Law Council
OF AUSTRALIA

2023 Workplace Reform Consultations

Department of Employment and Workplace Relations

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About the Law Council of Australia

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

Acknowledgement

The Law Council acknowledges the assistance of the following Committees and Constituent Bodies in preparing this submission:

- Business and Human Rights Committee;
- Equal Opportunity Committee:
- Industrial Law Committee of the Federal Litigation and Dispute Resolution Section;
- National Human Rights Committee;
- Law Institute of Victoria (**LIV**);
- Law Society of New South Wales (**LSNSW**); and
- Law Society of South Australia (**LSSA**).

Introduction

1. The Law Council appreciates the opportunity to provide a submission to the Department of Employment and Workplace Relations (**Department**) in relation to aspects of its *2023 Workplace Reform Consultations*.

2. The Law Council notes that the Department is consulting on 11 items in the industrial relations sphere which are presently being considered by the Australian Government for introduction later in 2023. As part of this process, the Department has released consultation papers on four of these items. The titles of the four consultation papers are as follows:

    - Same job, Same Pay (**Consultation Paper 1**);
    - Compliance and enforcement: Criminalising wage theft (**Consultation Paper 2**);
    - 'Employee-like' forms of work and stronger protections for independent contractors (**Consultation Paper 3**); and
    - Updating the *Fair Work Act 2009* to provide stronger protections for workers against discrimination (**Consultation Paper 4**).

3. The Law Council is grateful to have been able to participate in a discussion with the Department regarding the 11 consultation items on 5 April 2023. The Law Council now provides the following additional comments in relation to the four consultation papers.

Consultation Paper 1: Same Job, Same Pay

4. Consultation Paper 1 largely relates to the Australian Government's election commitment to ensure labour hire workers are paid at least the same as directly engaged employees who are doing the same work. The Paper seeks feedback about the design and implementation of this commitment as a legislative measure.

5. Overall, the Law Council supports the 'Same Job, Same Pay' principle and considers that Consultation Paper 1 generally proposes a sensible framework for responding to the increasing use of labour hire arrangements. The Law Council agrees it is appropriate to expand the jurisdiction of the Fair Work Commission to resolve disputes in this area, however, it will have resourcing implications for the Commission. There must also be education and guidance provided on the new measures.

Defining labour hire arrangements within scope

Question 1(a): How should different labour hire arrangements be identified or defined?

6. Different labour hire arrangements should be broadly defined. Various case study examples should be provided to demonstrate the wide array of work arrangements that may not typically be considered 'labour hire', but nevertheless encompass its fundamental characteristics. These definitions should apply to both contractor management services and recruitment and placement services. Care should be taken to ensure consistency across definitions in any legislation implementing the

scheme, together with consistency with the various state labour hire regulatory regimes.

Identifying the 'Same Job'

Question 2: Would the criteria [set out on pages 7-8 of the Consultation paper] capture when a labour hire worker is performing the 'same job' as a directly engaged employee?

7. The Law Council considers the criteria appropriate provided that consideration involves a qualitative assessment of what 'same job' means. Further, it should be limited to circumstances where a labour hire worker performs the same job as a current employee (that is, not a past or theoretical employee).

Question 3: Are there scenarios where these criteria would not operate clearly or lead to unintended outcomes? If so, what criteria should be used to identify when a labour hire worker is performing the 'same job' as a directly engaged employee, and why?

8. 'Same duties' must be defined in a way that allows an objective assessment of when the labour hire worker is performing the same job as an employee.

9. Modern award classification structures often contain generic terms in relation to coverage, definitions, and duties, and thus are difficult to narrow. It may therefore be difficult in some circumstances to undertake an accurate comparison. In other instances, the work of a labour hire worker can be compared and contrasted with the duties and classification of an engaged employee more straightforwardly, having regard to their relevant modern award or enterprise agreement.

10. In the absence of a guiding modern award or enterprise agreement, the assessment of a 'same job' may be less certain. It is likely than to rely on the interpretation of contracts and job descriptions to determine the degree of autonomy the labour hire worker has in relation to how, where and when they conduct their work.

Calculating the 'Same Pay'

Question 4: Is calculating 'same pay' with reference to 'full rate of pay' appropriate? Are there scenarios where this would not operate clearly or lead to unintended outcomes?

11. The Law Council supports the Department proposal to calculate the 'pay' that a labour hire worker should be entitled to (unless their usual pay is higher) with reference to any amounts that fall within the definition of 'full rate of pay', as that term is defined in section 18 of the *Fair Work Act 2009* (Cth) (**Fair Work Act**). Question 5(b): Should 'same pay' extend to conditions that fall outside this definition? If so, what conditions should be captured and why?

12. The Law Council suggests that entitling labour hire workers to the same 'benefits' as directly employed workers would be very difficult. For example, if an employee receives a vehicle as a condition of employment, it may not be reasonable for a short term labour hire contractor to receive the same benefit. For the sake of simplicity and the reduction of disputation and litigation, the principle of 'same pay' should be limited to Award, enterprise agreement or statutory entitlements. Benefits that may be in common law contracts may differ between employees and may be based on a range of discretionary factors even when performing the same job. It

would lead to difficulties with compliance for the requirement to be that the labour hire contractor received exactly the same holistic employment benefits.

Implementing Same Job, Same Pay entitlements and obligations

Question 6: If an obligation were imposed on labour hire providers and host employers:

a) What guidance should the Fair Work Act include about 'reasonable steps'?

b) To what extent should consultation and information-sharing provisions prescribe the steps to be taken by labour hire providers and host employers to comply?

c) Should any other criteria or thresholds for triggering obligations apply (for example, criteria or thresholds relating to the length of labour hire engagements)?

d) Should Same Job, Same Pay obligations apply differently for small business?

13. The Fair Work Act should include an inclusive list of factors which the Fair Work Commission must take into account in determining whether reasonable steps have been taken by a labour hire provider and/or host. Labour hire operators and hosts should have a general obligation to consult and share information, but the Fair Work Act need not be prescriptive as to how that must occur, with what frequency and so on.

Question 7: Are there alternative mechanisms the department should consider in order to confer entitlements and obligations about Same Job, Same Pay? If so, please provide details.

14. The Law Council does not consider that there are any other appropriate alternative mechanisms.

Dispute resolution

Questions 8-10: How should the Fair Work Commission resolve Same Job, Same Pay disputes?

15. In terms of resolving Same Job, Same Pay disputes, the Law Council considers that the Fair Work Commission's existing powers to deal with disputes should form the basis of dispute resolution processes. The Fair Work Commission should therefore be able to mediate, conciliate, and arbitrate these disputes. The Fair Work Commission is best placed to determine whether it is the 'same job' and what the 'same pay' should be, whilst its enforcement should be left to the courts.

Enforcement

Question 11: Should Same Job, Same Pay entitlements and obligations be civil remedy provisions in the Fair Work Act?

16. The Law Council considers Same Job, Same Pay entitlements and obligations should be amenable to enforcement action in the form of civil remedy provisions.

Question 12: If entitlements and/or obligations in the Fair Work Act were civil remedy provisions:

a) Who should be able to commence civil remedy proceedings?

17. The Law Council submits that the employee, union or Fair Work Ombudsman should all be able to commence proceedings in a court of competent jurisdiction in the same way they can pursue an underpayment and/or pecuniary penalties.

18. Additionally, the Law Council repeats its longstanding position that section 596 of the Fair Work Act—which requires a person to seek leave to be represented by a lawyer or paid agent in a matter before the Commission—should be repealed. The Law Council's experience is that, rather than acting as an impediment to the swift and efficient resolution of employment related claims, legal representation allows for the prompt identification of the relevant facts and legal questions to be determined. This supports the proper administration of justice. Self-represented parties often arrive underprepared and overwhelmed. This can result in delays in pre-trial procedures, increased time spent at hearing discussing irrelevant matters, a greater number of adjournments, and difficulties in advancing settlement discussions. For these reasons, the Law Council recommends lawyers not be excluded from proceedings before the Fair Work Commission, nor have their involvement limited.

b) How should this enforcement mechanism fit with any dispute resolution powers conferred on the Fair Work Commission about Same Job, Same Pay?

19. Dispute resolution powers should be consistent with existing powers to provide civil remedies under the Fair Work Act.

Question 13: If an underpayment of 'same pay' is established, who should be ordered to rectify it?

20. The Fair Work Commission should have a broad discretion to make orders appropriate to the circumstances of each case. This should include powers to make orders against labour hire operators and/or host employers.

Anti-avoidance measures

Questions 15-17: What could be done to prevent parties avoiding Same Job, Same Pay obligations?

21. If the rights of a worker under the Same Job, Same Pay measures are expressly identified as 'workplace rights' under the General Protection provisions,[1] the worker will be protected by those existing anti-avoidance provisions. Therefore, the Law Council suggests nothing further would be required.

22. The LIV proposes an alternative view which recommends inserting a general anti-avoidance provision in the Fair Work Act that prohibits labour hire providers and host employers from taking action or entering arrangements to avoid Same Job, Same Pay obligations.

[1] *Fair Work Act 2009* (Cth), Part 3-1.

Impacts and costs

Question 18: Please describe the cost impacts of Same Job, Same Pay measures on affected parties and the broader economy.

23. While the Law Council is not in a position to quantify the likely costs of the proposed measures, conceptually, it is likely that there will be cost implications for labour hire operators and host employers in adapting to, and applying, the Same Job, Same Pay measures. Additional costs incurred by labour hire operators will likely be passed through to host employers.

24. Guidance and education to labour hire operators and host employers is therefore required to minimise these costs, and to minimise the risk of incorrect assessments.

Question 19: What other positive and negative consequences of this measure could arise for [the various parties]. As relevant, please include observations on whether there may be positive or negative consequences in relation to enterprise bargaining.

25. It will be important to monitor the impact of the Same Job, Same Pay measures, to assess the extent of any unintended consequences, particularly for vulnerable workers. Labour should be correctly valued, but if the cost of labour rises as a result of the necessary transition, some workers may experience loss of hours of work, or job losses. Consideration of cost impacts should include this calculation. Increasing the cost of labour hire workers will not necessarily result in those workers being directly employed by the same employers who were previously hosts.

26. There may also be consequences for workers caused by an incorrect assessment of the relevant award or agreement. As noted in response to Question 18 above, providing guidance and education to labour hire operators and hosts will be essential in protecting workers from such risks.

Transition

Question 20: Should there be a transition period before Same Job, Same Pay measures commence operation, if enacted? If so, how long should the transition period, and why?

27. Allowing a substantial transition period before the new measures commence will be crucial to enabling organisations to adapt their arrangements to become compliant.

Consultation Paper 2: Compliance and enforcement: Criminalising wage theft

Criminalising wage underpayments

28. Consultation Paper 2 canvases issues relating to the underpayment and non-payment (together referred to as **underpayment**) of wages and the Government's proposed responses to bolster the Fair Work Act in terms of compliance and enforcement.

29. The Law Council recognises that underpayment is occurring. It occurs for a variety of reasons of increasing seriousness, ranging from: genuine mistake; inattention; negligence; recklessness; and deliberate and knowing breach.

30. The Law Council is generally supportive of new measures to address underpayment of wages and entitlements by employers, including increased pecuniary penalties, particularly where employers recklessly or deliberately and knowingly underpay employees. However, any consideration of increased or alternative penalties, including criminal sanctions (as is currently being considered by the Australian Government), ought to be carefully calibrated to appropriately reflect the different levels of seriousness of the conduct.

31. If the Government is minded to introduce criminal penalties, the Law Council's preferred model would be a tiered approach. This should involve both knowledge-based and recklessness-based offences, where the Court has a broad discretion to apply pecuniary and/or non-pecuniary penalties according to the seriousness of the conduct involved. Such criminal penalties should be one aspect of a multi-faceted approach, including civil penalties and education for employers about their payment obligations.

32. The introduction of criminal sanctions should not be seen as the sole means by which underpayment issues can be addressed. While criminal sanctions could play an important deterrent effect, they alone are not going to alter the vast majority of cases of underpayment of wages. Therefore, the Law Council suggests more resources must be directed to enforcing current laws and educating workers to ensure they are aware of their rights and are able to adequately and easily access legal recourses. Additional education is also required to help improve the capability of employers to navigate wage entitlements under the relevant awards and/or enterprise agreements, and to minimise the risk of inadvertent breaches. Sustained funding for the regulator and simpler processes at the Fair Work Ombudsman and the Federal Circuit and Family Court of Australia will increase access to justice for employees by facilitating outcomes in a timely manner.

33. The Law Council would be reluctant to see the introduction of new criminal offences while under-resourcing of the agencies with the power to prosecute under existing offences is a significant ongoing issue.

Question 1: Which of the options proposed by the Department would be the most effective for introducing a criminal offence for wage underpayment?

34. Of the options suggested by the Department, the Law Council prefers Option 3 which proposes a tiered approach with two offences inserted into the Fair Work Act—a knowledge-based wage underpayment offence and a recklessness-based

wage underpayment offence. There could be different penalties applicable to each offence, reflecting a more graduated approach to criminal culpability.

35. In preferring Option 3 (a tiered approach), the Law Council considers criminal sanctions may be effective in very serious cases where the individual has actual knowledge of the contravention or is reckless as to the contravention. Underpayment is inherently a monetary-based malfeasance and may be adequately and appropriately addressed through monetary compensation in the vast majority of cases, particularly where the underpayment was unintentional. Criminal sanctions may, however, have a further deterrent effect in serious cases where the companies or persons involved are not concerned about compensatory orders or pecuniary penalties. For example, this might include circumstances where they intend to claim insolvency or bankruptcy in the event of penalties being enforced against them and/or because pecuniary penalties will have no substantial impact on profitability.

36. Additionally, the Law Council supports the proposition on page 5 of Consultation Paper 2, that if criminal penalties were to be introduced, they should extend to underpayment of workplace entitlements due to be paid or directed to third parties, including superannuation funds.

37. The LIV suggests consideration be given to adopting different approaches depending on the size of the employer. For example the knowledge-based wage offence (i.e. Option 1) apply to employers with less than 50 employees, and the tiered approach (Option 3) apply to employers with 50 employees or more.

Question 2: Are there additional considerations which the department should examine for the wage underpayment offence, for example from other areas of Commonwealth criminal law or existing state and territory wage underpayment offences?

38. If a tiered approach were adopted incorporating established elements of knowledge and recklessness this would provide a clearer model than if elements were drawn from other state and territory based models.

39. As the Law Council has noted previously, what amounts to 'reckless' conduct is something that Courts have interpreted differently depending on the context and purpose of the legislation.[2] In some contexts recklessness may be proven where a person is aware of the possibility of a contravention and there is an indifference as to the consequences, combined with conduct which makes the person involved in the contravention.[3] In other contexts it has been held to mean where a person is aware of the probable consequences of their actions and is indifferent as to the consequences.[4] In the view of the Law Council, if a recklessness-based wage underpayment offence is to be proposed, it must be clear which of those two will be sufficient to prove a contravention. Noting the serious penalties that may be attached to a contravention, the more conservative second approach would be the Law Council's preferred approach, namely it must be proved the purported person was aware of the probable consequences of the conduct and was nevertheless involved in that conduct.

[2] Law Council of Australia, Submission No 90 to Senate Economics References Committee, Parliament of Australia, *Unlawful underpayment of employees' remuneration* (6 March 2020) 8-9 <https://www.lawcouncil.asn.au/resources/submissions/unlawful-underpayment-of-employees-remuneration>.
[3] See, eg, *Aubrey v R* [2017] HCA 18, [49].
[4] See, eg, *R v Nuri* [1990] VicRp 55; see too the discussion in *Maritime Authority of NSW v Rofe* [2012] NSWSC 5, [24]-[25].

Question 3: Should offence-specific defences be available for either of the wage underpayment offences in addition to the default defences available in Part 2.3 of the Commonwealth Criminal Code?

40. The elements of knowledge and recklessness within a tiered approach would appropriately limit the scope of the offences without the need for defences other than those set out in the *Criminal Code*.[5]

Question 4: Should the wage underpayment offence apply to any additional or different entitlements?

41. The Law Council does not support any extension to other entitlements, such as those solely arising from an employment contract.

Question 5: What would be appropriate penalties (including a fine and/or a period of imprisonment) for a knowledge-based wage underpayment offence and a recklessness-based wage underpayment offence?

42. Depending on the nature and extent of the underpayment, taking into consideration how many employees were impacted, the severity of the underpayment, and other relevant factors, an appropriate penalty may begin with mandatory training and/or education. Significant, and deliberate underpayments should attract additional penalties. However these penalties should remain proportionate to the severity of the offence.

43. As noted above, the Law Council considers criminal penalties appropriate and effective only in very serious cases where the employer had knowledge or was reckless as to the contravention and in circumstances where pecuniary penalties alone may provide little deterrence. In such cases, custodial sentences may be appropriate.

44. In addition, larger fines should apply to knowledge-based offences when compared to recklessness-based offences, given the higher degree of culpability attached to those knowledge-based offences. In all cases, however, the courts should retain a broad discretion to apply criminal penalties as they consider appropriate to the specific case.

Question 6: The Department proposes that courts would be empowered to order the higher of the maximum penalty units available or up to three times the amount of the underpayment arising in the particular matter if that amount can be calculated. Would it be appropriate to include such a penalty for knowledge-based and recklessness-based offence options?

45. As noted above, the Law Council considers that the courts should retain a broad discretion to apply criminal penalties as they consider appropriate to the specific case, and not necessarily calculated with reference to the amount of underpayment.

Question 7: Should the Department consider an alternative method than the one set out below for 'grouping' or 'rolling-up' charges for wage underpayment (and any record-keeping) offences?

46. In the Law Council's view, the position on 'grouping' criminal penalties is consistent with that previously stated in relation to 'grouping' civil penalties. The purpose of grouping penalties for multiple instances of a single contravention of a provision is to

[5] *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*').

ensure that a single non-compliant decision resulting in a course of conduct is not disproportionately penalised based on the number of breaches that transpire as a result.

47. The situation is different where a party is involved in an ongoing breach and decides to continue, or to maintain, that breach. In such cases, a separate decision to continue or maintain the breach should attract further contraventions and further pecuniary penalties.

48. Should criminal penalties be introduced, the Law Council supports consideration of course of conduct charging rules but recommends the inclusion of an express provision to clarify the penalty imposed for continuing or maintaining the breach.

Question 8: Is it appropriate to extend the bar to proving ancillary liability of officers of bodies corporate for the wage underpayments offence beyond the default provisions in the Commonwealth Criminal Code?

49. The Law Council considers there is no need for an extension beyond the default provisions in the *Criminal Code* and that the existing provisions allowing an application against a director of a body corporate are adequate. There are also established common law principles which determine accessorial liability in the context of civil penalties.[6]

Criminalising record-keeping misconduct

Question 9: Should criminal offences for record-keeping misconduct be introduced to complement a criminal offence for wage underpayment?

50. Should criminal penalties be introduced, the Law Council agrees they should include record-keeping offences. In the experience of members of the legal profession, it is not uncommon for an employer to attempt to mask a contravention through record-keeping misconduct. In the absence of specific record-keeping offences, such misconduct may not be captured by recklessness-based or knowledge-based offences.

Changes to the serious civil contraventions regime

Question 10: How should the serious civil contraventions regime be adjusted to align with the wage underpayment and any record-keeping offences?

51. In the Law Council's view, there is no clear need to adjust the serious civil contraventions regime if a new criminal regime is introduced, particularly if both regimes maintain flexibility and discretion as to the penalties available.

Increasing maximum civil penalties

Question 11. Which of the following options would most effectively implement recommendation 5 of the Migrant Workers' Taskforce?

52. While not expressing a view as to the appropriate maximum penalties that should be imposed for a breach of the provisions listed in the Consultation Paper, the Law Council supports the proposition that the general level of penalties for breaches of wage exploitation related provisions in the Fair Work Act should be increased to be

[6] *Fair Work Ombudsman v South Jin Pty Ltd* [2015] FCA 1456.

more in line with those applicable in other business regulatory legislation, especially consumer protection legislation.

12. The Department proposes that for all civil contraventions, courts would be empowered to order (at the election of the applicant) either the maximum penalty available or three times the amount of the underpayment arising in the particular matter if that amount can be calculated. Would it be appropriate to include such a penalty for all civil contraventions? Should this penalty option be limited to certain types of civil remedy provisions?

53. The Law Council does not support such an approach. Current common law principles provide an appropriately flexible approach to determining the quantum of penalty imposed.

Sham arrangements

13. The department proposes to amend the defence to a claim of sham contracting in subsection 357(2) of the Fair Work Act to provide that an employer will not be liable for a sham arrangement if, when the employer misrepresented the relationship as a contract for services rather than a contract for employment, the employer reasonably believed that the contract was for services and not for employment. Should the department consider adopting a different test or additional features for the defence to sham contracting?

54. In the Law Council's view, the current provisions respond adequately to instances of sham contracting without the need for further specific or changed provisions.

Consultation Paper 3: 'Employee-like' forms of work and stronger protections for independent contractors

55. As a general comment, the Law Council appreciates the need to strengthen protections for independent contractors, including those operating through online platforms in the gig economy. The Law Council supports a broad approach but looks forward to commenting further on a more detailed model in proposed legislation.

56. The Law Council supports the policy of supporting workers across different models of independent contracting who seek to balance flexibility, control over the work undertaken and in some cases the price of services, with fair levels of remuneration and conditions of work. The Law Council agrees that in some arrangements workers may lack bargaining power and control over their work, and that the arrangement may more closely resemble employment without the protection afforded to employees. In other circumstances, however, gig economy workers have relatively high bargaining power and some freedom to negotiate terms.

57. The Law Council is of the view that merely expanding the definition of 'employee' to include certain categories of independent contractor may result in minimum standards applying too broadly or too narrowly. In addition, in a dynamic marketplace, it may be difficult to define 'employee' in ways that capture workers in emerging models and that minimise the potential for platform operators or other contractors to adapt their models to avoid the standards. On that basis, the Law Council broadly supports the approach of expanding the Fair Work Commission's jurisdiction to consider unfair contractual terms for independent contractors.

58. The Law Council also broadly supports allowing the Fair Work Commission to develop minimum standards for independent contractors, including those in the road

transport industry, to protect contractors and ensure the industries in which they work remain viable. However, any expansion in the Fair Work Commission's jurisdiction will add complexity to the employment law system, with resourcing implications for the Commission.

59. In relation to defining the scope of the Fair Work Commission's new functions, currently there appear to be differences between the circumstances of contractors in 'horizontal' marketplace platforms, who are generally able to negotiate key terms with customers, and those in 'vertical' platforms where more bargaining power and control is exercised by the platform operator. This suggests that the need for minimum standards may be more likely in vertical platforms.

60. The Law Council supports the Fair Work Commission developing minimum standards in respect to the following areas:

- minimum rates of pay;
- concepts of 'work' time (e.g. which activities performed by a worker should attract compensation);
- payment times (e.g. timeframes between performance of work and payment);
- workplace conditions, such as portable leave, rest breaks, etc;
- treatment of business costs, including vehicles and maintenance, insurances, licences, etc;
- record keeping;
- training and skill development; and
- dispute resolution.

61. Different models and practices will emerge over time. There is a risk in legislating too prescriptively regarding particular categories of worker or industries, and the functions of the Fair Work Commission. In determining whether it has jurisdiction, the Fair Work Commission should have a discretion to consider arrangements which appear, or purport, to be contracts for service.

62. That said, the Law Council agrees that an 'objective' set of factors to consider in making decisions, a process for making orders and a work plan are all appropriate instruments for guiding the Fair Work Commission in the exercise of its functions in this area.

63. The Law Council supports the Fair Work Commission being granted a dispute resolution function to hear disputes about the application of or arising under dispute resolution terms contained in minimum standards orders. Matters regarding contractors and 'employee-like' work could be referred to the Fair Work Commission for arbitration if mutually agreed upon by both parties.

64. Additionally, the Law Council suggests the following in relation the Fair Work Commission's scope in dealing with 'employee-like' forms of work:

- the scope should be narrowed to workers who can be defined as a 'natural person' (operating as a sole proprietor or a partnership and genuinely operating their own business) and work performed on a 'vertical' on-demand model;

- ‘employee-like’ forms of work should remain separate to the National Employment Standard, in acknowledging that although there may be similarities, such work is not wholly consistent with an employment relationship. In the absence of the National Employment Standards applying, the Fair Work Commission should consider whether any other fundamental protections should be afforded to workers who conduct ‘employee-like’ forms of work; and

- the Fair Work Commission should consider the utility of developing a modern award for certain gig workers working in vulnerable industries, such as food delivery contractors. An award would provide greater clarity on the factors to consider around how such workers are engaged and could also assist in improving safety standards and preventing exploitation of gig workers in vulnerable industries.

Consultation Paper 4: Updating the Fair Work Act 2009 to provide stronger protections for workers against discrimination

65. Consultation Paper 4 relates to the general commitment to updating the Fair Work Act’s anti-discrimination framework, particularly noting several reforms were enacted recently via *the Fair Work Amendment (Secure Jobs, Better Pay) Act 2022* (Cth).

66. The following comments are general in nature and provided for the purpose of assisting the Department determine and refine possible options for reform. The Law Council otherwise reserves its position pending the publication of any draft legislation.

67. The Law Council couches its response to the questions raised in the paper in two overarching comments.

Consistency across anti-discrimination laws

68. Consultation Paper 4 states that a guiding principle to identifying the options for reforms to Fair Work Act’s anti-discrimination framework is alignment and consistency with anti-discrimination protections in other Commonwealth legislation.

69. The Law Council supports reducing complexity and inconsistency in legal frameworks which prohibit discrimination. The Law Council has previously noted that the increasing utilisation of the Fair Work Act to deal with workplace disputes which had tended to be almost the exclusive province of anti-discrimination law demands consideration of the interaction between anti-discrimination laws and relevant Fair Work Act provisions, with a view to avoiding multiple proceedings agitating the same subject matter.[7]

70. In its 2019 submission to the Australian Human Rights Commission’s (**AHRC**) ‘Discussion Paper: Priorities for federal discrimination law reform’, the Law Council suggested it may be most effective to undertake a holistic review, which considers relevant Fair Work Act provisions and state and territory anti-discrimination laws, as

[7] Law Council of Australia, Submission to Australian Human Rights Commission, *Response to Discussion Paper: Priorities for federal discrimination law reform* (20 December 2019) [14] <https://www.lawcouncil.asn.au/resources/submissions/response-to-discussion-paper-priorities-for-federal-discrimination-law-reform> (**2019 Law Council submission to the AHRC regarding federal discrimination law reform**).

well as the Commonwealth anti-discrimination laws, with a view to achieving consistent, harmonised national legislation.[8]

71. The LSNSW's preferred model would be to consolidate the existing Commonwealth discrimination laws into a single Act.

72. In the report it ultimately produced, 'Free and Equal – A reform agenda for federal discrimination laws', the AHRC recommended that once the reforms to anti-discrimination law which it recommended are implemented, they should be reviewed after five years. The review should consider the reforms effectiveness and whether a broader integration exercise should be undertaken to further standardise the approach across federal, state and territory discrimination laws, as well as the Fair Work Act and work, health and safety law.[9]

73. The Law Council expects that these matters will likely be considered by the Parliamentary Joint Committee on Human Rights as part of its inquiry into Australia's Human Rights Framework. The extant 2010 Framework, which will be considered in that inquiry,[10] includes a commitment to 'develop[ing] exposure draft legislation harmonising and consolidating Commonwealth anti-discrimination laws to remove unnecessary regulatory overlap, address inconsistencies across laws and make the system more user-friendly'.[11] That Framework does not consider the Fair Work Act, which at that stage was in its infancy.

74. The Law Council reserves its position on the best approach to harmonisation as it considers its position with respect to that inquiry, but suggests at this stage that the Department keep that inquiry in mind.

Better particularising the anti-discrimination scheme in the Fair Work Act

75. As a general comment, a number of the questions in the Consultation Paper highlight the gaps in the discrimination regime provided by section 351 of the Fair Work Act.

76. This provision does not, for example, address the inclusion of indirect discrimination, whether an employer should be required to make reasonable adjustments to prevent discrimination, whether there is vicarious liability for acts of employees, and whether it is a defence to show the employer has taken reasonable precautions to prevent the breach.

77. More fundamentally, the Act does not provide a definition of 'discriminate'.

78. While section 351 has the heading 'Discrimination', its function is to prohibit the taking of an 'adverse action' against a person because of certain attributes, and it does not otherwise use the term 'discrimination' (or any derivation of it). Section 342 sets out the meaning of adverse action, and provides that an adverse action

[8] Ibid [15].
[9] Australian Human Rights Commission, 'Free and Equal – A reform agenda for federal discrimination laws' (2021) 349, rec 38.
[10] Parliamentary Committee on Human Rights, Parliament of Australia, *Inquiry into Australia's Human Rights Framework* (Terms of Reference , 15 March 2023) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework/Terms_of_Reference>.
[11] Commonwealth of Australia, 'Australia's Human Rights Framework' (April 2010) 9.

includes when a person ‘discriminates’ against another in certain contexts. However, the Fair Work Act does not define the term ‘discriminates’ when used in section 342.

79. This results in a lack of clarity for complainants, respondents, and their legal representatives in matters brought under section 351 of the Fair Work. The feedback from the profession is that many cases dealing with this provision involve contention as to what ‘discriminate’ means.

80. The Fair Work Commission website makes clear that definitions of what may constitute ‘discrimination’ under anti-discrimination legislation are not imported into sections 351, and conduct which breaches anti-discrimination legislation may not necessarily breach section 351.[12]

81. The Law Council considers there to be benefit in drawing out the machinery provisions of the discrimination framework in the Fair Work Act, with a focus on providing clarity around the content of the term ‘discriminate’.

82. Any such drafting should be mindful of the scheme which otherwise exists in the Fair Work Act.

83. While, the Law Council supports in principle consistency across the legislative framework, and is open to the idea of drawing on common definitions and terms used in other Commonwealth laws where relevant, the Law Council suggests caution be employed in importing definitions of ‘discrimination’ from other Commonwealth or State or Territory anti-discrimination laws into the Fair Work Act.

84. The other definitions are themselves not consistent. Further, the other laws are mostly framed around the complainants or plaintiffs bearing the onus of proof (this is the case, for example, in Commonwealth discrimination matters).[13] However, section 361 of the Fair Work Act imposes a reverse onus on a respondent, to prove that an action alleged to have been taken for a particular reason or intent which would contravene section 351, was not taken for that reason or intent.

85. In this context, the Law Council notes that particular complexity is created by paragraphs 351(2)(a) of the Fair Work Act, which provides that the prohibition in subsection 351(1) does not apply to an action that is not unlawful ‘under any anti-discrimination law in force in the place where the action is taken’. The term ‘anti-discrimination law’ is defined in subsection 351(3) of the Fair Work Act as including twelve Commonwealth and State and Territory anti-discrimination laws. As a result, it effectively draws in all the defences and exemptions in the State and Territory laws[14] – the Law Council understands the vast majority of these are unrelated to employment-related discrimination.

86. As a matter of principle, the Law Council considers that the operation of section 351 would be clearer if the exemptions, defences and exceptions to the prohibition in subsection 351(1) were particularised within it.

[12] Fair Work Commission, ‘Discrimination’ (Web Page) <https://www.fwc.gov.au/discrimination-0>.
[13] *Sharma v Legal Aid (Qld)* [2002] FCAFC 196 at [40]; *Ferrus v Qantas Airways Ltd* [2006] FCA 812, [48] (Collier J).
[14] See, eg, *McIntyre v Special Broadcasting Services Corporation (t/a SBS Corporation)* [2015] FWC 6768.

Improving consistency and clarity

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

87. The Law Council supports amendment of the Fair Work Act to expressly make clear that discrimination provisions in that Act cover both direct and indirect discrimination.[15] This would bring the Fair Work Act into line with other legislation and provide for a serious alternative jurisdiction in pursuing a discrimination claim.

88. The Law Council understands that the formulations of 'indirect discrimination' are not consistent across Commonwealth and State and Territory laws,[16] so consideration will need to be given to a construction which operates consistently with the Fair Work Act scheme as a whole.

Question 2: Should the Fair Work Act be aligned with the [Disability Discrimination Act 1992] and include a definition of 'disability'?

89. The Law Council supports, in-principle, a definition of disability being inserted into the Fair Work Act (applying to both subsection 351(1) and paragraph 772(1)(f)) to bring it into line with the *Disability Discrimination Act 1992* (Cth) (**DDA**), noting that the Fair Work Act does not define this term but does refer to 'physical or mental disability'. One approach to this may be to cross-reference the definition in the DDA, rather than replicate it.

90. However, the Law Council notes difficulties raised by the AHRC in its report *Free and Equal: A reform agenda for federal discrimination laws*.[17] These difficulties have arisen in the application of the definitions in the DDA,[18] in the use of the comparator test[19] and in the status of reasonable adjustments.[20]

91. The Law Council is of the view that any amendment of this nature should strengthen protections for Australians who suffer disability discrimination, rather than making them more complex. The Law Council recommends that the Government take the AHRC's concerns into account in considering relevant amendments to the Fair Work Act.

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

92. The Law Council notes that consideration is being given to amending the 'inherent requirements' exemption in paragraph 351(2)(b) of the Fair Work Act to 'clarify the requirement to make reasonable adjustments.' It is not clear what is meant by 'clarify'.

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[15] Law Council of Australia, Submission No 43 to Senate Education and Employment Legislation Committee, *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (11 November 2022) [56] <> (**2022 Law Council submission on the Secure Jobs, Better Pay Bill**).
[16] Contrast, for example, s 6 of the *Disability Discrimination Act 1992* (Cth), s 5(2) of the *Sex Discrimination Act 1984* (Cth), s 15 of the *Age Discrimination Act 2004* (Cth) and s 9(1A) of the *Racial Discrimination Act 1975* (Cth).
[17] Australian Human Rights Commission, 'Free and Equal – A reform agenda for federal discrimination laws' (2021) ch 4.
[18] Ibid, 279 and 284-286.
[19] Ibid, 279-284.
[20] Ibid, 286-293.

93. Consultation Paper 4 notes that the 'inherent requirements' exemption in the DDA is subject to the requirement to make 'reasonable adjustments' to address disadvantages a person may experience because of their disability.

94. While this is strictly true, it is worth making clear that the failure to make reasonable adjustments forms part of the definition of disability discrimination itself under the DDA, rather than an aspect of the exemption.

95. This is worth making clear, because the Consultation Paper further notes that the 'Fair Work Act does not include such a requirement in its inherent requirements exception'. Specifically the Act does not provide for reasonable adjustments as part of the prohibition on taking an adverse action under section 351 of the Act.

96. If there is consideration of providing for reasonable adjustments in the Fair Work Act, the focus should be on the definition of 'adverse action' under section 342 of the Act.

97. However, is not clear whether the intended 'clarification' to the Fair Work Act is to a refusal or failure to make reasonable adjustments applicable only in relation to disability, or whether it is intended to extend this to other attributes protected under section 351 of the Fair Work Act. The Law Council has previously suggested that consideration should be given to whether such reasonable adjustments provisions under federal discrimination law should be extended beyond disability to other protected attributes such as age or pregnancy.[21]

98. In light of the lack of clarity with respect to this proposal, the Law Council is not in a position to provide a definitive view. Each Constituent Body which provided input to this submission supported amending the Fair Work Act to require employers to make reasonable adjustments in circumstances required by individuals with a disability, and the Law Council in-principle agrees with a reform at least of this scale.

99. The experience of members of the legal profession is that employers can be confused about the interaction between the inherent requirements exemption to the DDA and the reasonable adjustment provisions. Care should be taken to ensure that any confusion which exists in the present DDA is not imported into the Fair Work Act, noting the discussion above.

100. The Law Council notes finally that Consultation Paper 4 contrasts the absence of the concept of reasonable adjustments in the Fair Work Act with workers' compensation laws where it is said to be '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'. The Law Council suggests care be taken moving forward to keep in mind the different contexts in which those Acts operate.

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

101. The Consultation Paper notes that most anti-discrimination laws clarify that protection extends beyond protection against discrimination because of the person's protected attribute (such as race, sex, age or disability) 'to characteristics that people who have the protected attribute … generally have or are generally assumed to have'. It suggests that these clarifications are often referred to as 'attribute extensions.'

[21] 2019 Law Council submission to the AHRC regarding federal discrimination law reform, [74].

102. It notes that the Fair Work Act does not currently include an express provision for attribute extensions, and question 4 asks whether it should.

103. The Law Council in-principle supports the inclusion of attribute extensions in the Fair Work Act.[22]

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 Fair Work Commission via conciliation? What would be the benefits and limitations of establishing such a requirement?

104. The Law Council supports this proposal. The benefits would include ensuring more expeditious and cost-effective access to the resolution of discrimination complaints. Members of the profession report that current applications before AHRC can take more than six months to be conciliated. The complexity of the court system and the delays involved can also be a barrier to making an application in the first instance, in comparison to the Fair Work Commission.

105. Further, the Law Council considers it appropriate for complaints in respect of discrimination to be dealt with in a similar manner to complaints of bullying or sexual harassment, which are often based on discriminatory grounds, and to be subject to compulsory conciliation. The Law Council considers any new process should align with the Fair Work Commission's handling of sexual harassment claims under new Part 3.5A of the Fair Work Act.

106. An alternative to this approach may be to increase the capacity of the AHRC to manage discrimination complaints through better resourcing.

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 Fair Work Commission?

107. The Law Council would not object to the introduction of a filing fee, particularly if a fee waiver were available in circumstances of hardship. The Law Council suggests the fee be reasonably modest but sufficient to deter vexatious or frivolous complaints.

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?

108. The Law Council received some support for this proposal from some Constituent Bodies, on the basis of general support for the implementation of consistent standards across forums and the context in which discrimination or harassment occurs.

109. However, the Law Council draws attention to some important distinctions in the operation of the Fair Work Act, compared with some provisions in Commonwealth, State and Territory anti-discrimination laws. Specifically, under the Fair Work Act, employers have the primary liability (see subsection 351(1) of the Fair Work Act) – individuals are not liable, unless they are an accessory (see section 550 of the Fair Work Act). In contrast, anti-discrimination law can impose a primary liability on the

[22] 2022 Law Council submission on the Secure Jobs, Better Pay Bill, [51].

employee – the employer is brought in through vicarious liability. This is the case, for example, in relation to sexual harassment under the *Sex Discrimination Act 1984* (Cth) – see sections 28A and 106 of that Act.

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

110. The Law Council supports the clarification of the 'not unlawful' exemption to the extent that clarification is considered necessary.

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

111. The Law Council is not aware of the issue arising in practice to any significant degree. However, the Law Council does not, in-principle, oppose the repeal of the unlawful termination provision. Nor for all discrimination to be dealt with under the general protections rather than the imposition of a separate section for unlawful termination. This approach may provide additional clarity for employees and employers and their representatives.

Modernising the Fair Work Act

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

112. The Law Council supports the recent introduction of leave for those experiencing family and domestic violence. However, these are recent developments and the practical application of the new provisions, including evidentiary requirements, have not been fully tested.

113. The Law Council is, in principle, supportive of the idea of including 'experiencing family and domestic violence' as a protected attribute in the Fair Work Act. However, the Law Council suggests that this relatively novel reform proposal should be the subject of its own substantial consultation process undertaken by the Australian Government. Such a process could more comprehensively explore the potential benefits and implications of such a reform.

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

114. The Law Council received a range of views from its Constituent Bodies on this proposal. On one hand, the LSNSW suggests that there is no bar, and no disadvantage, to listing several protected attributes in a single claim. It considers that pleading a combination of attributes should require proof of each attribute, just as pleading several attributes currently does.

115. The LSSA similarly suggested that the Fair Work Act may already cover discrimination on the basis of a combination of attributes, but supported an amendment in the event it was considered necessary.

116. The LIV supported the amendment.

117. The Law Council has previously recognised the need for an 'intersectional' analysis of the challenges that disadvantaged groups face in terms of legal need and access

to justice and supported the principle that anti-discriminations should operate in a way which addresses intersectional discrimination.[23]

118. Consultation Paper 4 suggests the purpose of this amendment is to enable a person 'to raise a single complaint on the basis they have been discriminated against because of multiple intersecting protected attributes.' However, the Law Council understands that there is no restriction to raising multiple grounds under the current law – the issue will be proving the combined grounds. If the objective is to ease the process for persons facing intersectional discrimination, further consideration will need to be given as to the type of reform necessary to achieve this.

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?

119. In the experience of some members of the legal profession, clarification is required of the definition of 'workplace rights' in the General Protections jurisdiction, particularly as it relates to employees being able to make a complaint or inquiry in relation to their employment. The definition is a source of confusion, particularly for self-represented litigants.

120. As noted above, the Law Council strongly suggests introducing an automatic right to legal representation in the Fair Work Commission. The need to make an application for representation increases costs in the initial stages of a matter. It also results in the legal practitioner who is instructed by a worker having to assess and prepare the matter as well as preparing their client to conduct the matter if the application regarding legal representation fails. As an alternative, consideration could be given to requiring the Fair Work Commission to determine issues of legal representation in advance of any conciliation or hearing.

121. Consideration could also be given to extending the protected attributes to workers who request, or are subject to, flexible work arrangements, whether or not those arrangements are connected to attributes associated with family responsibility. In this context, flexible work arrangements could include an employee working remotely or from home and/or a hybrid working arrangement.

[23] 2019 Law Council submission to the AHRC regarding federal discrimination law reform, [34]-[35] and [38].