Ai GROUP SUBMISSION

Queensland
Human Rights Commission

Review of Queensland's *Anti-Discrimination Act 1991 (Qld)*

4 March 2022

Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission to the Review of Queensland's *Anti-Discrimination Act 1991 (Qld)* (**AD Act**).

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

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

Ai Group is concerned about the current level of anti-discrimination regulation on employers based on the overlapping jurisdictions of federal and state discrimination laws and broad General Protections in the *Fair Work Act 2009 (Cth)* (**FW Act**).

A simpler and easier to understand framework is needed.

Further, given the growing jurisdiction of the FW Act's General Protections, priorities for state discrimination law should consider the role other jurisdictions play in regulating employer obligations on discrimination and human rights, rather than assume a regulatory gap within a single jurisdiction. The FW Act covers national system employers, being employers who are generally constitutional corporations in addition to other categories as defined in the sections 14 and 30M of the FW Act. These employers are also subject to federal anti-discrimination law and state anti-discrimination legislation, including Queensland's AD Act.

Ai Group supports a discrimination law framework that:

- Is practical and workable for employers to engage with and comply with;
- Is sensitive to the regulatory burden on employers, including both larger businesses complying with up to 12 separate anti-discrimination statutes nationally, and the limited resources of small businesses;
- Is effective;
- Is accessible; and
- Is remedial.

Ai Group's responses, based on particular themes and issues canvassed through questions in the Discussion Paper, are set out below.

Definitions of discrimination

(a) Should the Act clarify that direct and indirect discrimination are not mutually exclusive?

As the concepts of direct and indirect discrimination are distinct concepts with their own legal thresholds and definitions, Ai Group does not see the need to clarify that they are not mutually exclusive.

In our experience in providing anti-discrimination law training to employers, it is important that the concepts of direct and indirect discrimination are not conflated, but separately understood by the community as different and distinct forms of unlawful discrimination. Employers generally understand these two limbs of discrimination, and this underpins their organisational anti-discrimination policies.

We would also be concerned that a legislative amendment pursued on the basis of clarification could result in litigants believing they needed to demonstrate both forms of discrimination or that one was dependent upon the other.

If there is a desire to clarify that direct and indirect discrimination are not mutually exclusive, we suggest this can more readily be achieved by way of QHRC guidance material rather than formal legislative amendments.

(b) Unfavourable treatment and the reverse burden of proof

Ai Group does not see the need to lower the threshold for direct discrimination to 'unfavourable treatment.' Most state and federal anti-discrimination statutes contain similar definitions of direct discrimination and departing from this approach would likely create further confusion for employers.

Moreover, the FW Act's General Protections provides remedies for persons who are the subject of adverse action (or less favourable treatment) because of a particular attribute. In other words, a large national jurisdiction already exists which provides such a lower threshold and is accessible by Queensland employees and employers. A further overlapping jurisdiction providing the same or similar threshold is not needed.

We have seen a steady increase in applications under the FW Act's General Protections provisions for the last decade based on the wide ability for employees to seek remedies for alleged adverse action, including discrimination relating to their employment. The low threshold of discrimination and adverse action in the General Protections is already burdensome on employers in applying to every day operational decisions in managing their business. This, combined with the General Protections' reverse burden of proof on employers to disprove that adverse action or

discrimination did not occur, intensifies this burden in organisational decision-making.

Specifically, employers report that it is not unusual for erroneous perceptions to arise from employees about employer reliance on protected attributes as part of organisational decisions – particularly where there is some level of perceived or actual disadvantage resulting from the decision unrelated to the attribute. Further, Ai Group has seen a significant increase in risk aversion, delay and compliance costs incurred by employers because of the low threshold when adverse action and discrimination occurs and due to the reverse onus of proof which requires employers to disprove the discrimination. As much as employers try to avoid causing disadvantage, the reality of organisational decision-making is complex, high-pressure and carries onerous responsibilities about the viability of the business and the lives of others. This burden is keenly felt by small to medium organisations which do not generally have in-house human resources or legal expertise.

Ai Group does not support the lowering of the direct discrimination threshold in the AD Act. We are also opposed to the AD Act departing from established approaches to the burden of proof in anti-discrimination law. The current standard and burden of proof should be retained.

(c) Test for indirect discrimination

Similarly, Ai Group does not see the need to lower the threshold for tests of indirect discrimination. We consider the current threshold proportionate to the needs of organisations to apply rules and requirements for the purpose of managing operations consistently, efficiently and with transparency. Organisations that make such decisions do not intend that discrimination or disadvantage be incurred by any person or group and are generally trying in good faith to determine what is fair, appropriate and consistent with legal requirements. Ai Group considers that the current definition is proportionate and that a lower threshold is not required.

(d) Do you support a unified test for both direct and indirect discrimination? Why or why not?

Ai Group does not support a unified test for direct and indirect discrimination for reasons identified in question 1.

(e) Reasonable accommodation

Ai Group supports the retention of the current unjustifiable hardship definition in the AD Act's exemptions. The exemptions appropriately target an organisation's capacity to comply with what would otherwise be unlawful discrimination in section 35 and forms an appropriate basis for determining whether the exemption threshold has been met. Compliance costs and the severity of practical difficulties in relation to the supply of special services are important considerations in this exemption.

It is important for natural justice that the exemption serve as a possible defence to the employer against whom discrimination is already presumed (see wording of section 35). Ai Group is opposed to the watering down of the exemption by transforming it into a 'weighing up' process for a relevant tribunal or court where discrimination is otherwise presumed. The applicant's circumstances are already taken into account by virtue of section 35 presuming discrimination against the employer.

Separately, Ai Group does not support the creation of, or extension of, a reasonable accommodation duty to general grounds of discrimination other than disability (or impairment, as described in the AD Act).

Section 65 of the FW Act provides a right for classes of employees, (such as those with caring responsibilities and those experiencing domestic violence) to request flexible work arrangements with employers only being able to refuse on reasonable business grounds. In effect, this already creates a responsibility of accommodation unless the employer can demonstrate reasonable business grounds as to why the request cannot be granted.

Sexual harassment

The *Respect@Work Report*

The *Respect@Work Report* released on 5 March 2020 by the Sex Discrimination Commissioner, Kate Jenkins, provides an important set of recommendations for policy reform aimed at better addressing sexual harassment prevention and complaints handling.

The *Respect@Work Report* arose from the National Inquiry into Sexual Harassment in Australian Workplaces conducted by the Australian Human Rights Commission. Ai Group was heavily involved in the National Inquiry. We facilitated employer consultations with the Commissioner and Ai Group's Chief Executive, Innes Willox, was appointed to the National Inquiry's Member Reference Group. Ai Group also filed a detailed submission providing a range of recommendations to better support employers in addressing sexual harassment. Many of these were adopted in the *Respect@Work Report* and by the Australian Government in its Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces.

(a) Positive duty and enforcement regulatory powers of QHRC

Ai Group supports employers taking preventative action against sexual harassment to limit the burden on employees coming forward with complaints but we do not support a separate positive duty in the AD Act. A statutory mechanism already exists to reinforce an employer's preventative response through WHS laws and the overarching statutory duties on employers (or PCBUs) to ensure the health and safety of their workers. This duty clearly covers sexual harassment.

Since the release of the *Respect@Work Report,* Safe Work Australia (**SWA**) has issued guidelines on how employers should manage their WHS statutory duties to prevent sexual harassment. It has released a model psycho-social hazard regulation and is developing an associated Code of Practice. If the model regulation and code are adopted by the Queensland Government, this will serve as an enhanced regulatory framework through which employers must ensure their workplace is free from psychological hazards, including sexual harassment. In other words, if adopted by the Queensland Government, the WHS framework that currently provides positive duties on employers to ensure safe workplaces (including sexual harassment), will extend, more explicitly, to steps employers are to take to prevent psychosocial hazards such as sexual harassment. Sexual harassment is already identified as a hazard by SWA guidance material with considerable resources aimed at practical sexual harassment prevention and risk assessments. This is very much in line with the concept of a positive duty to prevent sexual harassment at the workplace.

We also note that data from the Workplace Gender Equality Agency show that 99% of reporting employers have sexual harassment prevention policies and strategies. A separate stand-alone positive duty in another jurisdiction is not needed.

Our concern is that if the AD Act is amended to include a positive duty, it will provide an inconsistent standard with the SWA model and dilute employer efforts to treat sexual harassment as a serious safety and wellbeing issue as part of the robust framework already in existence. Doing so would also detract from the comprehensive WHS policies and risk controls employers have embedded and which underpin important cultural reform around the priority of safety in the workplace. For instance, Ai Group has observed that a "speak up", transparent and dynamic culture of continuous improvement relating to safe workplaces is conducive to better prevention of sexual harassment along with other forms of conduct that harm others (such as bullying etc). The WHS framework clearly covers psychosocial hazards, including sexual harassment and bullying, and Ai Group, on behalf of our members, has been active in these WHS developments.

In addition, the workplace safety regulation on preventing psychosocial hazards has the benefit of an already established regulator, through WorkSafe Qld. Transforming QHRC into a regulatory enforcement body in respect of a positive duty and other measures would threaten the perception about the QHRC's independence and impartiality in receiving and conciliating complaints. Perceptions of impartiality, independence and fairness are very important when issues arise between employers and employees.

It may be that if the Queensland Government adopts the SWA model regulation and Code, the QHRC may have a role in working with WorkSafe Qld to provide added expertise in responding to workplace sexual harassment.

Further, Ai Group does not support the creation of more general positive duties in the AD Act and transforming the QHRC into a broader regulatory and enforcement agency. As referred to above, this would destroy perceptions of impartiality and independence about the QHRC's complaints resolution jurisdiction on which many parties rely. Should this discontinue parties are likely to be forced into the more formal judicial system creating further barriers in accessing justice for both applicants and employers.

In areas of workplace law, there is a clear division between regulatory bodies and resolution bodies, for example the Fair Work Commission (**FWC**) is purposely separate to the Fair Work Ombudsman; WorkSafe regulators are separate to the judiciary. This separation of functions is essential to how matters that arise between employers and employees, or between employees and employees, are dealt with fairly.

A regulatory and enforcement model would prioritise regulatory powers over access to justice for both complainants and respondents.

(b) Sex-based harassment

Should the Queensland Government be minded to introduce amendments to the sexual harassment provisions of the AD Act, it is important that Recommendation 26 of the *Respect at Work Report* is followed:

> ***Recommendation 26 – Consistency of sexual harassment laws***
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> *The Australian Government work with state and territory governments, through the Council of Australian Governments or another appropriate forum, to amend state and territory human rights and anti-discrimination legislation with the objective of achieving consistency, where possible, with the Sex Discrimination Act, without limiting or reducing protections.*

In making this recommendation, the Report observed that the current legal framework governing sexual harassment is complex and confusing and that protections and obligations are inconsistent between federal and state legislation.

Accordingly, any amendments proposed to the sexual harassment provisions in Queensland should be consistent with the provisions of the *Sex Discrimination Act 1984 (Cth)* (**SD Act**) including the recent amendments made by the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021(Cth).*

This extends to amendments that adopt a new definition of sex-based harassment. Any new definition should be consistent with the definition adopted in the SD Act.

(c) Prohibition of hostile, offensive working environment

Ai Group does not see the need for a further explicit prohibition for creating an intimidating, hostile, humiliating or offensive environment on the basis of sex, given that there have been many court and tribunal decisions which have applied the definition of sexual harassment broadly to recognise hostile working environments. See for example *O'Callaghan v Loder and the Commissioner for Main Roads* [1983] NSWLE 89*; Johanson v Michael Blackledge Meats* [2001] FCMA 6*; Graincorp Operations Limited v Markham* (2003) EOC 93-250*; Green v Queensland, Brooker and Keating* (2017) EOC 93-816.

The inclusion of this as an express prohibition in the AD Act would likely narrow existing common law definitions of sexual harassment by carving out aspects of the working environment as separate to the statutory definition of harassment itself. This may limit the nature of relief sought by applicants and limit the application of employer policies designed to prevent and respond to sexual harassment in its broader meaning.

We are also mindful that the new psychosocial hazard regulation will further cover this area and require employers to provide a safe workplace free from psychosocial hazards. The regulation is likely to include hazards that are intimidating, hostile, humiliating and offensive on the basis of sex.

Ai Group does not support the 'doubling up' of regulatory provisions directed at the same outcome. Ai Group members reported during the National Inquiry into Sexual Harassment in Australian Workplaces that the overall framework governing sexual harassment (state and federal) was complex, inconsistent between jurisdictions and hindered the application of clear national policies and prevention strategies.

If the Queensland Government adopts the psychosocial hazard regulation and associated Codes of Practice, there is real risk that any amendment to the AD Act will be inconsistent with the WHS framework and dilute the efforts of employers in addressing sexual harassment as a serious WHS issue.

Access to justice and fair process

(a) Direct access to tribunals and courts

Ai Group is concerned that direct access to jurisdictions such as tribunals and the Supreme Court would not be in the interests of access to justice or the efficient administration of justice. The Supreme Court in particular demands a high level of formality, expectations of legal representation and a significant evidentiary threshold for claims to be heard. In our view it would not be an appropriate jurisdiction to receive complaints directly.

Employers, and no doubt applicants, value the opportunity to resolve matters without proceeding to formal litigation, whether that be in a tribunal or court. This opportunity should be provided at first instance at an early part of the complaints process. Employers value low cost resolution options, but also a process that does not entrench an adversarial approach or lead to excessive legal fees.

(b) Vexatious complaints

Ai Group members often report experiences with vexatious or misconceived claims in anti-discrimination tribunals, particularly where applicants may not have the benefit of legal representation or who are unwilling to accept an outcome different to their expectations. A disproportionate amount of time and cost is spent by employers in responding to these applications, and we expect that this is an issue experienced by many complaints-based tribunals.

In March 2021 the Australian Government's original *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021* proposed amendments to expand the powers of the FWC to dismiss applications on various grounds (including where they were vexatious, an abuse of process etc) and to order that applicants cease from making further applications in certain circumstances. This proposed amendment was to repeal current section 587 of the FW Act and replace it with new sections 587 and 587A to expand the FWC's powers in these circumstances. This was in recognition that the FWC, like other tribunals, faced a significant number of vexatious complaints that demanded disproportionate resources to address them. This obviously has an impact on a tribunal's ability to effectively resource and address legitimate complaints.

Ultimately the proposed amendments to section 587 did not feature in the final version of the FW Amendment Bill that was passed by the Australian Parliament. However, we refer to it here as it may be a useful model for the QHRC to adopt in any amendments to the AD Act.

(c) Access to justice

Ai Group supports access to justice and applicants being provided with a reasonable level of information to better inform themselves about how they wish to proceed. Ai Group supports the QHRC providing such information but not to the point where the perception of impartiality and independence is compromised.

In respect of non-written complaints, Ai Group does not oppose the Commission providing assistance in transferring the complaint into writing. Our concern with employers responding to video or audio complaints include:

- Potential privacy issues arising for both the applicant and employer, in terms of additional obligations that would apply to the employer through being provided with such video or audio in respect of how they store and use that information. For example, could an employer disclose that information to a third party for the purpose of a response or obtaining evidence? Employers should not be subject to elevated

privacy restrictions as a result of being a respondent to a claim and should not have their ability to respond compromised as a result of privacy obligations under the *Privacy Act 1988 (Cth*) and Australian Privacy Principles.

- Potential compromising of an employer's ability to respond to the complaint because the video or audio may be incomplete or not properly understood – particularly if the complaint was made in a language other than English.

(d) Timeframe for complaints

Employers should be afforded procedural fairness to enable them to properly respond to complaints, particularly given that they may be subject to orders requiring them to undertake some action or pay an amount of compensation. For employers, the longer the timeframe between an incident occurring and the making of a complaint, the more difficult it becomes to respond to a complaint or prepare an evidentiary case for reasons such as:

- Difficulties obtaining witness evidence from people who may have left the organisation since the incident occurred;
- The lapsing of records over time; or
- Reduced reliability and accuracy of people's memories over the relevant time period.

A longer timeframe places the relevant Tribunal or Court in a more difficult position in how they value and treat evidence from an incident occurring some time ago.

Ai Group supports the retention of the current 12-month timeframe within which to lodge a complaint, combined with the appropriate use of the QHRC's discretion to extend the timeframe where the applicant shows "good cause." An employer should be provided with the opportunity to inform the QHRC of reasons why the timeframe should not be extended. The exercise of the QHRC's discretion should be reviewable by a Tribunal who may separately decide that the case not proceed where prejudice to the respondent can be established. That step may be an interim hearing before the case proceeds further.

Representative bodies

Ai Group is not opposed to industrial officers of trade unions or representative bodies from making complaints on behalf of affected persons provided it is confined to conciliation. This approach is consistent with the current recognition given to representative bodies in the Australian Human Rights Commission who do not have standing in matters that proceed to the Federal Court.

Special measures

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

Special measures should be accessible for the many employers who wish to implement positive measures for a class of people who have experienced historical disadvantage and equality. Positive measures are commonly used in businesses to increase and elevate the participation of women in male-dominated industries or to provide certain benefits and preferential conditions to persons who are First Australians. Government procurement also has role to play in encouraging employers to adopt positive measures or targets and a mechanism is needed that is accessible for employers to engage in positive discrimination, without engaging in unlawful discrimination.

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

Proposals to extend protections to new attributes

While Ai Group understands the desire to protect certain attributes not currently protected from discrimination, we are concerned at the very long and growing list of attributes that employers need to be aware of to reasonably comply with the AD Act and other anti-discrimination legislation.

Employers developing anti-discrimination and harassment policies typically devote pages of these policies to identifying the various attributes covered by anti-discrimination protections and it is at a point where the list of protected attributes is so extensive employers are struggling to ensure that these attributes are understood by employees, management and others in the business for the purpose of prevention.

We note too that the section 351 of the FW Act offers protection against discrimination on the following grounds:

> ***351 Discrimination***
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> *(1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour,*

sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Ai Group considers these grounds to be expansive. They include many of the proposed grounds in the QHRC Discussion Paper, for example, employment activity. As a general position, we do not support the expansion of the AD Act to include further attributes.

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

We are also concerned with immigration status being considered a proposed attribute for discrimination protection. The *Migration Amendment (Protecting Migrant Workers) Bill 2021* (**Amendment Bill**) currently before Parliament imposes criminal sanctions on employers with respect to certain employment arrangements and offences under the *Migration Act 1958* (Cth) (**Migration Act**). The Amendment Bill proposes significant new protections for migrant workers in respect of their working arrangements reducing the need for discrimination protection.

The Migration Act and the Amendment Bill impose a very significant compliance burden on employers in relation to verifying whether non-citizens are lawfully able to work and on what conditions.

We are concerned that employers acting in compliance with the Migration Act, particularly to comply with visa requirements, may be found to have unlawfully discriminated against employees on the basis that employment decisions disadvantage a person in some way.

It is inappropriate and unworkable for immigration status to be considered a protected attribute given the Migration Act's protections, and given employer preferences to employ citizens where possible to avoid significant obligations and risk attached to employing migrant workers on particular types of visas.

Under Migration laws, there are restrictions on employers engaging overseas workers to perform certain jobs if Australian workers are available for the jobs. Also, section 34 of the *Building and Construction Industry (Improving Productivity) Act 2016* requires that the Building Code include a requirement that *"no person is employed to undertake building work unless….the employer demonstrates that no Australian citizen or Australian permanent resident is suitable for the job".*

We are also aware that other Queensland jurisdictions, such as the Queensland Labour Hire Licensing Authority created by the *Labour Hire Licensing Act 2017 (Qld)* (**LHL Act**) identifies the presence of temporary migrant workers in a licence holder's workplace as a risk factor to be considered in decisions to grant a labour hire licence and for general monitoring purposes. This power is supported by relevant provisions of the LHL Act. In this sense, the LHL Act provides a clear disincentive for labour hire licence holders to employ migrant workers and a disincentive for host businesses to engage with labour hire businesses who engage migrant workers.

In respect of protections for combined attributes, we acknowledge that some members of the community may be more vulnerable to discrimination based on multiple attributes they possess. Given the highly variable nature of experiences with intersectionality of different attributes, Ai Group does not propose altering the discrimination definitions in the AD Act but would suggest that these issues are discussed and raised during the complaints and conciliation process.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 150 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, ICT, transport & logistics, engineering, food, labour hire, mining services, the defence industry and civil airlines.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and we support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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