection to family and domestic violence

101. Domestic violence is an important community issue, on which governments, the police and justice system, community service organisations, the media, and employers all have an important role to play in addressing the problem.

102. Under the Fair Work Act, employees dealing with the impacts of family and domestic violence can:

a. Take family and domestic violence leave – added to the Fair Work Act in December 2018.[39]

b. Request flexible working arrangements.[40]

c. Take paid or unpaid personal/carer's leave.[41]

103. Further, employees have protection under the general protections provisions of the Fair Work Act from having adverse action taken against them (including being treated differently to another employee) because of a workplace right – including those outlined above.

104. Employers already must not unreasonably refuse an employee's request for flexible working arrangements if an employee is experiencing violence from an employee's family member.

105. In addition, there are clear protections for employees in the unfair dismissal provisions / are also protected from having their employment unfairly terminated under the unfair dismissal provisions because they experience family or domestic violence. For example, in *Moghimi v Eliana Construction and Developing Group Pty Ltd*,[42] an employee was dismissed because the employer did not believe they could protect her from a violent partner who was also an employee with the same company. The Fair Work Commission found the dismissal was unfair,

[39] *Fair Work Act 2009,* s.106A.
[40] *Fair Work Act 2009*, s.65.
[41] *Fair Work Act 2009*, ss.95-103.
[42] *Moghimi v Eliana Construction and Developing Group Pty Ltd* [2015] FWC 4864.

and awarded the maximum compensation amount – 26 weeks' pay. This decision was upheld in the Federal Court, with costs awarded to the former employee.

106. The Australian Chamber does not support an additional, overlapping ground of discrimination.

107. In addition, there are practical difficulties associated with including an additional protected attribute relating to domestic violence status. Those experiencing family and domestic violence may not wish to share their experience with their employer, and an employer does not generally have a right to make inquiries of such a nature with the employee.

108. Domestic violence is a very delicate issue. Many employers are already addressing the issue of domestic violence through employee support programs, access to flexible work arrangements, and other initiatives.

109. However, those who do seek to work with an affected employee to figure out working conditions that suit both the business and the employee, could also risk having a claim against them.

110. Anti-discrimination law may not be the best mechanism to address challenges posed by domestic violence. ACCI welcomes the Fair Work Ombudsman's 'Employer Guide to Family and Domestic Violence', published in July this year, and supports similar education / promotion initiatives.

Recommendation 9: Retain the status quo in relation to family and domestic violence / discrimination law, in favour of more appropriate avenues

The status quo in relation to family and domestic violence / discrimination law should be retained, in recognition of the current up-to-date protections, and more scope for appropriate initiatives in other areas to address this serious and important community issue.

7. ROLE AND PROCESSES OF THE AHRC

7.1 Complaint handling process

111. In relation to the role and processes of the AHRC, the Discussion Paper includes the following discussion questions:

> *What, if any, reforms should be introduced to the complaint handling process to ensure access to justice?*
>
> *What, if any, reforms should be introduced to ensure access to justice at the court stage of the complaints process?*

112. In the preceding section employer concerns in relation to overlap between State/Territory and Federal laws were outlined. Additionally, there are a number of discrete problems concerning the current operation of discrimination legislation.

7.2 Ensuring access to justice

113. A person aggrieved can lodge an application and initiate proceedings regarding a discrimination matter, in either federal or State/Territory jurisdictions, not knowing:

a) The strength of their case, or

b) Whether they have a sound legal basis for making the complaint in the first place.

114. This leads to claims being filed, which may be legally tenuous or without any basis, but which require an employer to then seek costly legal advice, attend conciliation proceedings, and decide whether they will defend the matter from mediation/conciliation to tribunal/Court proceedings.

115. It is well known that many employers simply settle claims via monetary compensation (in cases where either party is unsure whether they have legal grounds to initiate or defend proceedings) to make them "go away" (similar to what occurs in unfair dismissal jurisdictions). In most cases, legal advisors will recommend this as the most prudent approach to avoid the costs of litigation.

116. This does not assist the employee in having their alleged wrong redressed, nor does it provide the employer with certainty of their legal obligations into the future. Neither does it further the legislative objects of discrimination laws in preventing discrimination. It may have the overall effect of undermining managerial appetite to take action to address issues of discrimination or harassment when they occur (because of the risk and cost of litigation). There are also concerns that like the unfair dismissal regime, this area of law might become an attractive jurisdiction to peruse for for-profit lawyers who support, at times, spurious complainants in the hope a business owners will relent and offer compensation before a case has to be run.

7.3 Lodgement Times

117. Section 46PH(1)(b) of the AHRC Act 1986 currently provides that the President may terminate a complaint if it was lodged more than 6 months after the alleged unlawful discrimination took place. This time period was reduced from a period of 12 months to 6 months in April 2017 in order to provide a strong incentive for complainants to lodge complaints in a timely manner following the occurrence of conduct alleged to be unlawful discrimination.[43] It was also said to provide the President with additional flexibility to terminate potentially vexatious cases or others brought for similar unmeritorious purposes through the reduced time frame, thus reducing the burden on potential respondents.

118. Despite concerns[44] about the reduced timeframe, the AHRC's compliance statistics report for 2018-2019 shows that of the 2,037 complaints received by the Commission, only 5 complaints (0.25% of total complaints received) were assessed as appropriate for pre-inquiry termination on the basis of section 46PH(1)(b). As the following table also confirms, despite the decrease from 12 months to 6 months, the number of cases being terminated by the President is actually continuing to decrease, with 2018-2019 a record low for the AHRC.

AHRC Complaint Outcomes

Year	Complaints Lodge	Terminated – 46PH(1)(b)	Terminations as a percentage of complaints lodged
2018-2019 (6 months)	2,037	5	0.25%
2017-2018 (6/12 months)	2,046	8	0.39%
2016-2017 (12 months)	1,939	13	0.67%
2015-2016 (12 months)	2,013	11	0.55%
2014-2015 (12 months)	2,388	35	1.47%

119. It is also important to note that just because a party has its application terminated in the AHRC, this does not prevent a complainant from also making an application directly to the Federal Court or Federal Magistrates Court.

120. Whilst employers do not object to the principle that there should be some level of discretion to accept late lodgements in exceptional circumstances (as is the case for federal unfair dismissal legislation), employers face significant problems when an aggrieved person makes a claim long after the alleged unlawful conduct is alleged to have occurred. In discrimination proceedings, key evidence often may be in the sole domain of certain employees (or ex-employees) or contained in documents such as email, both of which may not be available after a prolonged period of time.

[43] Human Rights Legislation Amendment Bill 2017, Explanatory memorandum, page 32.
[44] AHRC, discrimination law report discussion paper, page 16.

121. This creates a distinct advantage for applicants, and puts pressure on employers to settle matters early in conciliation proceedings. In 2018-2019 of the 1,396 complaints dealt with at conciliation, over 72% (1,010 complaints) were resolved. With over half (63%) of all complaints lodged settling at conciliation, this means that many complaints may be potentially settled with respondents being forced into paying 'go away' money. For example news reports in 2016 detailed secret conciliation sessions in which employers were told by the AHRC to either compensate or apologise to employees who had lied in their job applications by failing to disclosure serious criminal conduct including such offences as possession of child pornography, indecent dealings with a minor, armed burglary and theft.[45] Employers should not be forced into compensating workers who do the wrong thing.

122. This is a particular problem when the alleged wrongdoer is a former employee who has left the workplace and the employer is alleged to be vicariously liable. There is little incentive for such persons to cooperate with their ex-employers in an investigation into the complaint.

123. Given this, it is preferable to provide for an absolute statutory limitation period that is enforceable. This is particularly important in light of a number of concerning cases[46] which have dealt with the applicability of state statutes of limitation to unlawful discrimination proceedings. Of particular note is the recent decision in *Kujundzic v MAS National*[47] in which the Federal Magistrates Court gave a former employee the capacity to bring an unlawful discrimination complaint under Federal law without any real limitation period. In making this decision the Federal Magistrate noted that this may lead to an unjust outcome.

124. This precedent allows a litigant to launch proceedings that are significantly outside any statutory limitation period, long after the alleged discrimination occurred. It is unreasonable that an employer should be exposed to such liability in a complaint based system.

125. Such an outcome could not have sensibly been the intention of Parliament, particularly when no other Federal and State employment related claims have an unlimited period of time in which they can be made. The fact that the Act allows the President to terminate a complaint that is more than 6 months old, and that employee records under the Fair Work Act only need to be kept for seven years post-employment, suggest that this outcome was not intended.

126. All federal legislation should therefore include an absolute limitation period, particularly where discrimination is alleged in the workplace context. ACCI considers that this approach is reasonable and should allow sufficient time for complainants to lodge an application if they have a genuine grievance.

---

[45] Compensation con: Human Rights Commission tells employers to compensate or apologise to crims, Daily Telegraph, 11 November 2016.
[46] McBride v Victoria [2001] FMCA 55, [10]; Artinos v Stuart Reid Pty Ltd [2007] FMCA 1141, [12].
[47] [2013] FMCA 8.

Recommendation 10: Retain the current 6 month discretionary term in section 46PH(1)(b) of the AHRC Act

The current 6 month discretionary period for complaints should be retained, in recognition that the data does not suggest there are any current issues with the allowable time period, it provides the President sufficient flexibility to deal with vexatious applicants and provides a strong incentive for complainants to lodge complaints in a timely manner following alleged unlawful conduct.

Recommendation 11: Set absolute limitation periods for discrimination claims

All federal discrimination legislation should include an absolute limitation period for the lodgement of claims.

7.4 Representative action

127. With a significant increase in the number of class action claims being commenced and funded by overseas based litigation funders, it is vitally important that clarity is given to prospective discrimination class action participants so that they are not enticed into joining class actions through misleading and deceptive conduct.

128. The Australian Law Reform Commission's Report into class action and the litigation-funding industry was released earlier this year. In response to the report it was reported that the industry class action/litigation funding industry is:

> "*Awash with conflicts of interest, consumers have next to no power to negotiate terms while funders unilaterally impose fees and charges which, in some instances are simply exorbitant*"[48]

129. For example, some individual complainants in representative actions claim to not be seeing any money until lawyers and funders receive in excess of 250 per cent returns on their costs.[49] Others are being forced into funding agreements for class actions which see up to 20% to 40% of compensation received flowing back to the ligation funders and lawyers before complainants see anything.[50]

130. With over 75% of all class actions between March 2017 and 2018 funded by litigation funders, and with median commission rates constituting 30% of settlements awarded and most classes

[48] The Australian, Litigation funders hit the jackpot at the expense of consumers, 7 March 2019.
[49] AFR, Class action over casuals require 250 per cent return for funder, 30 May 2019.
[50] Lawyerly, Judge rejects 'arguably excessive' funders' commission in KPMG class action, 1 August 2019.

receiving less than 50% of settlement amounts where a class action is funded by a third party[51], it is vitally important that the AHRC look to ensure that strong oversight and effective regulation is put in place to ensure that discrimination class action participants are not taken advantage of by lawyers and litigation funders to the detriment of individual complainants.

Recommendation 12: AHRC take steps to protect prospective discrimination class action participants

The AHRC should look to ensure that strong oversight and effective regulation is put in place to ensure that discrimination class action participants are not taken advantage of by lawyers and litigation funders, including ensuring protections against being enticed into joining actions through misleading and deceptive conduct.

7.5 Protective cost orders

131. Protective cost orders are a relatively new[52] and rare introduction into Australia's legal landscape and currently appear to be largely limited in their application to cases where there is a pressing question of public interest to be determined, and it is in the public interest that the risk of an adverse cost order should not cause a party to abandon a reasonably arguable case. The question must be a pressing one, which has not otherwise been resolved, and the applicant must ordinarily have a real personal interest at stake.[53]

132. Factors relevant in determining whether a protective costs order should be made include:

- the timing of the application;
- the complexity of the factual or legal issues raised;
- whether the applicant claimed damages or another form of financial compensation;
- whether the applicant's claims are arguable and not frivolous or vexatious;
- whether it would be undesirable to force the applicant to abandon the proceedings;
- whether there is any public interest element to the case;
- the costs which the parties to the proceeding are likely to incur;
- whether the party opposing the making of the order is uncooperative or has delayed the proceeding;

[51] Australian Law Reform Commission, Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and third-Party Litigation Funders, December 2018, 3.1 – 3.57.
[52] The first protective costs order capping costs early in proceedings was granted in the Land and Environment Court of NSW in 2009.
[53] Bare v Small [2013] VSCA 204 at [35]

- whether a significant number of members of the public may be affected by the matter and whether the basis of the challenge raises 'significant issues' about the interpretation and application of statutory provisions; and
- any other matters which could be relevant to establishing that the usual rule that costs follow the event should be departed from (such matters include the applicant's ability to pay costs).[54]

133. These considerations do not amount to a test, nor are they exhaustive.[55]

134. Further, as the courts have acknowledged, the fact that there is a public interest does not alone warrant a departure from the general rule as to costs. It does not confer immunity from an adverse costs order.[56]

135. It is also important to note that in most cases, the risk of an adverse costs order is an important discipline that encourages litigants not to commence or defend proceedings frivolously, to settle their disputes where possible, and compensates a successful party for the costs of vindicating its rights.

136. ACCI does not see any issue with the current test or applicability of protective cost order by the courts.

Recommendation 13: Retain the current applicability of protective cost orders

The current non exhaustive list of applicability factors for determining the making of protective cost orders by the courts should be retained.

7.6 Onus of Proof

137. The discussion paper raises the prospect of changing the evidentiary onus of proof in respect of discrimination laws by placing the onus on a respondent to a discrimination claim rather than the complainant, with the Fair Work Act listed as an example of such a shift in the evidentiary onus.

138. The Latin maxim *actori incumbit onus probandi* means "the burden of proof rests on the party who advances a proposition affirmatively."[57] In the Australian legal system, this principle dictates that the burden of proof rests with the person bringing a legal claim. Currently direct

[54] Bare v Small [2013] VSCA 204 at [29], citing Corcoran v Virgin Blue Airlines Pty Ltd [2008] FCA 864 at [6]-[7] per Bennett J.
[55] Bare v Small [2013] VSCA 204 at [37]
[56] Whitsunday Residents Against Dumping Ltd v Chief Executive, Department of Environment and Heritage Protection (No 2) [2017] QSC 159
[57] Institute of Public Affairs, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Committee's Inquiry into the Bill of the Human Rights and Anti-Discrimination Bill 2012, December 2012.

discrimination tests in Commonwealth anti-discrimination law,[58] place the burden of proving that the respondent discriminated against the applicant on the complainant. Under indirect discrimination tests, once an applicant has established the discriminatory impact of a condition, requirement or practice, anti-discrimination legislation shifts the burden of proving that the discriminatory condition was reasonable to the respondent.

139. It is important to first note that the *Ellenbogen* decision[59], which essentially lowered the threshold of what is defined by the AHRC as a complaint, has created a situation where currently complainants can already bring claims with very little substance and low prospects of success which are still accepted by the AHRC, subject to conciliation and require response from an employer. Given this low threshold, complaints already have an evidence burden advantage when bringing a discrimination claim.

140. Extending the reach by shifting the burden of proof in discriminatory matters will only serve to build and encourage a greater number of complaints, and provide further encouragement for claims settlement. There is also a clear risk that the jurisdiction could be increasingly perceived as a fruitful source of go-away money and subject to vexatious claims as a result of any shift in onus from the applicant.

141. Under such a change, the respondent (most likely employers) would face the burden of demonstrating a non-discriminatory reason for their action, that their conduct was justifiable or that an exemption applies. Meaning that employers will be saddled with the additional costs of compiling evidence to defend a claim, or even perhaps settling an unmeritorious claim out of court if it provides to be the more cost effective option.

142. As the Hon. Diana Bryant AO, former Chief Justice of the Family Court of Australia pointed out in her submission[60] to the Senate Inquiry into the Human Rights and Anti-Discrimination Bill 2012:

> "*The policy rationale for its extension to various other forms of unlawful behaviour ie: that the respondent is in the best position to know the reason for the discriminatory behaviour and have the best access to relevant evidence is in my view tenuous. There are processes by which relevant evidence can be elicited without disturbing the principle that a person making allegations, of discrimination or otherwise, bears the burden of proving those to the requisite standard. This proposal represents a significant departure from the current approach of applying the full burden of proof to the complaints and I observe it is not consistent with the approach taken in State and Territory anti-discrimination legislation*"

143. Finally, for the record ACCI opposes the unbalanced discrimination provisions already found in the Fair Work Act which reverse the onus on proof on an employer in adverse action cases,

[58] For example, s11(2) of the DDA explicitly states that the burden of providing unjustifiable hardship lies on the person claiming unjustifiable hardship
[59] Ellenbogen v Human Rights & Equal Opportunity Commission [1993] FCA 570
[60] Chambers of the Hon. Diana Bryant AO Chief Justice, Family Court of Australia Submission to the Senate Legal and Constitutional Affairs Legislation Committee's Inquiry into the Bill of the Human Rights and Anti-Discrimination Bill 2012, 21 December 2012.

which the discussion paper references. The current provisions replaced unlawful termination provisions that implemented relevant ILO conventions and are manifestly unfair to employers. Since the introduction of the reverse burden into the Fair Work Act, there has been a coinciding increase in the number of claims being made. In large part ACCI suggests this has been caused by the reversal of the burden of proof.

Recommendation 14: Retain the current onus of proof

144. The current evidentiary onus of proof in respect of discrimination laws should be retained.

8. OTHER MATTERS

8.1 ILO 111 Jurisdiction

145. The Discussion Paper notes the complaints the AHRC is empowered to receive under its mechanisms based on ILO 111 jurisdiction (*International Labour Organisation Discrimination (Employment and Occupation Convention 1958)*) have a different pathway for resolution to other complaints.

146. These include the protected attributes of irrelevant criminal record, trade union activity/industrial action, and political opinion.

147. Currently the AHRC is empowered to investigate and try to resolve the complaint of discrimination by conciliation. In some cases, such as in relation to an irrelevant criminal record, if the complaint is unable to be resolved by conciliation, then the AHRC can prepare a report with recommendations to the Attorney-General, for tabling in federal Parliament.

148. In the Discussion Paper, the AHRC proposes that there should be a further pathway for resolution of these disputes – through the judiciary.

149. ACCI welcomes and agrees with the AHRC's acknowledgement 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"*

150. Industrial activities are comprehensively covered in the general protections provisions of the Fair Work Act, including for example becoming or not becoming a member of industrial associations (e.g. a union), representing or advancing the views, claims or interests of an industrial association, and taking part (or refusing to take part in) in protected industrial action.

151. These complaints can be conciliated by the Fair Work Commission, and if unresolved, can be heard by the court. ACCI considers this avenue is comprehensive and does not consider it necessary to create additional complexity by introducing further duplication.

152. An employer must also not take adverse action (including discrimination) against an employee or prospective employee because of the person's political opinion. This protection appears in both the general protections provisions of the Fair Work Act,[61] and the unlawful termination provisions.[62] These have a similar pathway to resolution as the protected attribute concerning industrial activity, detailed above.

153. In relation to "irrelevant criminal record", the Discussion Paper sets out the AHRC's view as follows:

[61] See *Fair Work Act 2019*, s.351.
[62] See *Fair Work Act 2019*, s.772(1)(f).

> *The Commission consider [sic] 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.*

154. Under the current law, when a complaint cannot be resolved by conciliation, or where conciliation is inappropriate, and the AHRC finds that there has been a breach of human rights or that workplace discrimination has occurred, it may prepare a report for the federal Attorney-General, with recommendations, which must be tabled in Parliament

155. The issue of irrelevant criminal record has previously been considered, with the conclusion reached that there may be more appropriate models for dealing with this issue, such as through existing privacy and spent conviction schemes.

Recommendation 15: Avoid further duplication and streamline avenues for complaints

There should be no additional pathways for litigation or complaint in relation to the protected attributes of trade union activity/industrial action, and political opinion.

It should be recognised that the current avenues for complaints are comprehensive and further complexity should not be created by introducing further duplication. As set out in relation to previous recommendations, ACCI recommends identifying overlap and friction between jurisdictions, law and responsibilities for consideration and resolution.

In relation to the 'criminal record' attribute, ACCI recommends the status quo be maintained.

8.2 Sex Discrimination Act

156. A number of issues were raised in the discussion paper concerning the operation of the Sex Discrimination Act. To the extent the concerns relate to sexual harassment in the workplace, consideration of any priorities for change should be postponed until after a report is issued in relation to the National Inquiry into Sexual Harassment in Australian Workplaces.

157. This review has been ongoing since June 2018, and the AHRC has previously indicated that it will conclude in 2019/2020. To avoid duplication, the more beneficial time for consultation and consideration of any proposals in relation to the Sex Discrimination Act is after the final report and recommendations in relation to the National Inquiry have been released.

Australian Chamber of Commerce and Industry

Recommendation 16: Single process for consideration changes to Sex Discrimination Act

Consideration of any proposed changes to the Sex Discrimination Act should occur after the public release of the report and recommendations in relation to the National Inquiry into Sexual Harassment in Australian Workplaces.

Australian
Chamber of Commerce
and Industry

ABOUT THE AUSTRALIAN CHAMBER

The Australian Chamber represents hundreds of thousands of businesses in every state and territory and across all industries. Ranging from small and medium enterprises to the largest companies, our network employs millions of people.

The Australian Chamber strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

OUR MEMBERS

Australian Chamber of Commerce and Industry

CHAMBER

Business SA Chamber of Commerce and Industry South Australia
Canberra Business Chamber
Chamber of Commerce Northern Territory
CCIQ Powering business potential
Chamber of Commerce and Industry WA
NSW Business Chamber
TCCI Invigorating Business
Victorian Chamber of Commerce and Industry

INDUSTRY ASSOCIATION

accord
AMCA
Animal Medicines Australia
afa Great advice for more Australians
ais nsw
Australia Arab Chamber of Commerce & Industry
AADA
Australian Beverages
ADA Australian Dental Association
ADIA Australian Dental Industry Association
AFEI Australian Federation of Employers & Industries
Australian Gift & Homewares Association
AHA
aicm Australian Institute of Credit Management
Australian Made
AMPC
AMMA Australian Resources & Energy Group
AMTA Australian Mobile Telecommunications Association
apmf Australian Paint Manufacturers' Federation Inc.
ARIA Australian Recording Industry Association
ARITA
Australian Retailers Association
ARTA
ASMI Australian Self Medication Industry
Australian Steel Institute
ATEC Australian Tourism Export Council
ATIC Australian Tourism Industry Council
ATA Australian Trucking Association
AVA Australian Veterinary Association
BIC Bus Industry Confederation moving people
Business Council of Co-operatives and Mutuals
Caravan Industry Association of Australia
Cement Concrete & Aggregates Australia
Chemistry Australia
CAA
CMAA
Consult Australia
COPHE Council Of Private Higher Education
CPA Australia
CLIK Credit Union International Association Australasia
Customer Owned Banking Association
Direct Selling Australia
Exhibition & Event Association of Australasia
Fitness Australia
Franchisee Federation Australia
HIA
LFRA Large Format Retail Association
Live Performance Australia
Master Builders Australia
master plumbers Expert. Committed. Professional.
MTAA Medical Technology Association of Australia
Medicines Australia
NALSPA
NDS National Disability Services
neca national electrical and communications association
nesa national employment services association
National Fire Industry Association
NRA National Retail Association
NRMA MYNRMA.COM.AU
NSW HCA The voice of the Hire Car Industry
NSW Taxi Council
Outdoor Media Association
The Pharmacy Guild of Australia
ppca
Primerus The World's Finest Law Firms
rcsa Leading in the World of Work
Restaurant & Catering
S P
The Tax Institute
Think Brick Australia
VACC You're in good hands