

**SUBMISSION TO THE
AUSTRALIAN GOVERNMENT**



**Submission in response to the Discussion Paper,
*Consolidation of Commonwealth Anti-Discrimination
Laws***

 **AUSTRALIAN INDUSTRY GROUP**

1 February 2012

Consolidation of Commonwealth Anti-Discrimination Laws

1. Introduction

1. Ai Group welcomes the opportunity to comment on the *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper* ('Discussion Paper') released by the Attorney-General's Department in September 2011.
2. Ai Group represents industries with around 440,000 businesses employing around 2.4 million people. Ai Group and its affiliates have approximately 60,000 members and employ in excess of 1.25 million employees in an expanding range of sectors including: manufacturing; engineering; construction; automotive; food; transport; information technology; telecommunications; call centres; labour hire; printing; defence; mining equipment and supplies; airlines; and other industries.
3. Ai Group has a number of substantial concerns about the Government's proposal to consolidate the Commonwealth anti-discrimination laws ('Consolidation Project'). If the Government proceeds with its proposal it is very important that:
 - The consolidated legislation does not extend beyond the combined coverage of the four Federal Acts dealing with age, disability, race and sex discrimination;
 - The consolidated legislation ousts the operation of State and Territory laws dealing with the same grounds of discrimination, rather than operating concurrently to avoid imposing further red tape on businesses and facilitating 'forum shopping' by applicants;

- The consolidation does not result in the levelling-up of obligations upon duty holders in areas such as the definition of 'discrimination', the burden of proof, exemptions, etc.
4. In this submission we have responded to many of the questions set out within the Discussion Paper. We have not responded to every question but rather those that have direct relevance to the area of employment.
 5. Anti-discrimination law is found at Commonwealth, State and Territory levels. In total, 12 pieces of principal legislation prohibit discrimination on multiple grounds in various areas of employment. These include:
 - *Age Discrimination Act 2004* (Cth) ('ADA');
 - *Disability Discrimination Act 1992* (Cth) ('DDA');
 - *Racial Discrimination Act 1975* (Cth) ('RDA');
 - *Sex Discrimination Act 1984* (Cth) ('SDA');
 - *Anti-Discrimination Act 1977* (NSW);
 - *Equal Opportunity Act 1995* (VIC);
 - *Anti-Discrimination Act 1991* (QLD);
 - *Equal Opportunity Act 1984* (WA);
 - *Equal Opportunity Act 1984* (SA);
 - *Anti-Discrimination Act 1998* (TAS);
 - *Discrimination Act 1991* (ACT);
 - *Anti-Discrimination Act* (NT).
 6. Aspects of anti-discrimination law are also found in the *Fair Work Act 2009* (Cth) ('*Fair Work Act*'), which is the principal piece of legislation regulating workplace relations in Australia.

7. Further, the *Australian Human Rights Commission Act 1986* (Cth) establishes the Australian Human Rights Commission and regulates the processes for dealing with complaints made under the ADA, DDA, RDA and SDA.
8. It is clear that the area of anti-discrimination is overregulated. A consolidation bill, contrary the aims of the Consolidation Project¹, will not make the law clearer and more consistent for employers if the State and Territory anti-discrimination laws are allowed to continue to apply in areas covered by the Federal laws. It will only complicate matters for employers by duplicating their statutory obligations and increasing red-tape. It will also allow complainants to continue to 'forum shop' for a jurisdiction which would result in the more favourable outcome for their claim. This is inappropriate and unfair for duty holders, such as employers, who must ensure compliance with multiple laws covering the same subject matter, requiring different actions to comply and exposing them to different remedies.
9. Ai Group urges the Government to implement Federal anti-discrimination legislation which ousts the operation of State and Territory laws dealing with the same grounds of discrimination.
10. Ai Group also urges the Federal Government to remove the anti-discrimination provisions from the *Fair Work Act*, beyond those that have been in the Federal workplace relations legislation for many years e.g. the requirement that industrial instruments not include discriminatory provisions and the requirement that employees not be terminated for a discriminatory reason. The major expansion in the anti-discrimination provisions implemented via *Fair Work Act* has created another layer of red tape for employers and higher costs for employers and the community. For example, the new provisions have required the establishment of an anti-discrimination section within the Office of the Fair Work Ombudsman.

¹ See page 5 of the Discussion Paper.

11. If the Government proceeds with a consolidated Commonwealth anti-discrimination bill, the bill must take an approach which balances the need to protect vulnerable groups in the community with the obligations on duty holders. The Consolidation Project must not become an exercise of levelling-up the obligations on duty holders.

2. Meaning of Discrimination

Question 1: What is the best way to define discrimination? Would a unified test for discrimination (incorporating both direct and indirect discrimination) be clearer and preferable? If not, can the clarity and consistency of the separate tests for direct and indirect discrimination be improved?

12. The Commonwealth anti-discrimination laws determine unlawful discrimination as being either direct or indirect discrimination. Ai Group supports the retention of the distinction of direct and indirect discrimination and is opposed to the amalgamation of these very different concepts.
13. Ai Group agrees with the proposition put forth by the Discussion Paper that a fundamentally revised test, given the lack of Australian jurisprudence on an amalgamated definition, will give rise to uncertainty as to the scope of the test.²
14. Furthermore, a fundamental change of this nature would impact employers by increasing red-tape and administrative costs associated with the reworking of workplace policies, procedures and processes, and impose a substantial re-education requirement upon employers and their employees.

² See page 14 of the Discussion Paper.

Direct discrimination

15. As identified in the Discussion Paper, the comparator test is the most common test used to establish whether direct discrimination has occurred. It is used in the ADA, SDA, DDA, and in all States and Territories other than Victoria and the ACT. It is logical for the comparator test to be adopted as the relevant test for direct discrimination in any consolidation bill.
16. The Discussion Paper fails to recognise the important benefits of retaining the test as the determiner as to whether direct discrimination has occurred. The comparator test has been interpreted and applied by the Courts for more than 30 years and employers and others within the community are familiar with its operation. Any changes to the test after many years of developed law will simply create uncertainty for employers and the greater community.
17. It is our view that the comparator test effectively achieves the balance of protecting employees from the detrimental consequences of discrimination as well as employers who may be exposed to a complaint of discrimination, when actual discrimination has not occurred.

Indirect discrimination

18. The test for indirect discrimination used in the DDA, RDA, Queensland, WA and SA is the most appropriate test to be adopted in the consolidation bill. Importantly the test incorporates the necessary element that the complainant either does not or cannot comply with the condition, requirement or practice imposed by the duty holder. Without this element a complainant would be able to substantiate a claim for indirect discrimination despite not having suffered any negative consequences because of the condition, requirement or practice imposed by the duty holder.
19. Ai Group does not agree that this element is likely to mislead persons. This

element is a matter of fact and has generally been applied in a practical manner, without the imposition of stringent criteria by the courts.

20. We support the adoption of the ADA/SDA 'reasonableness' test for indirect discrimination in the consolidation bill and do not agree that it should be replaced with a more stringent 'legitimate and proportionate test', as it used in the United Kingdom. Similar tests for 'reasonableness' are used in other anti-discrimination laws across Australia and the concept of 'reasonableness' is familiar in Australian law.

Question 2: How should the burden of proving discrimination be allocated?

21. The standard burden of proof, as it applies in existing anti-discrimination law, must be retained in the consolidation bill as it relates to direct and indirect discrimination. Any departure from the status quo and adoption of a full or partial reverse of the onus of proof is strongly opposed by Ai Group.
22. Ai Group does not accept the proposition made in the Discussion Paper that the reverse onus of proof present in the General Protections provisions of the *Fair Work Act* has not caused any significant problems in practice.³ Rather, it is our experience that the General Protections provisions are highly problematic for employers and are becoming increasingly problematic over time. The General Protections provisions have made it far too easy for employees to pursue speculative claims aimed at achieving a monetary settlement during conciliation.

³ See page 16 of the Discussion Paper.

23. Fair Work Australia has reported that General Protections claims lodged with the Tribunal have doubled over the periods 2009-10 to 2010-11, from 1,442 to 2,375, an increase of 60% in a matter of 2 years.⁴ This demonstrates that the General Protections are becoming an ever increasing burden for employers.
24. Furthermore, it is inappropriate to model the provisions of the consolidation bill, which is designed to protect human rights and which will relate to discrimination within various areas of public life, on the *Fair Work Act*, which is piece of industrial legislation designed to regulate the employment relationship between employers and their employees.

Question 3: Should the consolidation bill include a single special measures provision covering all protected attributes? If so, what should be taken into account in defining that provision?

25. Ai Group does not agree that the consolidation bill should include a special measures provision covering all protected attributes. Currently, each of the Commonwealth anti-discrimination laws include special measures provisions which are tailored to a particular target group that the particular legislation is designed to protect. It is our view that this more targeted approach is the most appropriate approach. A 'catch-all' provision would create uncertainty and most likely be difficult to apply in practice.

⁴ General protections applications under s.372 of the *Fair Work Act*, which do not involve dismissal, increased from 254 in 2009–10 to 504 in 2010–11. General protections applications under s.365, which involve dismissal, increased from 1188 in 2009–10 to 1871 in the reporting period, an increase of almost 60 per cent. See page 11 of Fair Work Australia's 2010-11 Annual Report:
http://www.fwa.gov.au/documents/annual_reports/ar2011/FWA_annual_report_2010-11.pdf

Question 4: Should the duty to make reasonable adjustments in the DDA be clarified and if so, how? Should it apply to other attributes?

26. Ai Group does not agree that the duty to make reasonable adjustments be extended beyond the DDA and apply to other attributes. It is unclear how a direct duty to make reasonable adjustments would practically apply in areas such as sex, racial and age discrimination.
27. It is also important to recognise that while an implicit duty to make reasonable adjustments flow from the tests for indirect discrimination, the duty is not a standalone duty for which additional claims may be pressed. The imposition of an additional or separate type of discrimination flowing from a positive duty to make reasonable adjustments beyond what is already legislated under the DDA will be burdensome on employers and expose them to a raft of additional claims.

Question 5: Should public sector organisations have a positive duty to eliminate discrimination and harassment?

28. Ai Group does not support the imposition of positive duties to eliminate discrimination and harassment on either public sector or private sector organisations. Ai Group is concerned that if positive duties are introduced into the public sector, that it will only become a matter of time before they are introduced into the private sector.
29. As outlined in the Discussion Paper, Australian anti-discrimination laws impose a duty on duty holders not to discriminate as opposed to a positive duty to eliminate discrimination and promote equity. Nonetheless, while a positive duty is not currently expressed in anti-discrimination law, the current 'negative' duty operates to achieve the same aim, i.e. to eliminate discrimination etc.

30. The imposition of a positive duty on either the public sector or private sector is unnecessary. It will simply increase the regulatory burden on duty holders for very little gain. It is also likely to confuse duty holders about their obligations.

Question 6: Should the prohibition against harassment cover all protected attributes?
If so how would this most clearly be expressed?

31. Ai Group opposes a blanket prohibition against harassment across all protected attributed at the Commonwealth level. Sexual and disability harassment is explicitly prohibited in the SDA and DDA respectively⁵ and vilification on the basis of race is prohibited by the RDA⁶. Also, as identified by the Discussion Paper, harassment can constitute direct discrimination in particular circumstances.⁷ On this basis, we are of the view that employees already enjoy comprehensive protections against harassment and employers are already subject to substantial duties in this area.
32. Also, the term harassment is often used together with 'bullying'. Harassment and bullying are not the same. Harassment is an action prohibited by anti-discrimination law with the purpose to protect and preserve human rights, whereas bullying is an action prohibited by workplace health and safety laws with the purpose to protect and preserve the health and safety of employees and others at the workplace.
33. It is often very confusing and onerous for employers to understand their obligations under the numerous anti-discrimination laws and occupational health and safety laws in Australia. An extension of the prohibition of harassment across anti-discrimination laws would further confuse employers about their obligations under anti-discrimination laws and workplace health and safety laws, in respect of bullying and harassment.

⁵ Sections 28B to 28L of the SDA and Sections 35-39 of the DDA.

⁶ Section 18C of the RDA.

⁷ See page 18 of the Discussion Paper.

3. Protected Attributes

Question 7: How should sexual orientation and gender be defined?

34. We understand that the Government made a commitment during the 2010 election to include sexual orientation and gender identity as protected attributes under Commonwealth anti-discrimination law. We would object to the introduction of any other protected attributes in the consolidation bill.
35. In respect of the definitions of sexual orientation and gender identity, we propose the following:
- *Sexual orientation*: heterosexuality, homosexuality, lesbianism and bisexuality.
 - *Gender identity*: males who genuinely identify as female, females who genuinely identify as males, intersex people who genuinely identify as male or female.
36. It is our view that the definition of sexual orientation in the consolidation bill must specifically list the types of 'sexual orientation' with which a person may generally identify. The term sexual orientation is used to describe a person's alignment or identification flowing from the sex of a person they generally find sexually attractive.
37. The concept of 'sexual orientation' defined in terms of specific types of orientation, is a far more tangible and certain approach than the vague notion of 'sexual attraction or sexual activity of a person'. Certainty is important to enable employers and other duty holders to understand their obligations.

Question 8: How should discrimination against a person based on the attribute of an associate be protected?

38. Ai Group does not support the extension of the coverage of associates to all protected attributes under the consolidation bill.
39. As identified by the Discussion Paper, discrimination against a person based on the attribute of an associate is covered by most State and Territory anti-discrimination laws⁸ and therefore it is unnecessary to duplicate these provisions at the Federal level, particularly if the Government intends to allow the concurrent operation of State and Territory laws.
40. The duplication of these provisions at the Commonwealth level will create a further regulatory burden and more red-tape for employers and will create further opportunities for forum shopping.

Question 9: Are the current protections against discrimination of the basis of these attributes appropriate?

41. Ai Group opposes the coverage of any additional attributes, including domestic violence status and homelessness, at the Commonwealth level beyond than those grounds already committed to by the Government (see above).
42. The many grounds not recognised in Commonwealth anti-discrimination laws are recognised under State and Territory laws. It is incorrect to assume that extending coverage of Commonwealth anti-discrimination law to attributes already covered by the State and Territories and the *Fair Work Act* will only have a modest impact on the private sector.⁹

⁸ See page 22 of the Discussion Paper.

⁹ See page 23-24 of Discussion Paper.

43. Any duplication of attributes in the consolidation bill will impose a greater regulatory burden upon employers without any benefit to the community and will simply increase the opportunity for complainants to forum shop for the jurisdiction in which their claim would be more successful. This is unfair to duty holders, such as employers.
44. Further, we do not accept that it is necessary to align the grounds of discrimination covered by the *Fair Work Act* in the consolidation bill. As outlined above, it is our view that it is inappropriate to model the provisions of the consolidation bill, which is designed to protect human rights and which will relate to discrimination within various areas of public life, on the *Fair Work Act*, which is piece of industrial legislation designed to regulate the employment relationship between employers and their employees.

Domestic violence status

45. Ai Group opposes the inclusion of domestic violence status as a protected attribute under the consolidation bill, particularly to the area of employment.
46. Domestic violence is an important community problem and Governments, police forces, Courts, community services organisations, professionals, the media, employers and employees have important roles to play in addressing the problem. However we do not believe that it is appropriate to address the problem of domestic violence through anti-discrimination laws.
47. Often victims of domestic violence do not disclose the violence to their employer and therefore the employer is often unaware that it is occurring. It would be unfair to employers to be subject to a discrimination claim without the knowledge of the domestic violence status of the employee.
48. Employers would most likely be willing participants in workable initiatives to

address the community problem of family violence. The extension of anti-discrimination laws risks the creation of negative views amongst employers, rather than seeking to engage them in a positive way.

49. Family violence is an issue which some employers have begun to address through employee support programs and other initiatives. Also, it is common for employers to provide access to various forms of leave and flexible work arrangements where an employee is a victim of family violence.
50. In Ai Group's view, the most obvious and practical way to assist employers to play a role in addressing the community problem of family violence is to assist them to develop appropriate workplace policies. This could take the form of:
- Providing information to employers about family violence and how they can assist in addressing the problem and supporting employee victims; and
 - Providing model workplace policies with options.

Question 10: Should the bill protect against intersectional discrimination? Is so, how should this be covered?

51. We believe that it is not necessary to explicitly recognise intersectional discrimination in the consolidation bill. Under the current law, a person is free to pursue an anti-discrimination claim for unlawful discrimination on multiple grounds. It is our understanding that this will not change under the consolidation bill and therefore such a provision will have no practical utility.

4. Protected Areas of Public Life

Question 18: How should the consolidation bill prohibit discriminatory requests for information?

52. Ai Group supports the retention of the existing test, including the exemptions provided by the DDA and SDA, in any consolidation bill. A benefit of the tests is that they clearly specify the range of requests which are expected, making it clear for employers and other duty holders of their obligation.

Question 19: Can the vicarious liability provisions be clarified in the consolidation bill?

53. While an employer can, to a degree, control the nature of work their employees perform at the workplace, they cannot control every action of their employees. Accordingly, any vicarious liability provision incorporated within the consolidated bill must be fair and balanced.

54. Of the tests in the ADA, DDA, RDA and SDA, in our view the most appropriate test for vicarious liability is that the unlawful act must be committed within the scope of the person's (director, officer, employee or agent of the employer) actual or apparent authority. This is the same test adopted in the most recent of the Commonwealth anti-discrimination laws, the ADA and DDA.¹⁰

55. We consider the alternative test in the SDA and RDA, i.e. *in connection with the person's employment or duties as an agent* ('*in connection with test*'), as unfair.¹¹ The test is very broad and can easily lead to a finding against an innocent employer. For example the courts have interpreted *in connection with employment* to include conduct between employees outside ordinary working

¹⁰ See section 57 of the ADA and section 123 of the DDA.

¹¹ See section 106 of the SDA and section 18E of the RDA.

hours and ordinary places of work.¹²

Defences to vicarious liability

56. If the consolidation bill is to include a provision for vicarious liability, it must also include a workable defence that employers can rely on to defend claims of discrimination made against them because of the actions done by another.
57. We propose that the consolidation bill include the defence currently within the ADA and DDA that requires an employer to show that it took reasonable precautions and exercised due diligence to avoid the unlawful conduct.¹³
58. As identified in the Discussion Paper, the terms *reasonable precautions* and *due diligence* are common legal concepts and therefore are not uncertain terms in the eyes of the law.¹⁴ The terms do not impose unrealistic expectations on employers and, when applied, the defence has the practical effect of positively recognising the efforts of employers that meet the test. This can be encouraging and rewarding for employers that do the right thing.
59. On the other hand, the concept of *all reasonable steps* as it appears in the SDA and RDA imposes unrealistic expectations on employers and can be very difficult to prove.¹⁵ For example, an employer could have gone to great lengths to take as many steps as possible to prevent the conduct, but the fact the conduct occurred may be proof enough that *all* reasonable steps were not taken. This is unfair for employers that do the right thing but are nonetheless punished.

¹² In *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402, the Full Federal Court held that the sexual advances made by an employee to another employee while both were off duty and during the early hours of the morning amounted to sexual harassment occurring in connection with the employee's employment because the conduct occurred on the premises of the employer provided accommodation. See also *Leslie v Graham* [2002] FCA 32.

¹³ See subsection 57(2) of the ADA and subsection 123(2) of the DDA.

¹⁴ See page 36 of the Discussion Paper.

¹⁵ See subsection 106(2) of the SDA and subsection 18E(2) of the RDA.

5. Exceptions and Exemptions

Question 20: Should the consolidation bill adopt a general limitations clause? Are there specific exceptions that would need to be retained?

60. The benefit of the current method of specifically providing a range of important, permanent exceptions in the consolidation bill is that its familiarity provides immediate certainty to duty holders about the nature and limit of the exceptions available to them. This is particularly important for employers, who in advance, need to assess the needs of the person possessing the protected attribute and whether those needs could reasonably be accommodated.
61. Further, the current exceptions are relevantly specific to the particular ground and area of discrimination they are intended to deal with. For example, the exceptions in the DDA are tailored to the specific circumstances in which discrimination is taken not to have occurred on the basis of disability.¹⁶ It is difficult to contemplate how a general limitations clause could be applied across attributes and areas of anti-discrimination law and achieve the same certainty currently present in Commonwealth anti-discrimination laws.
62. Given that we have not identified any problems with the operation of the existing exceptions, it begs the question why they ought to be replaced with a general limitations clause which would create uncertainty for duty holders. The benefits of a general limitations clause are unclear, particularly given that the specifics of any potential provision are not proposed in the Discussion Paper. A general limitation clause would, in concept, require the Court to consider the specific circumstances of the duty holder and its capacity to accommodate the needs of the person possessing the prohibited attributes. Therefore it would be subject to judicial interpretation and could be interpreted in an inflexible and convoluted manner that subject duty holders, especially employers, to more

¹⁶ See sections 21A and 21B of the DDA. Also see specific exemptions in Division 5 of Part 2 of the DDA.

onerous obligations.

63. Therefore the decision to insert a general limitations clause in Commonwealth anti-discrimination law must not be taken lightly. Before the Government determines that a general limitation clause should replace the specific exemptions, further consultation with stakeholders about the nature and application of a general limitation clause in Commonwealth anti-discrimination is necessary.

Question 21: How should a single inherent requirements / genuine occupational qualifications exception from discrimination in employment operate in the consolidation bill?

64. The *inherent requirements* exception and *genuine occupational qualification* exception are very important provisions in Commonwealth anti-discrimination law as they each acknowledge an employer's right to exercise judgment in determining what job requirements are essential for employees to possess without being subject to unlawful discrimination claims.
65. The nature and operation of the *inherent requirements* exception has been considered by the Courts on numerous occasions, including in different contexts (e.g. workplace health and safety), and is more familiar than the *genuine occupational qualifications* exception, on which there is very little case law.¹⁷ Nonetheless, in our view, the most appropriate approach is to maintain the status quo in the consolidation bill by containing an inherent requirements exception for disability and age plus a genuine occupational qualification exception for sex and race¹⁸. This will prevent confusion for duty holders as the exceptions will essentially remain the same. Also, it will be aligned with

¹⁷ See also page 38 of the Discussion Paper.

¹⁸ The RDA does not contain an express *genuine occupational qualification* exception but section 15 of the Act implies that it is not unlawful for an employer to refuse or fail to provide employment or afford the same terms of employment, conditions, or opportunities for training and promotion to a person for which the person is not qualified.

what currently applies in most of the State and Territory anti-discrimination acts.¹⁹

66. Further, it is important that the unjustifiable hardship exception, as it currently applies in disability discrimination, is included in the consolidation bill.²⁰ This exception is an important protection for duty holders, particularly when the physical challenges of some disabilities are such that it is too difficult for the duty holder to accommodate the person's specific needs.

Question 23: Should temporary exemptions continue to be available? If so, what matters should the Commission take into account when considering whether to grant a temporary exemption?

67. The permanent and temporary exemptions are an important aspect of anti-discrimination law as they permit businesses to lawfully discriminate for legitimate purposes.

68. The SDA, DDA and ADA allow the Commission to grant temporary exemptions but they do not specify criteria to assist the Commission in exercising its power.²¹ Therefore the Commission has developed its own set of guidelines, which are taken into consideration when deciding whether or not to grant an exemption to an applicant. This guidelines require the Commission to consider:

- Whether an exemption is necessary;
- The objects of the particular Commonwealth anti-discrimination act under which the exemption is being sought;
- The applicant's reasons for seeking an exemption;
- Submissions by interested parties; and

¹⁹ See page 39 of the Discussion Paper.

²⁰ See section 21B of the DDA.

²¹ See Division 4 of Part II of the SDA, Division 5 of Part 2 of the DDA and Division 5 of Part 4 of the ADA.

- All relevant provisions of the particular Commonwealth anti-discrimination act under which the exemption is being sought.²²

69. If the consolidation bill is made and the Government considers it necessary for the exemptions provision to set out criteria to assist the Commission to determine whether or not to grant an exemption, we believe that it is appropriate for the criteria to be based upon the above guidelines.

6. Complaints and Compliance Framework

Question 24: Are there mechanisms that would provide greater certainty and guidance to duty holders to assist them to comply with their obligations under Commonwealth anti-discrimination law?

70. Ai Group would welcome the development of further voluntary guidance material to assist duty holders to comply with their obligations under Commonwealth anti-discrimination law.

71. Guidance materials need to be flexible so that they are suited to the needs of different workplaces.

72. It is important that guidance materials are developed in consultation with industry stakeholders, including industry associations such as Ai Group.

²² See <http://www.humanrights.gov.au/legal/exemptions/index.html>.

Action plans

73. The DDA makes available the opportunity to duty holders to develop and enter into voluntary action plans with the Commission to help them achieve a level of compliance with the Act.²³ Ai Group does not see a need for this mechanism to be extended to other attributes, but if the Government chooses to do so, the action plans need to remain voluntary and non-binding on the duty holder.

Co-regulation and standards

74. The development of industry codes and standards would impose an additional level of legal liability on duty holders as they can be used by claimants as evidence of a breach or potential breach of anti-discrimination law.
75. If the Government decides to allow for co-regulation in the consolidation bill, it **must** be voluntary and non-binding on duty holders.
76. Furthermore, the decision on whether or not to develop an industry code must be made at the industry level by the organisations that seek to be covered by it. Coverage of any such code must not extend to organisations within an industry that do not elect to be covered by the code.
77. Ai Group does not support the extension of the Attorney-General's power to make standards, whether or not legally binding, to any of the protected attributes under any consolidation bill, beyond those that already exist in disability discrimination law.²⁴ Standards will complicate duty holder's obligations and expose them to unnecessary regulation.

²³ See Part 3 of the DDA.

²⁴ See section 67 of the DDA.

Certification of special measures

78. Special measures enable employers to discriminate in a positive way so as to increase equality of a minority group at the workplace. For example, an employer, using the special measures provision, is able to lawfully introduce workplace policies to increase the number of women in senior management.
79. Ai Group supports mechanisms that enable the Commission to assist employers promote equality at the workplace by using special measures.
80. An option to obtain certification of special measures by the Commission would be a useful tool for employers who are uncertain of the lawfulness of the special measures implemented at their workplace. Certification should not be mandatory.

Question 25: Are any changes needed to the conciliation process to make it more effective in resolving disputes?

81. In our view, the Commission's conciliation process has been generally effective in resolving disputes and this process should remain unaltered in any consolidation bill.

Mandatory vs. voluntary conciliation

82. Mandatory conciliation is an important step in the dispute resolution process before formal litigation is commenced in Court as it is quick, cheap and efficient. In most cases, it can prevent formal litigation from commencing or, if the parties are able to agree on particular aspects of the claim (such as facts), it can significantly reduce costs once the matter is referred to a Court.

83. Voluntary conciliation may not attract the same benefits currently enjoyed by mandatory conciliation as it would allow the parties to the dispute to commence lengthy and costly Court proceedings as a first step option.

Voluntary arbitration

84. Ai Group does not support arbitration as a mechanism of resolving anti-discrimination claims. The current system of mandatory conciliation as a precursor to Court proceedings is working effectively. It is unnecessary to change the system.

Mediation

85. A mediator's role is simply to assist and facilitate the discussion between the parties. Mediation may be useful tool to assist in resolving claims but participation should be voluntary.

Question 26: Are any improvements needed to the court process for anti-discrimination complaints?

Representative actions

86. It is appropriate for anti-discrimination claims, if unable to be conciliated, to be resolved by either the Federal Court or the Federal Magistrates Court on application by the aggrieved party.
87. It is inappropriate to grant representative bodies the right to be a party to a complaint under the legislation unless they are the party which has allegedly been discriminated against. Representative bodies should be free to assist an aggrieved person in making a complaint and with the Court process more generally. However, they should not be a party to the complaint. This would, in

particular, confuse the issue of compensation and remedy if the matter is found in favour of the aggrieved person by a Court. In no circumstances should any remedy be awarded to a representative body when they, themselves, have not suffered any damage as result of the discrimination.

Litigation costs

88. In respect of litigation costs, any consolidation bill should specify that each party to an anti-discrimination claim should bear their own costs, unless the matter is found to be vexatious and without merit.

Remedies

89. There are already a wide range of remedies available to a Court where the ADA, DDA, RDA or SDA have been breached. We oppose any expansion.

Question 27: Is it necessary to change the role and functions of the Commission to provide a more effective compliance regime? What, if any, improvements should be made?

90. The Commission has a multifaceted role, including conciliating complaints of unlawful discrimination. As identified above, the Commission is effective in this role. It is not necessary, in our view, to change the role and function of the Commission.

Investigation of alleged unlawful discrimination

91. Ai Group strongly opposes expanding the Commission's role to include initiating investigations into unlawful discrimination and bringing actions for breaches of anti-discrimination law in the Federal Court or Federal Magistrates Court. Any such expansion would clearly conflict with the Commission's

function as an impartial conciliator and would cause duty holders defending an anti-discrimination claim to lose faith in the system.

92. The arguments here are similar to the debates that occurred following the Australian Labor Party's announcement that Fair Work Australia would be 'one stop shop'. After the issues were properly debated and considered, the Labor Government decided that the functions of Fair Work Australia and the Fair Work Ombudsman needed to be kept separate.

7. Interaction with Other Laws and Application to State and Territory Governments

Question 28: Should the consolidation bill make any improvements to the existing mechanisms in Commonwealth anti-discrimination laws for managing the interactions with the Fair Work Act?

93. It is inappropriate to model the provisions of the consolidation bill, or otherwise seek 'consistency', with the *Fair Work Act*. The *Fair Work Act* is piece of industrial law intended to regulate the employment relationship, including the terms and conditions of employment.
94. Ai Group urges the Federal Government to remove the anti-discrimination provisions from the *Fair Work Act*, beyond those that have been in the Federal workplace relations legislation for many years e.g. the requirement that industrial instruments not include discriminatory provisions and the requirement that employees not be terminated for a discriminatory reason.
95. The major expansion in the anti-discrimination provisions implemented via *Fair Work Act* has created another layer of red tape for employers and higher costs for employers and the community. For example, the new provisions have

required the establishment of an anti-discrimination section within the Office of the Fair Work Ombudsman.

96. The consolidation bill will be a piece of human rights law, with its primary object to protect vulnerable people from discrimination and harassment in everyday public life. While employment is an area dealt with in anti-discrimination law, it is merely one area of public life from which the law protects vulnerable people from discrimination. Therefore, any attempt to merge or align the two laws will not result in a practical outcome and will only complicate matters for duty holders, especially employers.
97. The test for discrimination under section 351 of the *Fair Work Act* is inherently different to the tests for discrimination under Commonwealth, State and Territory anti-discrimination laws. To prove a claim of discrimination under section 351 of the *Fair Work Act* a complainant merely needs to show that it was treated adversely by the employer for the reason that they possess a protected attribute, leaving the employer with the difficult task of disproving the claim. This is unfair for employers and we will be seeking a reversal of the burden of proof within this part of the *Fair Work Act* during the current *Fair Work Act* Review. Under no circumstances would Ai Group support a full or partial reverse onus of proof in the consolidation bill.

Question 29: Should the consolidation bill make any amendments to the provisions governing interactions with other Commonwealth, State and Territory laws?

98. Ai Group is disappointed that the Government, without consulting with industry, has already made its decision to enable State and Territory anti-discrimination laws to operate concurrently with the consolidation bill.

99. It is unnecessary and counter-intuitive to the consolidation process if the existing provisions in the RDA, SDA, ADA and DDA, enabling concurrent operation with State and Territory anti-discrimination laws, are included in a consolidation bill. Rather than simplifying anti-discrimination laws, concurrent application with State and Territory laws will only complicate the situation for duty holders by duplicating their statutory obligations and increasing red-tape.
100. The Discussion Paper considers the interaction between the State, Territory and Commonwealth complaints systems and notes that a complainant is not entitled to make a complaint or initiate proceedings within the Commonwealth scheme if they have already made a complaint or initiated proceedings under a State or Territory Law.²⁵ However, the Discussion Paper fails to address the very real concern of the ability for complainants to ‘forum shop’ for a jurisdiction which would result in a more favourable outcome for their claim. This is extremely inappropriate and unfair to duty holders, who must ensure compliance with multiple laws covering the same subject matter but which otherwise operate within different jurisdictions and expose them to different remedies and penalties.
101. Ai Group urges the Government to reconsider its position and insert a provision into the consolidation bill enabling the Commonwealth to ‘cover the field’ and prevent the State and Territories anti-discrimination laws from applying to the extent that they cover the same protected attribute as the Commonwealth law. A provision should be inserted into the Bill along the lines of the following::

“This Act is intended to apply to the exclusion of all State and Territory anti-discrimination laws to the extent that a particular attribute covered by anti-discrimination law in that State or Territory is already covered by provision of this Act.”

²⁵ See page 57 of the Discussion Paper.

Question 30: Should the consolidation bill apply to State and Territory Governments and instrumentalities?

102. Any consolidation bill should also apply to State and Territory Governments and instrumentalities. To exclude them from the consolidation bill would be unfair to employers in the private sector who are obliged to comply with anti-discrimination laws at the Commonwealth, State and Territory levels.
103. State and Territory Governments are employers and they should not be treated differently to private sector employers, who are forced to comply with a complex web of interwoven and inconsistent State and Federal anti-discrimination laws.

8. Conclusion

104. Anti-discrimination law is overregulated and is becoming increasingly burdensome for employers. A consolidation of the Commonwealth anti-discrimination laws, in the manner contemplated by the Discussion Paper, will not address this problem in any meaningful way and appears set to make the problem worse.
105. The proposed concurrent operation of State and Territory laws within the consolidation bill will increase red-tape for employers and promote forum shopping.
106. If a consolidation bill is made, the bill must balance the needs of vulnerable groups within the community with the obligations upon duty holders.