



Australian Government
Department of Employment
and Workplace Relations

Updating the *Fair Work Act 2009* to provide stronger protections for workers against discrimination

Consultation paper

April 2023



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The document must be attributed as the *Australian Government Stronger Protections for Workers consultation paper*.

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Overview

Following the 2022 Jobs and Skills Summit, the Government committed to update the *Fair Work Act 2009* (the Fair Work Act) to provide stronger protections for workers against adverse action, discrimination, and harassment.

Last year, the Government enacted a number of reforms through the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (the Secure Jobs, Better Pay Act) which delivered on this commitment, including:

- an express prohibition on sexual harassment in connection with work in the Fair Work Act to provide stronger protections against harassment – this was accompanied by a new jurisdiction in the Fair Work Commission (FWC) to deal with sexual harassment disputes, and
- the addition of breastfeeding, gender identity and intersex status in the Fair Work Act’s list of protected attributes to provide stronger protections against discrimination.

In February this year, the Hon Tony Burke MP, Minister for Employment and Workplace Relations, announced his intention to consult on further measures to deliver on this commitment.

This paper seeks stakeholder feedback on potential options to achieve that end.

How to provide your feedback

This consultation paper sets out a range of questions which can help structure your response in relation to each proposal.

Please provide your written comments via email to WRSubmissions@dewr.gov.au. All submissions will be treated as confidential and will not be published. You can choose to remain anonymous.

Closing date: Submissions close at 11:00pm AEST on Friday 12 May 2023.

Please keep informed of progress of these reforms at www.dewr.gov.au, including opportunities to be involved in later stages of consultation.

Guiding Principles

The following principles have been used in guiding the identification of the options for reforms to the Fair Work Act anti-discrimination framework that are outlined in this paper, and should also be considered when providing feedback:

- Alignment and consistency with key features of anti-discrimination law, including terminology and definitions.
- Protected attributes in the Fair Work Act are consistent with community expectations and best practice language.
- Exemptions from anti-discrimination provisions are clear and relevant.
- Protections for national and non-national system employees are consistent and fair.

Options for reform – Anti-discrimination measures

Various civil frameworks prohibit discrimination in the workplace in Australia. The primary laws dealing with discrimination in employment and related areas are Commonwealth, state and territory anti-discrimination laws.

There are four separate anti-discrimination laws at the Commonwealth level:

1. *Racial Discrimination Act 1975* (RDA)
2. *Sex Discrimination Act 1984* (SDA)
3. *Disability Discrimination Act 1992* (DDA), and
4. *Age Discrimination Act 2004* (ADA).

A fifth Act, the *Australian Human Rights Commission Act 1986* (AHRC Act), establishes the Australian Human Rights Commission (AHRC) and regulates the processes for making and resolving discrimination complaints under the above Acts.

The Fair Work Act also contains protections against workplace discrimination¹.

This array of Commonwealth, state and territory laws generally overlaps and can apply in slightly different ways, which results in a complex and fragmented scheme that is confusing and difficult for both employers and employees to understand and navigate.

The Department of Employment and Workplace Relations has identified a number of ways the Fair Work Act's anti-discrimination framework could be further aligned with Commonwealth anti-discrimination laws to improve consistency and clarity at a federal level, and to modernise the Fair Work Act's provisions.

¹ The following provisions make up the Fair Work Act's anti-discrimination framework: sections 153, 194 and 195, which deal with discriminatory terms in modern awards and enterprise agreements; section 342, which defines 'adverse action' as including certain forms of discrimination; section 351, which prohibits an employer from taking discriminatory 'adverse action' against an employee or prospective employee, subject to certain exceptions; paragraph 578(c), which requires the FWC, when performing its functions, to take into account the need to prevent and eliminate discrimination; and paragraph 772(1)(f), which prohibits an employer from terminating an employee's employment for a discriminatory reason. This framework protects the following attributes: race, colour, sex, sexual orientation, intersex status, breastfeeding, pregnancy, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction and social origin.

Improving consistency and clarity

Indirect discrimination

Australian anti-discrimination laws recognise two ways in which unlawful discrimination may occur:

- **direct discrimination**, which relates to actions which are on their face discriminatory, such as an employer dismissing an employee because they are pregnant, and
- **indirect discrimination**, where an apparently neutral condition has the effect of unreasonably disadvantaging a group of people with a particular attribute. For example, indirect discrimination may arise where an employer requires counter sales staff to stand up while at work, potentially discriminating against someone with a physical disability.

Each of the four primary Commonwealth anti-discrimination laws define what constitutes direct discrimination and indirect discrimination (albeit with slight differences).

Section 351 of the Fair Work Act makes it unlawful for an employer to take adverse action against an employee (or prospective employee) for discriminatory reasons and identifies a number of protected attributes for that purpose. However, ‘discrimination’ is not defined under the Fair Work Act, so it is unclear whether indirect discrimination is in fact prohibited by this section. Although it has been generally settled by case law that indirect discrimination is included in section 351², employers can be in doubt as to exactly what is required from them to comply with anti-discrimination provisions.

Question 1: Should the Fair Work Act expressly prohibit indirect discrimination?

Defining ‘disability’

All Australian jurisdictions provide protection against discrimination on the basis of either ‘disability’³ or ‘impairment’⁴. In each case a definition of ‘disability’ or ‘impairment’ is provided for the purposes of clarifying the scope of this protection.

The Fair Work Act utilises the term ‘physical or mental disability’ but does not define what this means. It has been suggested that this lack of definition has limited the ability of the Fair Work Act to effectively address disability discrimination in the workplace, with courts applying the ordinary meaning to these words rather than interpreting them with reference to the definition of a disability in the DDA.⁵ In particular, uncertainty exists as to whether discrimination protections under the Fair Work Act only cover a disability itself or extend to the characteristics or manifestations of disability. Aligning the Fair Work Act with the DDA by adopting its definition of disability could address this criticism.

Question 2: Should the Fair Work Act be aligned with the DDA and include a definition of ‘disability’?

² *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178 (Klein).

³ Commonwealth, Australian Capital Territory, South Australia, New South Wales, Victoria and Tasmania.

⁴ Queensland and Western Australia.

⁵ Dominique Allen, *Adverse Effects: Can the Fair Work Act Address Workplace Discrimination for Employees with a Disability* (2018) 41 (3) UNSWLJ 846.

Clarifying the interaction between the inherent requirements exemption and reasonable adjustments

All anti-discrimination laws include exemptions (sometimes called exceptions), which are circumstances in which it is permissible to discriminate. The DDA includes an 'inherent requirements' exception which allows employers to discriminate against a person because of a disability where their disability prevents them from performing the inherent requirements of a particular position. This is subject to the requirement to make 'reasonable adjustments' to address disadvantages a person may experience because of their disability and recognises that many people with disability may be able to meet the inherent requirements of a role if reasonable adjustments are made.

The Fair Work Act does not include such a requirement in its inherent requirements exception. This is despite it being a common requirement under workers compensation laws for businesses and employers to make reasonable adjustments for the purposes of assisting workers, who have acquired a disability during employment, to return to work.

Question 3: Should the inherent requirements exemption in the Fair Work Act be amended to clarify the requirement to consider reasonable adjustments?

Attribute extensions

Most anti-discrimination laws clarify that protection extends to characteristics that people who have a protected attribute (such as race, sex, age or disability) generally have or are generally assumed to have. This includes having attributes (or characteristics of the attribute) in the past, present, or future. For example, these provisions clarify that it is unlawful to discriminate against a woman because she *may* become pregnant in the future. These clarifications are often referred to as attribute extensions.

At the Commonwealth level, attribute extension provisions exist in the SDA and ADA. The DDA does not expressly provide for attribute extensions in the same terms as the SDA and ADA but does refer to a number of characteristics relating to some people with disability.⁶

The Fair Work Act does not currently include an express provision for attribute extensions.

The AHRC has noted that discrimination frequently occurs because of concerns about characteristics which members of a group either often have or have attributed to them, and that without provision for attribute extensions the definition of direct discrimination can have a much-reduced effect.⁷

Question 4: Should attribute extension provisions be included in the Fair Work Act?

⁶ Characteristics include requiring adjustments, using assistive devices, or being accompanied by an assistant or assistance animal.

⁷ Australian Human Rights Commission, Submission to the Commonwealth Attorney-General's Department, *Consolidation of Commonwealth Discrimination Law* (6 December 2011) <<https://humanrights.gov.au/our-work/legal/consolidation-commonwealth-discrimination-law>>.

Complaints processes

Complaints about discrimination, including about sexual harassment, under Commonwealth anti-discrimination laws can be made to the AHRC for free and are generally resolved through conciliation.

Complaints about discrimination can also be made to the FWC under the general protections provisions of the Fair Work Act. However, the powers of the Commission to deal with these disputes differ depending on whether the dispute is related to a dismissal or not.

Dismissal-related disputes that are commenced under the Fair Work Act must be made to the FWC, with conciliation available as the first step in the dispute resolution process. The FWC's new jurisdiction for dealing with sexual harassment disputes (other than by way of a stop sexual harassment order) operates along similar lines. For disputes not involving dismissal, applicants can choose to either make an application to the FWC or take their complaint straight to the Federal Court or Federal Circuit and Family Court. If an application is made to the FWC, the FWC can deal with the dispute (including by conciliation), however the FWC can only arbitrate the dispute with the consent of both parties.

Discrimination complaints made to the FWC attract a filing fee (currently \$77.80), which also applies to unfair dismissal, unlawful termination and/or stop bullying applications. This fee goes towards resourcing the FWC (but is not cost recovery) and is intended to achieve a balance between the competing objectives of providing access to justice and deterring vexatious complaints. Importantly, the FWC has discretion to waive this fee where a party is experiencing serious hardship.⁸

Question 5: As per the broader Commonwealth anti-discrimination framework, should a new complaints process be established to require all complaints of discrimination under the Fair Work Act (i.e. both dismissal and non-dismissal related discrimination disputes) to be handled in the first instance by the FWC via conciliation? What would be the benefits and limitations of establishing such a requirement?

Question 6: If a new complaints process were to be established, should it attract a filing fee consistent with other similar dispute applications to the FWC?

Vicarious liability

The four Commonwealth anti-discrimination Acts contain vicarious liability provisions, though the elements differ. These provisions generally render an employer or principal liable for the unlawful acts of their employees or agents where the act was committed 'within the scope of [the person's] actual or apparent authority' or 'in connection with' the person's employment or duties. This ensures an applicant can obtain a remedy from the employer or principal in circumstances where it may not be possible to obtain a remedy from the perpetrator of the discrimination.

An employer or principal generally will not be liable for unlawful acts where they took 'reasonable precautions and exercised due diligence' or 'took all reasonable steps' to prevent the conduct.

⁸ See for example in relation to unfair dismissal applications: *Fair Work Regulations 2009* (Cth), reg 3.02(7).

The new sexual harassment jurisdiction that was inserted into the Fair Work Act on 6 March 2023 by the Secure Jobs, Better Pay Act includes a vicarious liability provision modelled on the equivalent provision in the SDA. However, this provision only applies to contraventions of the new prohibition on workplace sexual harassment. The vicarious liability provisions that apply to all other contraventions of the Fair Work Act are narrower, and only apply where a person was ‘involved in’ the contravention (i.e. aided, abetted, induced, etc.) (section 550). This means the circumstances in which an applicant can recover a remedy from the perpetrator’s employer or principal are narrower for discrimination claims under the Fair Work Act compared to sexual harassment claims or discrimination claims under Commonwealth anti-discrimination law.

Question 7: Should vicarious liability in relation to discrimination under the Fair Work Act be made consistent with the new sexual harassment jurisdiction and other Commonwealth anti-discrimination laws? Why or why not?

The ‘not unlawful’ exemption

Section 351 includes an exemption for action that is not unlawful under anti-discrimination legislation in force in the place where the discriminatory action is taken.⁹

This ‘not unlawful’ exemption was intended to specifically incorporate exceptions in other anti-discrimination laws into the Fair Work Act. However, it has sometimes been interpreted too broadly, as wholly exempting conduct in jurisdictions where there is no legislation to enforce the prohibition of discriminatory conduct.

Such a situation arises, for example, in New South Wales (NSW) where ‘political opinion’ is not a protected attribute. Applying the approach that has been adopted in some cases, because political opinion is not a protected attribute in NSW anti-discrimination legislation, employees in NSW do not have access to the general protections in relation to discrimination because of this attribute.¹⁰

This creates inconsistency in the application of the Fair Work Act across Australia. Furthermore, since the case law is still unsettled, businesses and workers cannot be certain about whether their behaviour is prohibited by the general protections because it is considered discriminatory.

Question 8: Should the application of the ‘not unlawful’ exemption be clarified?

Improving the coverage of section 351 and removing the unlawful termination provision

The Fair Work Act provides different, though similar, protections against discrimination to employees depending on whether they are national system employees or non-national system employees.

Under section 351 of the Fair Work Act, national system employees are protected from ‘adverse action’ (a broadly defined term) because of a protected attribute (e.g. race, sex, age or disability).

Under paragraph 772(1)(f) of the Act, non-national system employees are only protected from termination of employment because of a protected attribute. Section 772 has also been interpreted

⁹ *Fair Work Act 2009* (Cth), s 351(2)(a)

¹⁰ *McIntyre v Special Broadcasting Services Corporation T/A SBS Corporation* [2015] FWC 6768 (1 October 2015).

as providing national system employees in NSW and South Australia with protection from dismissal on the grounds of their religion or political opinion.¹¹

This approach is duplicative and potentially confusing, particularly when it is not clear whether sections 351 or 772 is the appropriate avenue for recourse.

Question 9: Should the unlawful termination provision in the Fair Work Act dealing with discrimination be repealed, and section 351 of the Act broadened to cover all employees?

Modernising the Fair Work Act

Discrimination law is an evolving area of practice, and the law needs to keep pace with contemporary community standards and expectations. Since the commencement of the Fair Work Act's anti-discrimination framework in 2009, there have been a number of developments in discrimination laws in Australia which have not flowed through to the Fair Work framework.

'Family and domestic violence status' as a protected attribute

Family and domestic violence (FDV) can impact many aspects of a person's life, including their wellbeing and productivity at work,¹² which can result in adverse action being taken against a person because of their FDV status (for example, through reduced hours of work or demotion). As such, FDV status can be a source of discrimination in the workplace.

Currently, subjection to FDV is a protected attribute only under the Australian Capital Territory's *Discrimination Act 1991*.¹³ The Fair Work Act does not currently prohibit discrimination on the basis of FDV status.

However, FDV is a serious issue which is at the forefront of the government's policy agenda, last year introducing the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022*. There is a stigma attached to FDV status, which may preclude victims from seeking flexible working hours or accessing paid FDV leave. Legislating to protect persons subject to FDV from discrimination would complement existing policies seeking to ameliorate this issue. It would also be consistent with Australia's treaty obligations, including any future obligations under the International Labor Organisation's Violence and Harassment Convention (ILO 190).¹⁴

Question 10: Should experiencing family and domestic violence be inserted as a protected attribute in the Fair Work Act?

¹¹ *McIntyre v Special Broadcasting Services Corporation T/A SBS Corporation* [2015] FWC 6768 (1 October 2015).

¹² Australian Human Rights Commission, *Fact Sheet: Domestic and family violence – a workplace issue, a discrimination issue* (Report, 2014)

https://humanrights.gov.au/sites/default/files/13_10_31_DV_as_a_workplace_issue_factsheet_FINAL6.pdf

¹³ *Discrimination Act 1991* (ACT), s 7(1)(x)

¹⁴ *Convention Concerning the Elimination of Violence and Harassment in the World of Work* (Entered into force 25 June 2021), art 10(f).

Multiple attribute discrimination

Discrimination may arise because of two or more intersecting protected attributes. This reflects the reality that many people are discriminated against because they have multiple protected attributes, such as being a woman with a disability.

Like each of the four other Commonwealth anti-discrimination laws, the Fair Work Act does not expressly provide for claims of discrimination based on more than one attribute to be made. Because of this, persons who have experienced discrimination because of multiple intersecting protected attributes are required to prove discrimination on the basis of each protected attribute separately. Clarifying the application of the Fair Work Act's anti-discrimination framework in these circumstances would make it easier to navigate for persons who have experienced discrimination, by allowing them to raise a single complaint on the basis they have been discriminated against because of multiple intersecting protected attributes.

Question 11: Should the Fair Work Act be updated to prohibit discrimination on the basis of a combination of attributes? Why or why not?

Options for reform – Adverse action

Part 3-1 of the Fair Work Act also includes protections for employees against adverse action taken by their employers for a range of other prohibited purposes, including because they have a workplace right or propose to exercise or not exercise a workplace right (section 340). Workplace rights include where an employee is entitled to the benefit of a workplace law or instrument (section 341), including protections against discrimination.

There is also a protection against adverse action because a person is, or is not, an officer or member of an industrial association, or that person engages, or proposes to engage, in industrial activity including in their capacity as a member of an industrial organisation (section 346). High Court authority on the application of section 346 of the Fair Work Act has provided guidance on the scope of this protection for employees,¹⁵ finding that the relevant test is whether an employee's engagement in industrial activity was the 'substantial and operative factor' influencing the decision to take the adverse action. Determining whether this is the case is a heavily fact dependant assessment, which involves interrogating direct evidence provided by the person engaging in the alleged adverse action to determine what the person's actual reasons were for taking those actions. While the Fair Work Act defines industrial activity (section 347), it does so in general terms, referring to activities of industrial associations without specificity.

This interpretation of the operation of section 346 could be similarly applied to instances where the alleged reason for the adverse action relates to an attribute protected by anti-discrimination law.

Question 12: Are there improvements that could be made to the general protections to clarify protections for a person engaging, or not engaging, in industrial activity?

¹⁵ *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32.

Options for reform – Other considerations

The options canvassed in this paper have been identified having regard to the Guiding Principles set out earlier in this paper. However, the Department is conscious that there may be other issues of importance to stakeholders.

Question 13: Are there any other reforms you would like to see to the Fair Work Act's anti-discrimination and adverse action framework? Why?