



THE LAW REFORM COMMISSION  
*of*  
WESTERN AUSTRALIA

# Review of the Equal Opportunity Act 1984 (WA)

Project 111 Final Report

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May 2022

Law Reform Commission of Western Australia

Chairperson:

**The Hon CF Jenkins**

BA, LLB (Macquarie)

Members:

**Ms K Chivers PSM**

LLB (Hons) (Murdoch)

**Dr S Murray**

BA (Hons), LLB (Hons) (UWA), PhD (Monash)

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**Law Reform Commission of Western Australia**

**Level 23 David Malcolm Justice Centre**

**28 Barrack Street**

**PERTH WA 6000**

**Australia**

**Telephone: +61 8 9264 1600**

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The Commission respectfully acknowledges the traditional custodians of the land as being the first peoples of this country. We embrace the vast Aboriginal cultural diversity throughout Western Australia and recognise their continuing connection to country, water and sky.

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## FOREWORD

*The Equal Opportunity Act 1984* (WA) seeks to ensure that the attitudes and actions of people, organisations and government in key areas of public life support and encourage a fair, functioning, stable Western Australian society. In such a society people are treated equally and are free to exercise their human rights in a manner that respects the rights of others.

But the legislation is 38 years old, and it needs to be kept up to date for it to do its work of educating and compensating Western Australians and improving their daily lives.

The Law Reform Commission of Western Australia has been honoured to have been tasked by the Attorney General for Western Australia, the Honourable John Quigley MLA to provide advice and make recommendations for consideration by the government on possible amendments to enhance and update the *Equal Opportunity Act 1984* (WA).

This Report contains the advice and the recommendations of the Commission that it believes should be implemented to ensure that Western Australia has modern, fair and effective anti-discrimination laws. The advice and recommendations of the Commission have been informed by research and consultation with stakeholders as well as an analysis of anti-discrimination legislation in Australia and overseas.

After receiving the reference, the Commission identified and consulted with a substantial number of stakeholders. After it received their preliminary submissions, the Commission prepared a Discussion Paper which was published in October 2021. It contained a summary of the existing anti-discrimination laws in Western Australia, the Commonwealth, Australian states and territories and, where relevant, other jurisdictions. It posed questions about critical areas of the Act for public comment. The Commission also invited the public and stakeholders to online and in person consultations.

In total the Commission received 995 written submissions and conducted seven online and in person public consultation sessions. Those submissions were received from a wide variety of people and organisations including people with protected attributes, other members of the public, anti-discrimination commissions, industry groups, trade unions, discrimination advocacy groups and legal experts. The Commission is grateful to all persons and organisations who contributed to the law reform process by making a submission to the Commission, or by engaging with the Commission in relation to this important review.

In particular, the Commission thanks members of the public who took the time to prepare a written submission or to attend a public consultation session. People told the Commission about their individual experiences and in that way they shared part of themselves to assist in the law reform process. In some cases, those stories were deeply personal and their significant impacts on the individual very apparent. The Commission heard directly from people that regularly experience discrimination, harassment or victimisation because of a personal characteristic or who feel that they are unable to exercise their human rights because of a personal characteristic.

The consultations and submissions allowed the Commission to obtain firsthand knowledge of how the Act is and is not aligned to the needs and aspirations of the Western Australian community. Without those submissions, it would have been impossible for the Commission to prepare this Report.

In any law reform process that concerns legislation with wide ranging implications for the whole of the community, and which seeks to achieve a balance between rights and interests which might be seen to be incompatible at times, it is inevitable that opposing viewpoints will be expressed. This process was no exception. The Commission acknowledges the spirit with which those stakeholders who participated in the publication consultation sessions approached those sessions, and which enabled the Commission to hear from all interested stakeholders. The Commission also gratefully acknowledges those advocates and organisations

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who extended offers of support and assistance to ensure as many voices as possible could be heard, and who gave freely of their knowledge and experience to support this reference.

The information obtained through the submission and consultation process has enabled the Commission to make recommendations for reform of the Act that aim to meet the current and future needs of the Western Australian community and align with best practice.

- Key recommendations made by the Commission include:
- Simplifying the structure of the Act
- Clarifying the objectives of the Act
- Removing the proportionality test for indirect discrimination
- Updating and expanding the protected attributes and protected areas of public life
- Refining and modernising exceptions to the anti-discrimination provisions in the Act
- Creating a positive duty to eliminate discrimination, harassment, victimisation and vilification

Some of the reforms considered and recommendations made by the Commission relate to areas of social policy. When making recommendations for reform in these areas the Commission has reflected the community views that it has received, the academic literature it has researched and the trends in anti-discrimination laws across Australia. However, the Commission acknowledges that the final decision as to where the balance is struck between recognising competing rights lies with government.

The Commission records its thanks to the people who have enabled it to complete this Report. They are listed on the Acknowledgements page. The Commission especially thanks Clayton Utz for preparing the initial drafts of the Discussion Paper and Final Report and Dr Jamie Walvisch for the invaluable assistance he has provided to the Commission in writing and editing this Report in 2022.

**Hon Lindy Jenkins**

**Dr Sarah Murray**

**Kirsten Chivers PSM**

May 2022

## RECOMMENDATIONS

### Legislative Drafting

#### ***Recommendation 1***

The Act should be redrafted in a clear, concise and accessible manner.

### Objects of the Act

#### ***Recommendation 2***

The scope and objects of the Act should be:

- to eliminate discrimination, harassment, vilification and victimisation, to the greatest possible extent;
- to promote community education about principles of equality and the elimination of discrimination, harassment, vilification and victimisation;
- to promote and protect equality including through protecting:
  - enjoyment of equality without distinction or discrimination of any kind;
  - equal protection of the law without discrimination; and
  - equal and effective protection against discrimination on any ground;
- to encourage the identification and elimination of systemic causes of discrimination, harassment, vilification and victimisation;
- to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that—
  - discrimination, harassment, vilification and victimisation can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society;
  - equal application of a rule can have unequal results or outcomes; and
  - the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures;
- to recognise that all forms of behaviour resulting from prejudice and stereotyping undermine the right to equality and damage social cohesion.

### Defining Discrimination

#### ***Recommendation 3***

Discrimination should be defined as occurring when a person discriminates either directly or indirectly, or both, against someone else. The concepts of direct and indirect discrimination should also be defined, ensuring that they are not expressed to be mutually exclusive.

#### **Recommendation 4**

The Act should prohibit discrimination on the grounds of a protected attribute, define discrimination as being direct or indirect and then list the protected attributes, in a similar manner to Part 4 Division 1 of the *Anti-Discrimination Act 1998* (Tas).

#### **Recommendation 5**

The definition of direct discrimination should include an unfavourable treatment test. It should not include a comparator test.

#### **Recommendation 6**

The unfavourable treatment test should not be defined.

#### **Recommendation 7**

The Act should provide that the complainant's protected attribute (or attributes) must be a substantial reason for the unfavourable treatment but does not (or do not) need to be the only or dominant reason for the unfavourable treatment.

#### **Recommendation 8**

The definition of direct discrimination should specify that it is not necessary for alleged discriminators to regard the treatment as unfavourable or to prove motive.

#### **Recommendation 9**

The definition of indirect discrimination should include a test which considers whether a condition or requirement has, or is likely to have, the effect of disadvantaging a complainant. It should not include a proportionality test.

#### **Recommendation 10**

The Act should include a non-exhaustive list of factors to be considered by the decision-maker when determining whether a requirement is reasonable.

#### **Recommendation 11**

The definition of indirect discrimination should not require a complainant to be incapable of complying with a requirement or condition.

#### **Recommendation 12**

The definition of indirect discrimination should specify that it is not necessary for alleged discriminators to be aware that their conduct is indirectly discriminatory or to prove motive.

#### **Recommendation 13**

The Act should allow complaints to be made on the basis of two or more overlapping protected attributes.

### **Protected Attributes**

#### **Recommendation 14**

The Act should provide that a protected attribute includes:

- a characteristic that people with the attribute generally have;
- a characteristic that people with the attribute are generally presumed to have;

- an attribute that a person has;
- an attribute that a person has had in the past, whether or not the person still has the attribute;
- an attribute that a person is thought to have, whether or not the person has the attribute;
- an attribute that a person is thought to have had in the past, whether or not the person has had the attribute in the past; and
- an attribute a person is planning or proposing to adopt in the future.

## Accommodation Status

### **Recommendation 15**

A new protected attribute of accommodation status should be included in the Act.

### **Recommendation 16**

Accommodation status should be defined to include being a tenant, an occupant, in receipt of or waiting to receive housing assistance, or homeless.

### **Recommendation 17**

An occupant should be defined in a manner so as to have a similar meaning as that in the *Residential Tenancies Act 1997* (ACT).

## Assistance Animals

### **Recommendation 18**

Assistance animal should be defined in similar terms to the way it is defined in the *Disability Discrimination Act 1992* (Cth). Section 9(2) of that Act defines assistance animal as a dog or other animal:

- (a) accredited under a law of a State or Territory that provides for the accreditation of animals trained to assist persons with a disability to alleviate the effect of the disability; or
- (b) accredited by an animal training organisation prescribed by the regulations for the purposes of this paragraph; or
- (c) trained:
  - (i) to assist a person with a disability to alleviate the effect of the disability; and
  - (ii) to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

The definition should also include an animal of a class prescribed by regulation.

## Carer Responsibility

### **Recommendation 19**

The Act should separate the protected attributes of carer responsibility and family status.

### **Recommendation 20**

Carer responsibility should be defined as having responsibility for the care of another person, whether or not that person is a dependant, other than in the course of paid employment.

## Disability

### **Recommendation 21**

The Act should use the term disability rather than impairment.

### **Recommendation 22**

Disability should be defined to mean:

- total or partial loss of a person's bodily or mental functions;
- total or partial loss of a part of the body;
- the presence in the body of organisms causing disease or illness;
- the presence in the body of organisms capable of causing disease or illness;
- the malfunction, malformation or disfigurement of a part of the person's body;
- a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.

It should include a disability that may exist in the future (including because of a genetic predisposition to that disability).

It should also include behaviour that is a symptom or manifestation of a disability.

## Employment Status

### **Recommendation 23**

A new protected attribute of employment status should be included in the Act.

### **Recommendation 24**

Employment status should be defined to include:

- being unemployed;
- receiving a pension or another social security benefit;
- receiving compensation;
- being employed on a part-time, casual or temporary basis; and
- undertaking shift or contract work.

## Family Status

### **Recommendation 25**

The protected attribute of family status should be defined to mean:

- the status of being a particular relative; or
- the status of being a relative of a particular person.

## Frailty

### **Recommendation 26**

Frailty should not be specifically included in the Act as a protected attribute.

## Gender Identity

### **Recommendation 27**

The Act should:

- use the term gender identity rather than gender history;
- not include a requirement that the complainant hold a gender recognition certificate under the *Gender Reassignment Act 2000* (WA); and
- not use the terminology of gender reassigned person.

### **Recommendation 28**

Gender identity should be defined to mean a person's gender-related identity, which may or may not correspond with their designated sex at birth. It should include the personal sense of the body (whether this involves medical intervention or not) and other expressions of gender, including dress, speech, mannerisms, names and personal preferences.

### **Recommendation 29**

The Act should provide that gender identity includes trans, gender-diverse and non-binary gender identities.

### **Recommendation 30**

If it is necessary to include references to another gender or sex in the Act, the term another gender or another sex should be used rather than opposite gender or opposite sex.

## Immigration Status

### **Recommendation 31**

Provided careful consideration is given to compatibility with the Migration Act 1958 (Cth), a new protected attribute of immigration status should be included in the Act.

### **Recommendation 32**

Immigration status should be defined in similar terms to the way it is defined in the Discrimination Act 1991 (ACT). The Dictionary to that Act provides:

*immigration status* includes being an immigrant, a refugee or an asylum seeker, or holding any kind of visa under the *Migration Act 1958* (Cth).

## Industrial, Trade Union or Employment Activity

### **Recommendation 33**

A new protected attribute of industrial, trade union or employment activity should be included in the Act.



## Irrelevant Criminal Record

### **Recommendation 34**

A new protected attribute of irrelevant criminal record should be included in the Act.

### **Recommendation 35**

The Act should provide that it is not discriminatory for an employer to refuse to offer employment to a candidate with a criminal record, if that criminal record provides evidence that the person does not have the attributes that will enable them to fulfil the selection criteria or inherent requirements of the job.

### **Recommendation 36**

The definition of irrelevant criminal record should be consistent with the following:

**Irrelevant criminal record**, in relation to a person, means a record relating to arrest, a criminal investigation or criminal proceedings where –

- further action was not taken in relation to the arrest, investigation or charge of the person;
- a charge has not been laid;
- the charge was dismissed;
- a charge has been laid but not completed;
- the prosecution was withdrawn;
- the person was discharged without a penalty, whether or not after conviction;
- the person was found not guilty;
- the person's conviction was quashed or set aside or is a spent conviction for the purposes of the *Spent Convictions Act 1988* (WA);
- the person was granted a pardon;
- the circumstances relating to the offence for which the person was convicted or given an infringement notice are not relevant to the situation in which the discrimination arises;
- the person's charge or conviction was expunged under the *Historical Homosexual Convictions Expungement Act 2018* (WA)

and includes

- the imputation of a record relating to arrest, criminal investigation or criminal proceedings of any sort; or
- a record relating to arrest, criminal investigation, criminal proceedings or criminal conviction of an associate of the person.

## Irrelevant Medical Record

### **Recommendation 37**

A new protected attribute of irrelevant medical record should be included in the Act.

### **Recommendation 38**

The definition of irrelevant medical record should specify that it includes a person's workers' compensation history.

## Lawful Sexual Activity

### **Recommendation 39**

A new protected attribute of lawful sexual activity should be included in the Act.

### **Recommendation 40**

Lawful sexual activity should be defined to mean engaging in, not engaging in or refusing to engage in lawful sexual activity.

## Physical Features

### **Recommendation 41**

A new protected attribute of physical features should be included in the Act.

### **Recommendation 42**

Physical features should be defined to include a person's height, shape, facial features, weight, natural hair colour, alopecia, hirsutism and birthmarks but to exclude voluntarily obtained piercings, tattoos and bodily modifications.

## Political Conviction

### **Recommendation 43**

The Act should separate the protected attributes of political and religious conviction.

### **Recommendation 44**

Political conviction should be defined as:

- having a political conviction, belief, opinion, or affiliation;
- engaging in political activity;
- not having a political conviction, belief, opinion, or affiliation; and
- not engaging in political activity.

Political should not be defined.

## Pregnancy

### **Recommendation 45**

Pregnancy should be defined to include potential pregnancy.

Potential pregnancy should be defined to include:

- the fact that the person is or may be capable of bearing children;
- the fact that the person has expressed a desire to become pregnant; and
- the fact that the person is likely, or is perceived as being likely, to become pregnant.

### **Recommendation 46**

The reasonableness requirement should no longer apply to direct discrimination on the basis of pregnancy as there will be a single definition of direct discrimination applying to all protected attributes.

### **Recommendation 47**

The reasonableness requirement should apply to indirect discrimination on the basis of pregnancy as there will be a single definition of indirect discrimination applying to all protected attributes.

## **Race**

### **Recommendation 48**

The definition of race should include ethno-religious origin.

### **Recommendation 49**

The definition of race should include ancestry.

## **Relative or associate of someone with a protected attribute**

### **Recommendation 50**

A new protected attribute of personal association (whether as a relative or otherwise) with a person who is identified by reference to another protected attribute should be included in the Act.

The references to relatives and associates currently contained in other sections of the Act should be removed.

## **Religious Conviction**

### **Recommendation 51**

Religious conviction should be defined in the Act. It should be defined as:

- having a religious conviction, belief, opinion or affiliation;
- engaging in religious activity;
- appearance or dress required by, or symbolic of, the person's religious conviction;
- the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander peoples;
- engaging in the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander peoples;
- not having a religious conviction, belief, opinion or affiliation; and
- not engaging in religious activity.

The word religious should not be defined.

## **Sex Characteristics**

### **Recommendation 52**

A new protected attribute of sex characteristics should be included in the Act.

### ***Recommendation 53***

Sex characteristics should be defined as a person's physical features relating to sex, including:

- genitalia and other sexual and reproductive parts of the person's anatomy; and
- the person's chromosomes, genes, hormones, and secondary physical features that emerge as a result of puberty.

## **Sexual Orientation**

### ***Recommendation 54***

Sexual orientation should be defined as a person's emotional, affectional and sexual attraction to, or intimate or sexual relations with, persons of a different gender or the same gender or more than one gender. It should be made clear that this includes people who feel attraction towards all persons irrespective of their gender and people who experience no sexual attraction to any persons.

### ***Recommendation 55***

A new protected attribute of subjection to domestic or family violence should be included in the Act.

## **Protected Areas of Public Life**

### ***Recommendation 56***

Subject to any exceptions, all the attributes protected by the Act should be protected in relation to all the areas of public life covered by the Act.

## **Education**

### ***Recommendation 57***

The definition of educational authority should include an organisation whose purpose is to develop or accredit curricula or training courses used by educational institutions.

### ***Recommendation 58***

The Act should provide that it is unlawful for an educational provider to discriminate in the evaluation and selection of student applications.

## **Employment**

### ***Recommendation 59***

The definition of employment in the Act (which term could be changed to 'work') should include:

- part-time and temporary employment;
- work under a contract for services;
- work as a State employee;
- work by a statutory appointee;
- work by a student gaining work experience;

- work by a volunteer or unpaid worker;
- work under a vocational placement;
- work by a person with a disability in an Australian Disability Enterprise, whether on a paid or an unpaid basis; and
- work under a guidance program, an apprenticeship training program, or other occupational training or retraining program.

This recommendation should be reviewed after five years.

The definition should not include carers and should not apply to discrimination in private domestic situations or other private situations.

## Goods, Services and Facilities

### **Recommendation 60**

The definition of services should remain unchanged, but an additional area of State laws and State programs should be added to the protected areas of public life to which the Act applies.

## Local Government

### **Recommendation 61**

Local government should be included as a protected area of public life to which the Act applies.

### **Recommendation 62**

The protected area of local government should include:

- actions by a councillor in their capacity as a local government councillor towards another councillor;
- actions by a councillor in their capacity as a local government councillor towards a local government employee;
- actions by a local government employee towards a councillor; and
- other activity between councillors and other persons mentioned in the *Local Government Act 1995* (WA) that ought to be included in the definition of the local government protected area of life.

### **Recommendation 63**

Other than in the case of acts done by one councillor towards another councillor on the grounds of political conviction, the Act should provide that it is unlawful to discriminate in the protected area of local government on the basis of all protected attributes under the Act.

## Clubs

### **Recommendation 64**

The definition of club should be reviewed. It should include incorporated associations.

## Requirement to Provide Information

### **Recommendation 65**

The Act should contain a single provision relating to unlawful requests for information. The provision should be drafted in similar terms to section 124 of the *Anti-Discrimination Act 1991* (Qld), which provides:

- (1) A person must not ask another person, either orally or in writing, to supply information on which unlawful discrimination might be based.
- (2) Subsection (1) does not apply to a request that is necessary to comply with, or is specifically authorised by—
  - (a) an existing provision of another Act; or
  - (b) an order of a court; or
  - (c) an existing provision of an order or award of a court or tribunal having power to fix minimum wages and other terms of employment; or
  - (d) an existing provision of an industrial agreement under the repealed Industrial Relations Act 1999; or
  - (e) an order of QCAT or the industrial relations commission.
- (3) It is a defence to a proceeding for a contravention of subsection (1) if the respondent proves, on the balance of probabilities, that the information was reasonably required for a purpose that did not involve discrimination.
- (4) In this section—

**existing provision** means a provision in existence at the commencement of this section.

*Example—*

An employer would contravene the Act by asking applicants for all jobs whether they have any impairments but may ask applicants for a job involving heavy lifting whether they have any physical condition that indicates they should not do that work.

## Responsibility to Make Reasonable Adjustments

### **Recommendation 66**

A legislative responsibility to make reasonable adjustments should be enacted. At a minimum it should prohibit a failure to accommodate a special need that another person has because of an impairment (or disability if the Commission's recommendation is adopted), pregnancy, breastfeeding, family responsibilities or carer obligations. Consideration should be given to creating a responsibility that extends to all protected attributes and all areas of life.

### **Recommendation 67**

The responsibility to make reasonable adjustments should be a positive, stand-alone responsibility.

### **Recommendation 68**

The responsibility to make reasonable adjustments should be framed as a responsibility to make reasonable adjustments unless it would impose unjustifiable hardship on the holder of the responsibility.

The Act should provide that in determining whether a hardship would be an unjustifiable hardship, all relevant circumstances of the particular case must be taken into account, including the following:

- the nature of the adjustment sought;
- the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned if the adjustment were or were not made;
- the effect of the disability (or other protected attribute) of any person concerned;
- the financial circumstances of the alleged discriminator, the estimated amount of expenditure required to be made by them and the financial impact on them if the adjustment was made;
- the availability of financial and other assistance to the alleged discriminator; and
- any relevant equal opportunity management plan made under Part IX of the Act.

## General Exemptions

### ***Recommendation 69***

The term exemptions should be used to refer to what the Act currently terms exceptions and exemptions. All the exemptions should be placed in one part of the Act.

## Charitable Benefits

### ***Recommendation 70***

The Act should define charitable benefits by specifying the nature of such benefits.

### ***Recommendation 71***

The Act should continue to provide an exemption for a provision of a deed, will or other document that confers charitable benefits on, or entitles charitable benefits to be conferred on, persons of a class identified by one or more of the protected attributes. However, the Act should only exempt an act done to give effect to such a provision if the act is:

- consistent with the stated purpose of the relevant charity; and
- reasonable and proportionate to the public benefit that the charity is trying to achieve.

## Voluntary Bodies

### ***Recommendation 72***

The voluntary bodies exception should be amended to except voluntary bodies from the discrimination provisions in the Act in connection with the admission of persons as members of the body and in the provision of benefits, facilities or services to members of the body, if the otherwise discriminatory act is in conformity with a lawful core purpose of the body and is reasonable and proportionate in the circumstances.

### ***Recommendation 73***

The definition of voluntary body should be simplified. It should identify in simple language the types of associations and bodies that are of a sufficiently public nature to be included in the Act, but that have aspects of their lawful operation for which they warrant an exemption from the Act's discrimination prohibitions in relation to their membership requirements or the services they provide.

## Religious Exceptions

### **Recommendation 74**

The religious personnel exemption should only apply where the otherwise discriminatory conduct conforms to the doctrines, tenets or beliefs of the relevant religion.

### **Recommendation 75**

The Act should contain a religious bodies provision of government funded or commercial (for profit) goods and services exemption, and a religious bodies general exemption, rather than the single religious bodies exception currently contained in section 72(d) of the Act.

### **Recommendation 76**

The religious bodies provision of government funded or commercial (for profit) goods and services exemption should apply where:

- a religious body is funded by a government to provide goods or services or enters into a commercial (for profit) arrangement to provide goods and services;
- the religious body refuses to supply the goods and services, or provides the goods and services on terms or subjects a person to a detriment in connection with the provision of goods and services, on the basis of the person's religious conviction;
- the act of the religious body conforms to the doctrines, tenets or beliefs of the religion of the religious body or is reasonably necessary to avoid injury to the religious susceptibilities of adherents of the religion; and
- the otherwise discriminatory act is reasonable and proportionate in the circumstances.

### **Recommendation 77**

The general religious bodies exemption should apply where:

- the act of the religious body does not relate to the provision of government funded goods and services and the provision of goods and services pursuant to commercial (for profit) arrangements;
- the act of the religious body conforms to the doctrines, tenets or beliefs of the religion of the religious body;
- the act of the religious body is reasonably necessary to avoid injury to the religious susceptibilities of adherents of the religion; and
- the otherwise discriminatory act is reasonable and proportionate in the circumstances.

### **Recommendation 78**

The Act should contain an employment exemption for religious educational institutions.

### **Recommendation 79**

The religious educational institutions employment exemption should be similar to section 83A of the Equal Opportunity Act 2010 (Vic), to be inserted by the Equal Opportunity (Religious Exceptions) Amendment Act 2021 (Vic). This exception is limited to the employment of staff and the appointment of commission agents and contract workers if:



- conformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the job;
- the person cannot meet that inherent requirement because of their religious conviction; and
- the discrimination is reasonable and proportionate in the circumstances.

### ***Recommendation 80***

The Act should contain a provision of education exemption.

### ***Recommendation 81***

The provision of education exemption should provide that educational institutions established for religious purposes may only discriminate in the provision of education and training on the basis of a person's religious conviction at the time the school decides whether or not to admit a student to the school and where the discrimination:

- conforms with the doctrines, beliefs or principles of the religion;
- is reasonably necessary to avoid injury to the religious susceptibilities of adherents of the religion; and
- the discrimination is reasonable and proportionate in the circumstances.

## **Aged Care Housing**

### ***Recommendation 82***

Section 74 of the Act, which allows institutions providing housing accommodation for aged persons to discriminate, should be removed from the Act. If a provider of housing accommodation for aged persons wishes to discriminate, it should be required to apply for an exemption under the Act.

## **Special Needs, Affirmative Action and Bona Fide Benefits or Concessions**

### ***Recommendation 83***

The Act should include a general provision combining exemptions for special needs, affirmative action and the provision of bona fide benefits or concessions and should include statutory examples to assist in its application. It should provide:

Measures intended to achieve equality

Nothing in this Act makes it unlawful for a person to discriminate against another person if it is for the purpose of:

- carrying out a scheme for the benefit of a group which is disadvantaged or has a special need because of a protected attribute; or
- promoting equal opportunity or providing a bona fide benefit or concession for a group of people who are disadvantaged or have a special need because of a protected attribute if it discriminates in a way that is reasonable to achieve that purpose.

## Health and Safety

### ***Recommendation 84***

The Act should include an exemption for acts that are done in order to comply with health and safety considerations and which are reasonable in the circumstances. At the minimum, the exemption should apply in the areas of employment, goods, services and facilities and access to places and vehicles, but consideration could be given to whether it is appropriate to extend it to all areas of public life protected by the Act. Consideration should also be given to it applying to at least include the protected attributes of pregnancy, age, assistance animals, disability and physical features.

## Insurance and Superannuation

### ***Recommendation 85***

Following further consultation with relevant stakeholders, consideration should be given to amalgamating exemptions relating to insurance and superannuation.

## Specific Exemptions

## Accommodation Status

### ***Recommendation 86***

The Act should provide that it is not unlawful for a person to discriminate on the ground of accommodation status in relation to the provision of accommodation if the discrimination is reasonable, having regard to any relevant factors.

## Age

### ***Recommendation 87***

The exception to discrimination on the ground of age contained in section 66ZS of the Act should be repealed unless, during the course of further investigation, it is shown that there are necessary provisions in other legislation that still rely upon this exception.

If section 66ZS is not repealed, sections 66ZS(3) to (6) should be repealed. These provisions are now redundant due to the passage of time.

## Gender Identity

### ***Recommendation 88***

The Act should only include limited exemptions relevant to discrimination on the basis of gender identity. These could include exemptions in the protected area of employment, where there is a genuine occupational qualification or requirement in relation to a particular position.

## Irrelevant Criminal Record

### **Recommendation 89**

If a protected attribute of irrelevant criminal record is included in the Act, the Act should also include exemptions which allow a person to discriminate on this basis in relation to:

- the education, training or care of a vulnerable group, including children, if it is reasonably necessary to protect the physical, psychological or emotional wellbeing of that vulnerable group having regard to the relevant circumstances; and
- the provision of accommodation, if it is reasonably necessary to do so in order to protect the physical, psychological or emotional wellbeing of residents or nearby residents.

## Lawful Sexual Activity

### **Recommendation 90**

The Act should provide that it is not unlawful for a person to refuse to provide accommodation to another person if the other person intends to use the accommodation for, or in connection with, a lawful sexual activity on a commercial basis.

## Local Government

### **Recommendation 91**

If local government is included in the Act as a protected area of public life, there should be an exemption for acts done by one councillor towards another councillor on the grounds of political conviction.

## Political Conviction

### **Recommendation 92**

The political conviction exemption should be narrowed in scope. It should provide that the offering of employment or work to a person as an officer within the meaning of the *Electoral Act 1907* (WA), or as a ministerial adviser or officer, employee or worker for a political party, member of the electoral staff of another person, or in other similar employment or work, is not unlawful provided that:

- holding or not holding of any political conviction or the engaging in or refusal or failure to engage in any lawful political activities is an inherent requirement of the job;
- the person cannot comply with that requirement because of their political conviction; and
- it is otherwise reasonable and proportionate in the circumstances.

## Physical Features

### **Recommendation 93**

The Act should include a genuine occupational requirement exemption for discrimination on the basis of a physical feature. That exemption should provide that it is not unlawful to discriminate in respect of any work or employment, where that work or employment involves any one or more of the following:

- participation in a dramatic performance or other entertainment in a capacity for which a person with a particular physical feature is required for reasons of authenticity;

- participation as an artist's or photographic model in the production of a work of art, visual image or sequence of visual images for which a person with a particular physical feature is required for reasons of authenticity;
- providing persons with a particular physical feature with services for the purpose of promoting their welfare where those services can most effectively be provided by a person with the same physical feature.

## Pregnancy, Childbirth, Breast Feeding and Bottle Feeding

### **Recommendation 94**

The exemptions relating to pregnancy, childbirth, breast feeding or bottle feeding should be drafted in gender neutral terms.

## Sporting Activity

### **Recommendation 95**

The exemptions relating to sporting activity should be consolidated and simplified.

For any exclusion from a competitive sporting activity to be lawful, it must be shown to be reasonable and proportionate in the circumstances.

The exemption for discrimination based on the gender history of a gender reassigned person should be replaced with an exemption for discrimination based on gender identity or sex characteristics, to reflect the Commission's recommendations in relation to these protected attributes. It should apply in limited circumstances and should not apply to children under 12 years of age.

Consideration ought to be given to defining and clarifying phrases such as sporting activity and competitive, as well as clarifying when the strength, stamina or physique of competitors will be relevant.

## Exemption Applications

### **Recommendation 96**

The Act should specify that in determining whether an application for an exemption should be granted, the SAT should consider the following matters:

- Is the exemption sought necessary?
- Is the exemption appropriate and reasonable in light of the reasons for which it is necessary?
- Is it in the public interest that the exemption be granted?
- Have the applicants taken, and will they continue to take steps to mitigate the potential adverse effects of the proposed exemption?
- Are there any non-discriminatory ways of achieving the objects and purposes for which the exemption is sought?

## Burden and Standard of Proof

### **Recommendation 97**

The Act should impose an evidentiary burden on a complainant to establish a prima facie case of discrimination. Once this evidentiary burden has been established, a persuasive burden should be imposed on the respondent to establish that their conduct did not constitute unlawful discrimination.

In respect of indirect discrimination, the complainant should be required to prove a prima facie case that they have a protected attribute, that the respondent has imposed a requirement or condition on them, and that the condition or requirement had, or was likely to have, the effect of disadvantaging the complainant. The evidentiary onus should then shift to the respondent to prove that the requirement was not unreasonable.

## Sexual Harassment

### **Recommendation 98**

The definition of sexual harassment should not include a requirement that the conduct results, or the harassed person reasonably believes that it will result, in disadvantage.

### **Recommendation 99**

The Act should adopt the definition of sexual harassment contained in section 28A of the *Sex Discrimination Act 1984* (Cth).

### **Recommendation 100**

The prohibition against sexual harassment should apply to all the areas of public life to which the Act applies.

### **Recommendation 101**

The prohibition against sexual harassment in the Act should protect members of Parliament, staff and any other person who performs duties at Parliament or for a member of Parliament from sexual harassment.

### **Recommendation 102**

The prohibition against sexual harassment in the Act should protect judicial officers, staff and any other person who performs duties at the court from sexual harassment.

### **Recommendation 103**

The prohibition against sexual harassment in the Act should protect unpaid or volunteer workers from sexual harassment.

## Racial Harassment

### **Recommendation 104**

The definition of racial harassment should not require that the conduct results, or the harassed person reasonably believes that it will result, in disadvantage.

### **Recommendation 105**

The definition of racial harassment should include an objective standard, which considers whether a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

### **Recommendation 106**

The prohibition against racial harassment should apply to all the areas of public life to which the Act applies.

### **Recommendation 107**

The prohibition against racial harassment in the Act should protect members of Parliament, staff and any other person who performs duties at Parliament or for a member of Parliament from racial harassment.

### **Recommendation 108**

The prohibition against racial harassment in the Act should protect judicial officers, staff and any other person who performs duties at the court from racial harassment.

### **Recommendation 109**

The prohibition against racial harassment in the Act should protect unpaid or volunteer workers from racial harassment.

## **Sex based Harassment**

### **Recommendation 110**

The Act should adopt the definition of sex based harassment contained in section 28AA of the *Sex Discrimination Act 1984* (Cth). It should, however, only require the conduct to be demeaning rather than seriously demeaning.

## **Vilification**

### **Recommendation 111**

The Act should include anti-vilification provisions.

### **Recommendation 112**

The anti-vilification provisions should apply to all areas of public life covered by the Act.

### **Recommendation 113**

The Act should define vilification to focus on the likely effects of the vilifying conduct. It should be unlawful to engage in any conduct, otherwise than in private, that is likely to:

- Create, promote or increase animosity towards;
- Threaten;
- Seriously abuse; or
- Severely ridicule

a group, or a person as a member of a group.

### **Recommendation 114**

The anti-vilification provisions in the Act should apply to vilification on the grounds of disability, gender identity, sex, sex characteristics, race, religious conviction and sexual orientation.

### **Recommendation 115**

Consideration should be given to expanding the scope of existing criminal anti-vilification provisions to cover serious or harmful instances of vilification on the basis of disability, gender identity, sex, sex characteristics, race, religious conviction and sexual orientation.

### **Recommendation 116**

The anti-vilification provisions should not render unlawful anything said or done reasonably and in good faith:

- in the performance, exhibition or distribution of an artistic work;
- in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- in making or publishing:
  - a fair and accurate report of any event or matter of public interest; or
  - a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

## **Victimisation**

### **Recommendation 117**

The Act should provide that it is not necessary for a victimisation complainant to prove that the dominant or substantial reason for the alleged victimiser doing the relevant act was to victimise that person.

### **Recommendation 118**

The provisions of section 5 of the Act should include victimisation complaints under the *Public Interest Disclosure Act 2003* (WA) and discrimination on the ground of having a spent conviction under the *Spent Convictions Act 1988* (WA).

## **Conversion Practices**

### **Recommendation 119**

The Act should not address conversion practices. These should be dealt with in standalone legislation.

### **Recommendation 120**

The prohibition of conversion practices should be the subject of a separate review.

## **Duty to Eliminate Discrimination, Harassment, Victimisation and Vilification**

### **Recommendation 121**

The Act should include a positive duty to eliminate discrimination, harassment, victimisation and vilification.

### **Recommendation 122**

The positive duty to eliminate discrimination, harassment, victimisation and vilification should be limited to taking reasonable and proportionate measures.

### ***Recommendation 123***

The Act should provide that the following factors must be considered in determining whether a measure is reasonable and proportionate:

- The size of the duty holder's business;
- The nature and circumstances of the duty holder's business;
- The duty holder's available resources;
- The duty holder's business and operational priorities; and
- The practicability and the cost of the measures.

### ***Recommendation 124***

The Act should provide examples of reasonable and proportionate measures that are tailored to different types of organisation, such as:

- A small, not-for-profit community organisation takes steps to ensure that its staff are aware of the organisation's commitment to treating staff with dignity, fairness and respect and makes a clear statement about how complaints from staff will be managed.
- A large company undertakes an assessment of its compliance with this Act. As a result of the assessment, the company develops a compliance strategy that includes regular monitoring and provides for continuous improvement of the strategy.

### ***Recommendation 125***

The positive duty to eliminate discrimination, harassment, victimisation and vilification should apply to all areas protected under the Act.

### ***Recommendation 126***

The EOC should be empowered to investigate breaches of the positive duty to eliminate discrimination, harassment, victimisation and vilification. The EOC should be empowered to enforce compliance with the duty, with escalating powers of enforcement including conducting compliance reviews in line with sections 151 and 152 of the Equal Opportunity Act 2010 (Vic).

### ***Recommendation 127***

Individual complainants who have been aggrieved by a duty holder's non-compliance with the positive duty to eliminate discrimination, harassment, victimisation and vilification should have standing to make a complaint for a breach of the duty, and to claim compensation for any losses they have suffered by reason of the duty holder's non-compliance.

Representative bodies, as defined in Recommendation 139, should also have standing to make a complaint for a breach of the duty. In accordance with Recommendation 140, if they make a complaint without identifying a specific complainant, they should only be entitled to seek systemic or structural remedies that will benefit the people they represent as a whole.

### ***Recommendation 128***

Complaints about breaches of the positive duty to eliminate discrimination, harassment, victimisation and vilification should be managed in the same way as other complaints under the Act. That is, an initial complaint should be made to the EOC, which may be referred at a later stage to the SAT.



### **Recommendation 129**

The victimisation provisions should be amended to protect complainants who allege that a duty holder has failed to comply with their positive duties.

### **Recommendation 130**

The provisions concerning equal opportunity management plans should be extended to require authorities who fall within the scope of sections 138 and 139 of the Act to demonstrate compliance with the positive duty to eliminate discrimination, harassment, victimisation and vilification (including in the context of access to government services and service provision).

### **Recommendation 131**

Organisations not within the current scope of sections 138 and 139 of the Act, upon request of the Equal Opportunity Commissioner, be required to provide evidence of compliance with the positive duty to eliminate discrimination, harassment, victimisation and vilification through the lodgement of an equal opportunity management plan.

### **Recommendation 132**

The reforms concerning the monitoring of compliance with the positive duty to eliminate discrimination, harassment, victimisation and vilification should be reviewed after a five-year period.

## **The Complaints Process**

### **Recommendation 133**

The time limit for making a discrimination, harassment, vilification or victimisation complaint should be increased to 24 months.

### **Recommendation 134**

The Equal Opportunity Commissioner should have discretion to accept all or part of an out-of-time complaint where there is good reason to do so. The Act should specify that in determining whether to accept an out-of-time complaint, the Equal Opportunity Commissioner must take into account the following factors:

- The seriousness of the conduct alleged in the complaint;
- Whether the late acceptance of the complaint would unacceptably diminish the prospects of a fair determination; and
- Any other matters the Commissioner considers relevant.

### **Recommendation 135**

The complaints procedure should be clarified to enable the following persons or bodies to lodge a complaint under the Act, and to communicate with the Equal Opportunity Commission about that complaint, on behalf of an affected person or persons:

- Legal representatives;
- Agents;
- Parents or guardians of child complainants;
- Representative bodies with a sufficient interest in the matter; or
- Anyone else the Equal Opportunity Commissioner considers has a sufficient interest in the matter.

### ***Recommendation 136***

The Act should provide that a representative body has a sufficient interest in a matter if it adversely affects, or has the potential to adversely affect, the interests of the body or the interests or welfare of the persons it represents.

### ***Recommendation 137***

Where a complaint is lodged on behalf of a person or persons, that person or persons should ordinarily be required to have provided written consent in a prescribed form. The only exceptions should be where the complaint is lodged on behalf of:

- A child complainant under the age of 12; or
- A complainant who does not have the capacity to consent.

### ***Recommendation 138***

The fact that a parent or guardian can lodge a complaint on behalf of a child should not preclude children from being able to lodge complaints on their own behalf.

### ***Recommendation 139***

Representative bodies with a sufficient interest in a matter should also be able to lodge a complaint about that matter on behalf of the people it represents, without identifying a specific complainant.

### ***Recommendation 140***

Where a representative body makes a complaint without identifying a specific complainant, it should only be entitled to seek systemic or structural remedies that will benefit the people it represents as a whole. It should not be entitled to seek a monetary remedy.

### ***Recommendation 141***

Complainants should not be prevented from lodging complaints that have also been lodged in another jurisdiction.

### ***Recommendation 142***

A complainant should be entitled to amend their complaint upon request before it is declined, dismissed, referred to the SAT or otherwise resolved. If the EOC becomes aware of information that could conveniently be dealt with as part of the complaint, it should be empowered to offer the complainant the opportunity to amend their complaint.

### ***Recommendation 143***

The Act should empower the Equal Opportunity Commissioner to tailor the dispute resolution process to the nature of the dispute.

### ***Recommendation 144***

The parties to a dispute should be permitted to resolve a complaint by consent on the papers, without having to attend a conciliation conference.

### ***Recommendation 145***

The Equal Opportunity Commissioner should retain the power to compel the provision of documents or information, orally or in writing, and to require attendance at a conciliation conference.

### ***Recommendation 146***

Subject to the exceptions contained in Recommendations 147 and 148, complainants and respondents should not be permitted to be represented at conciliation conferences except by leave of the Equal Opportunity Commissioner.

### ***Recommendation 147***

A child under 12 should be entitled to be represented at a conciliation conference by their parents or guardians.

### ***Recommendation 148***

A person who is unable to attend a conciliation conference because of a disability should be entitled to nominate another person to attend on their behalf. A person who is unable to participate fully in a conciliation conference because of a disability should be entitled to nominate another person to assist them at the conference.

### ***Recommendation 149***

Where a complaint is resolved by conciliation, the Equal Opportunity Commissioner should be required to record the terms of the agreement and have the document signed by the complainant and the respondent. The Commissioner should be required to file the document with the SAT. To the extent that its terms reflect matters that could have been the subject of an order by the SAT, the agreement should be enforceable as if it were an order of the SAT.

### ***Recommendation 150***

The Equal Opportunity Commissioner should have discretion to dismiss a complaint where:

- The complaint is frivolous, vexatious, misconceived or lacking in substance;
- The matters raised by the complaint, if proven, would not disclose the contravention of a provision of the Act;
- The matters raised by the complaint have been adequately dealt with by another person or body;
- The complainant has commenced proceedings in a commission, court or tribunal in relation to the matters raised by the complaint, and that commission, court or tribunal may order remedies similar to those available under this Act;
- The nature of the matters raised by the complaint is such that no further action is warranted;
- The complainant has failed to comply with a requirement to provide information or documents to the Commissioner, or to attend a dispute resolution proceeding; or
- The Commissioner is satisfied that for any other reason no further action should be taken in respect of the complaint.

### ***Recommendation 151***

The Equal Opportunity Commissioner should not be permitted to dismiss a complaint simply because, in the Commissioner's view:

- The matter would be more appropriately dealt with in another forum; or
- There is no reasonable prospect of an order being made by the SAT that is more favourable to the complainant than an offer refused by the complainant.

### **Recommendation 152**

Where the Equal Opportunity Commissioner has:

- refused to accept lodgement of a complaint; or
- dismissed a complaint

the complainant should be entitled, within 21 days, to require the Commissioner to refer the matter to the SAT.

Where a complaint is referred to the SAT in this way, it should only be permitted to be heard with the leave of the SAT. The SAT should be entitled to determine applications for leave on the papers.

### **Recommendation 153**

The Equal Opportunity Commissioner should be empowered to enforce a direction to provide information, produce documents or attend a dispute resolution proceeding by filing a copy of a certificate setting out the details of the act or omission that constitutes a failure to comply with the direction in a court of competent jurisdiction. Where a certificate is filed, the court should have jurisdiction as if the failure to comply with the direction was a contempt of that court.

### **Recommendation 154**

The government should review the criminal penalty levels in Part X of the Act to ensure that they sufficiently disincentivise breaches of the Equal Opportunity Commissioner's directions.

## **Tribunal Hearings**

### **Recommendation 155**

When requested, the Equal Opportunity Commissioner should be permitted, but not required, to assist the complainant or respondent in the presentation of their case before the SAT.

When determining whether to provide assistance, and what assistance to provide, the Commissioner should be required to apply available public funds judiciously, taking into account factors including:

- the capacity of the complainant or respondent to represent themselves or provide their own representation;
- the nature and circumstances of the alleged contravention of this Act; and
- any other matter considered relevant by the Commissioner, including the extent to which the complainant or respondent (as the case may be) provides information and assistance to demonstrate their need for assistance in proceeding with the complaint.

The Equal Opportunity Commissioner should be entitled to request information from a party to enable them to determine what assistance (if any) to provide. They should also be required to inform the Commissioner of any relevant change of circumstances.

If the Commissioner provides representation to a complainant or respondent, the person representing the complainant or respondent should be required to disclose to the Commissioner non-privileged information reasonably required by the Commissioner to determine whether the Commissioner should cease to provide representation. The representative should also be permitted to disclose to the Commissioner information that the person considers relevant to the question of whether the Commissioner should cease to provide representation, but the uses to which that information can be put must be strictly limited. In addition, privilege in the material should be expressly preserved in other contexts.

### **Recommendation 156**

The SAT should be given broader powers to amend complaints. This should be permitted at any stage during proceedings, on the application of a party to the complaint or on the SAT's own motion. A complaint may be amended to include additional complaints and anything else that was not included in the complaint as investigated by the EOC. An amendment may be made subject to such conditions as the SAT thinks fit.

### **Recommendation 157**

The \$40,000 compensation cap should be removed. The Commission recommends that the cap be dispensed with, but if it is to be retained, the cap needs to be increased to an amount which takes into account inflation, in addition to the increasing significance that has been accorded to protection from discrimination and the need to deter persons from engaging in discriminatory behaviour.

### **Recommendation 158**

The SAT should be expressly empowered to order the payment of interest on compensation amounts.

## **Management Plans**

### **Recommendation 159**

The scope of management plans under the Act should be reviewed along with their intersection with the *Public Sector Management Act 1994* (WA).

### **Recommendation 160**

The Equal Opportunity Commissioner should be responsible for evaluating and auditing equal opportunity management plans. The Commissioner should be provided with expanded investigatory and enforcement powers to assist them in this role. The Director of Equal Opportunity in Public Employment should retain an advising and assisting role.

### **Recommendation 161**

The role of the Equal Opportunity Commissioner in relation to equal opportunity management plans should be reviewed after a five-year period.

### **Recommendation 162**

The matters contained in Part IX of the Act should remain in the Act. They should be revised in line with Recommendations 159-161.

## **Proactive monitoring and regulation**

### **Recommendation 163**

The EOC should be empowered to investigate matters within the scope of the Act on its own motion, including in circumstances where a complaint has been withdrawn and where it considers it would be in the public interest. It should have broad powers to take action at the conclusion of an investigation.

# 1. INTRODUCTION

## 1.1 Background to Reference

Since its commencement on 8 July 1985, the *Equal Opportunity Act 1984* (WA) (the Act) has helped to protect Western Australians from discrimination in certain aspects of public life. As set out in its long title, the purpose of the Act is to promote equality of opportunity in Western Australia and to provide remedies in respect of discrimination on a number of specified grounds or protected personal attributes.

The protection afforded by the Act is not universal. That is, it is limited in both the areas of life to which it applies, and the grounds upon which a person may not discriminate against another person. In addition, it also contains a range of exceptions whereby behaviour that would otherwise constitute discrimination under the Act is carved out from the scope of those provisions and consequently, in effect, authorised by the Act.

Precisely when particular behaviours or actions will constitute discrimination varies with circumstances. In some areas of public life, it is unlawful to discriminate on any of the grounds. In other areas of public life, the Act only provides that it is unlawful to discriminate on some of the grounds. The Act does not prohibit discrimination on any ground in areas of private life. As noted above, the Act also contains exceptions, which explain the circumstances in which conduct that might otherwise constitute discrimination is not unlawful.

In addition to making it unlawful to discriminate on the grounds in specified areas of public life, the Act also provides that sexual harassment, racial harassment and victimisation are unlawful. Each of these areas of unlawful conduct are limited by the scope of their definitions.

The Act reflects an individual complaints-based model of anti-discrimination regulation. The primary avenue to address unlawful conduct under the Act is through the making of individual complaints by those who believe that they have been discriminated against. Such complaints are then investigated and dealt with by the Equal Opportunity Commission of Western Australia (EOC).

In 2020 - 2021, the EOC received 564 complaints of discrimination. The most common complaints were related to discrimination on the basis of impairment or race, and to sexual harassment.<sup>1</sup> The significant majority of complaints related to the area of employment.

Whilst the number of complaints made under the Act evinces an ongoing need for its protections, it is also timely to consider whether the Act's protections and the mechanisms by which such protections must be asserted, continue to reflect best practice in anti-discrimination laws. In other words, does the Act operate effectively to protect and promote equality for all members of our society, and to prevent the proliferation of discrimination.

Community expectations have evolved over the past 37 years since the Act commenced. This review interrogates whether amendments or updates are required to modernise the Act and to further protect and encourage equality in Western Australia.

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<sup>1</sup> Equal Opportunity Commission, *Annual Report 2020-2021*, 5.

## 1.2 Terms of Reference

Against this background, the Law Reform Commission of Western Australia (Commission) was asked by the Attorney General to review the Act and consider whether there is a need for any reform, and if so, the scope of such reform, in respect of the following Terms of Reference:

- (a) the objects of the Act and other preliminary provisions;
- (b) the grounds of discrimination including (but not limited to) introducing grounds of gender identity and intersex status;
- (c) the areas of public life to which the Act applies;
- (d) definitions in the Act including (but not limited to) discrimination, harassment (including a requirement for disadvantage in a definition of sexual harassment), impairment (including a requirement to make reasonable adjustments for persons with an impairment), victimisation, services and employment;
- (e) the inclusion of vilification, including racial, religious, sexual orientation and impairment vilification;
- (f) the inclusion of a positive duty not to discriminate on grounds covered by the Act;
- (g) exceptions to grounds of discrimination including (but not limited to) those for religious institutions;
- (h) the burden of proof;
- (i) the functions and investigative powers of the Commissioner for Equal Opportunity (Commissioner), including (but not limited to) the functions of the Commissioner (either personally or by counsel) assisting complainants in the presentation of their case to the State Administrative Tribunal (SAT);
- (j) requirements around the referral of complaints to the SAT;
- (k) the role and jurisdiction of SAT under the Act, including the requirement for leave if the complaint is dismissed by the Commissioner;
- (l) interaction with the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) and other relevant Commonwealth laws or proposed laws;
- (m) any other element of the Act or other laws relevant to equal opportunity and non-discrimination; and
- (n) any related matter.

## 1.3 Methodology

This project involved a number of steps which have led to this Final Report. The Commission recognises that engagement with stakeholders, including members of the public, is central to any law reform process, and particularly critical when dealing with law reform as it pertains to legislation like the Act. The Commission has sought to engage interested members of the public and other stakeholders throughout the process in a variety of ways, noting that the COVID-19 pandemic presented some unique challenges in that respect.

This Final Report is informed by the Commission's consultations, stakeholder submissions, as well as its own research and analysis.

The details of the process adopted by the Commission are set out below.

### 1.3.1 Preliminary consultation

The Commission conducted early targeted consultation with stakeholders to obtain some initial high level stakeholder feedback on the Terms of Reference, which was then incorporated into the Commission's Discussion Paper' dated August 2021 (Discussion Paper). While the Commission's initial communications were sent to a targeted range of stakeholders, the Commission clearly expressed its willingness to receive initial stakeholder feedback from any stakeholders. A number of stakeholders indicated their plans to provide a detailed submission as part of the consultation phase of the reference and elected not to provide initial feedback.

The Commission also met with the EOC as a key stakeholder.

### 1.3.2 Discussion Paper

In August 2021, the Commission published a Discussion Paper which comprehensively summarised the Act and compared it with anti-discrimination legislation in other states and territories, as well as the Commonwealth. The Discussion Paper considered options for reform and posed a number of questions about potential changes to the Act.

Following publication of the Discussion Paper, the Commission invited stakeholders and members of the public to make submissions. To assist this process, the Commission also prepared issues papers summarising some of the key issues raised in the Discussion Paper. The Discussion Paper and the issues papers were published on the Commission's website. The closing date for submissions was 30 November 2021.

### 1.3.3 Stakeholder submissions

The Commission received submissions from a wide range of stakeholders, allowing this Report to be prepared with the benefit of significant community input. The level of public interest and the number of submissions received supports the need for reform of the Act.

Stakeholders were from a variety of backgrounds, including anti-discrimination bodies, religious entities, humanitarian groups, the academic community and individual members of the public. Given the Act seeks to achieve equality through balancing competing rights and interests, it is perhaps inevitable that stakeholders will hold competing points of view on issues, which will be reflected in their submissions. Accordingly, a consideration of the submissions requires an understanding of the interests of various groups who, in some cases, consider their interests to be opposing.

The common themes raised in stakeholder submissions involved:

- whether the grounds of protection and areas of public life remain adequate;
- whether the Act should take a more positive and proactive approach;
- whether implied duties to eliminate discrimination should be made express; and
- whether there should be stricter enforcement mechanisms to promote change (rather than solely relying on individual complaints to address particular instances of unlawful conduct).

Some aspects of the Act were not addressed in any submissions, while other aspects were addressed in very few submissions. The Commission has, where necessary, addressed those aspects by reference to its own research and analysis, and the core principles identified as underpinning the Act.



### 1.3.4 Public consultation sessions

The Commission invited stakeholders to attend public consultation sessions with the Commissioners. The Commission offered numerous sessions in an effort to ensure that all participants were given an adequate opportunity to be heard on issues of significance to them. Seven sessions were held: six were held online and one was held in person. The majority of the sessions were held online due to the ongoing constraints of the COVID-19 pandemic. During the course of this reference, the Commission also conducted consultation sessions with the Australian Discrimination Lawyers Expert Group (ADLEG) and met with the EOC, the Queensland Human Rights Commission and the Australian Human Rights Commission.

The Commission engaged Fred Consulting to facilitate the public consultation sessions. Each of the consultation sessions undertaken was invaluable in informing the Commission's work in preparing this Report.

This Report has been prepared to address the terms of reference, including through summarising the issues raised in stakeholder consultations, and to set out the Commission's recommendations with respect to the matters raised by the terms of reference. The Commission has also conducted desktop research and used information obtained from academic, stakeholder and media publications to inform this Report. The Final Report should be read in conjunction with the Discussion Paper, as this Report does not repeat its comprehensive summary of the Act nor its comparisons to other jurisdictions.

### 1.3.5 Citation of submissions

The Commission received over 900 preliminary submissions and submissions from stakeholders in relation to the reference. To aid the readability of the Report, where numerous stakeholders supported a particular position, the Commission has not cited individual submissions by name. However, where the views of a single stakeholder have been referred to or quoted, the Commission has identified the particular submission received. A detailed list of submissions received and people who participated in consultations with the Commission is accessible on the Commission's website at <https://www.wa.gov.au/organisation/law-reform-commission-of-western-australia>. A number of stakeholders provided case examples in their submissions. The Commission has referred to some of those case examples in this Report. The Commission has made some minor changes to those examples to anonymise them.

## 1.4 Structure of this Report

The Report begins with a discussion of principles informing the Commission's approach and the objects of the Act before engaging in a detailed discussion of the Commission's recommendations in relation to discrimination, harassment, vilification and victimisation in Chapters 4-7. The protected attributes are discussed in alphabetical order for ease of reference. Chapters 8 and 9 address conversion practices and a positive duty to eliminate discrimination, harassment, victimisation and vilification, while Chapter 10 addresses related procedural matters. Terms defined in the Report are set out in Appendix A.

## **2. SOME THRESHOLD OBSERVATIONS**

### **2.1 Terminology**

The Commission acknowledges that the challenges affecting disadvantaged, vulnerable or disempowered groups are highly personal in nature. The Commission also recognises that terminology can have a profound impact upon the inherent dignity, self-worth, and identity of a person: the use of inappropriate language can have very harmful effects on individuals or groups of individuals by perpetuating stereotypes, promoting discrimination, affecting perceptions of self and others, and acting as a barrier to substantive and formal or individual equality.

The need for inclusive and respectful language that recognises the unique experiences of individuals, is both universal and critical to achieving equality for all. By way of example only, although there is much that unites people belonging to the various identities under the LGBTIQA+ umbrella, it must also be recognised that there is rich diversity within the community. Various stakeholder submissions expressed the concern that it was inappropriate for anti-discrimination legislation to 'lump together' members of the broader LGBTIQA+ communities without regard to their differing experiences and the different types of discrimination they may face.

The Commission acknowledges the varied and diverse experiences of individuals within the LGBTIQA+ community. It notes the significant advocacy and efforts of certain stakeholders to ensure that those experiences were understood and able to inform this Report. The Commission is particularly cognisant of the important distinctions between gender identity (including gender-related expression), sex characteristics and sexual orientation. Accordingly, the Commission has considered these matters separately in this Report.

The Commission has sought to adopt language in this Report which is respectful and inclusive in all areas. Key terminology will be set out within the relevant sections where necessary.

### **2.2 Models of anti-discrimination legislation and the principles informing the Commission's approach**

Before turning to the Act's specific provisions in detail, the Commission notes that its consideration of the need for reform has extended beyond consideration of the functionality of those specific provisions in the Act's current form. Effective law reform in any area, but particularly in relation to discrimination, requires an examination of the principles which should underpin the legislation before considering how those principles might best be enshrined in legislation.

The Act reflects what might best be described as an individual rights, complaints-based model of legislating for equality. Its underlying premise is essentially a fault-based system in which one party, often described as the victim, uses the complaints process to bring a complaint against another party, the discriminator, seeking an individual remedy for discrimination that they have faced. This system is reactive in nature, in that it responds to behaviours once they have occurred, rather than imposing any active requirement to prevent them. Although this model of anti-discrimination is one which generally reflects models of anti-discrimination laws at the time that the Act was introduced, it is a model which has been harshly criticised in more recent times.

Perhaps the most significant of those criticisms concerns the extent to which a reactive legislative model can operate to overcome systemic discrimination. In the Act's current form, the individual bears a heavy onus in bringing a complaint upon which action can then be taken. The Act itself does not, other than providing for potential penalties for a breach of its provisions, encourage organisations to take proactive steps to eliminate discrimination by organisations. Whilst this is not to suggest that the

Act's provisions do nothing to shape behaviour in the absence of a complaint, a substantive legal consequence only attaches where fault can be identified. The Act does not dictate what one must do to avoid discrimination, but rather dictates what one must not do, and the enforcement of that depends upon the making of a complaint.

A further, related criticism queries the extent to which an individual, complaints-based model can support and facilitate both formal and substantive equality. At its simplest, formal equality is about treating likes alike and ignoring differences in favour of consistent treatment. Substantive equality, on the other hand, is more concerned with equality of outcome, and involves an inherent acknowledgment that equality will not always be achieved by giving everyone the same opportunity. Instead, substantive equality might well require differential treatment, and in effect, embeds certain moral principles in the meaning of equality.

In considering the need for reform of the Act, the Commission's approach has been framed upon a number of principles, including those that flow from the criticisms outlined above. The principles are discussed below.

### 2.2.1 Upholding human rights

The Commission recognises that discrimination laws play a fundamental role in upholding the human rights of all people. The Commission's approach to this Report is guided by the principles enshrined in the United Nations *Universal Declaration of Human Rights* (UNDHR). Relevantly, in the context of reforming the Act, these principles include the following:

- A good community is one where members feel that their human rights are protected. Our inalienable human rights include rights to be respected and treated fairly, equally and with dignity. Everyone is entitled to the enjoyment of human rights and freedoms without distinction of any kind.
- An equal community requires that members of the community enjoy both formal equality and substantive equality. Formal equality rests on the proposition that fairness requires consistent or equal treatment. Substantive equality goes further and focuses on enabling (not merely allowing) full and equal participation, dignity, and respect.
- Failing to treat people equally means discriminating between them.
- Discrimination that involves a person or group being treated in a less favourable way than others are treated because of a characteristic such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status can cause the person or group discriminated against to feel disrespected, unsafe and alienated from others. This is an infringement of their human rights. This is especially so if this type of unfavourable treatment occurs in areas of life that are in themselves recognised as human rights, such as the right to education, to work for equal pay, to form a family or to participate in government, or a right which is provided by government to citizens generally, such as the right to social services and medical care.

The Commission is also guided by principles contained in other key human rights instruments including the International Convention on the Elimination of all forms of Racial Discrimination (CERD),<sup>2</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>3</sup> the International

<sup>2</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 1, (entered into force 4 January 1969, entered into force for Australia 30 October 1975 except Article 14 which entered into force for Australia 28 January 1993).

<sup>3</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, (entered into force 3 January 1976, entered into force for Australia 10 March 1976).

Covenant on Civil and Political Rights (ICCPR),<sup>4</sup> the Convention on the Elimination of all forms of Discrimination against Women (CEDAW),<sup>5</sup> the Convention on the rights of the Child (CRC),<sup>6</sup> and the Convention on the Rights of Persons with Disabilities (CRPD).<sup>7</sup>

## 2.2.2 Protecting and enforcing equal and respectful treatment

Discrimination law aims to set standards of behaviour which, if met, mean that people's human rights are upheld through the protection and enforcement of equal and respectful treatment.

The Commission acknowledges that:

- Members of the community have different backgrounds and philosophies, and people's understandings of equality evolves over time. Consequently, they will have different views as to what it means to be treated equally and respectfully and how others should be treated. Apart from the general principle that discrimination laws should protect and enhance the dignity and equality of members of our community, discrimination laws should not impose any norms or views of others onto individuals. Discrimination law should not prescribe (as in dictate) or proscribe (as in forbid) life choices or lifestyles.
- The object of discrimination laws mean that they will necessarily impose some limitations on people's freedom to say and do what they wish. These limitations should only be imposed where it is fair and necessary to do so to protect the rights of others. This is a matter of careful judgment and balance.
- It is especially important for discrimination laws to protect the rights of people and marginalised groups who are particularly vulnerable to unequal treatment.
- Discrimination law should provide that a person or group can make a complaint of discrimination and have that complaint heard and determined by an impartial tribunal to provide an effective remedy against discrimination. This process should reflect that all members of the community are entitled to equal protection of the law without any discrimination, including to equal protection against any unlawful discrimination.

## 2.2.3 Recognising and addressing systemic causes of discrimination

Submissions received by the Commission highlighted that Australian anti-discrimination laws have historically focused on addressing an individual instance of discrimination rather than targeting wider, systemic discrimination. The Commission recognises that discrimination should not only be conceptualised as discrete instances of less favourable treatment against a particular group or individual. Discrimination is systemic and is manifested through structures and patterns of behaviour that underpin our society, which in turn undermine the enjoyment of human rights by all. Accordingly, discrimination law should aim to address systemic causes of discrimination.

<sup>4</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, entered into force for Australia 13 November 1980, except Article 41 which entered into force for Australia 28 January 1993).

<sup>5</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 1, (entered into force 3 September 1981, entered into force for Australia 27 August 1983).

<sup>6</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990, entered into force for Australia 16 January 1991).

<sup>7</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3, (entered into force 3 May 2008, entered into force for Australia 16 August 2008).

In this regard, the Commission notes three key requirements on governments in formulating and implementing discrimination law, as identified in the Australian Human Rights Commission's 2021 report *Free & Equal: A reform agenda for federal discrimination laws (Free & Equal)*:

- *Respect*: Ensuring that governments do not engage in or support discrimination.
- *Protect*: Governments should take actions to prevent any person or organisation from discriminating against others and ensure that discrimination is prohibited by law.
- *Fulfil*: Governments should take positive actions to eliminate discrimination, including by taking measures to reduce barriers between different groups, and enhancing the protection and development of groups and individuals that experience inequality and discrimination.

## 2.2.4 Taking a proactive approach

The effectiveness of anti-discrimination legislation depends on the choice of framework or regulatory model which it adopts, including whether that model is able to address the complexity of discrimination.<sup>8</sup> Since the development of the current framework almost four decades ago, regulatory thinking in this space has undergone much change.<sup>9</sup> To best assess and reform our approach in Western Australia, recent developments in regulatory thinking need to be accounted for, including the increased recognition of the need for legal frameworks for anti-discrimination to promote substantive equality, not merely formal equality.<sup>10</sup>

Previous reforms of anti-discrimination laws in Australia have been critiqued as being 'merely incremental and extending a flawed framework'.<sup>11</sup> Such reforms have generally involved the expansion of protections (that is, the addition of new protected attributes), whilst leaving the regulatory model itself untouched.<sup>12</sup> It has been argued that there is a pressing need to consider more fundamental regulatory reform to eliminate discrimination and promote equality, including by exploring fully different regulatory options and legislative models.<sup>13</sup> Choices made in designing a regulatory framework can also 'reflect and reinforce an understanding of the nature of the problem and the importance of addressing it',<sup>14</sup> thereby aligning with the aims of the Act.

The current regulatory model has been described as an 'individual complaints-based model' based on a traditional conceptualisation of human rights.<sup>15</sup> It seeks to affect behaviour in society by prohibiting discriminatory conduct and enabling individual victims to take action against it. Such individual rights are considered valuable on both a practical and normative level in bringing about social change.<sup>16</sup>

<sup>8</sup> Beth Gaze and Belinda Smith, 'Basic Framework of Legislation' in *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 47, 48 - 49.

<sup>9</sup> Belinda Smith, 'It's About Time - for a New Regulatory Approach to Equality' (2008) 36(2) *Federal Law Review* 117, 144.

<sup>10</sup> *Ibid* 137.

<sup>11</sup> *Ibid*.

<sup>12</sup> *Ibid* 136.

<sup>13</sup> *Ibid* 137.

<sup>14</sup> Beth Gaze and Belinda Smith, 'Basic Framework of Legislation' in *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 47, 49.

<sup>15</sup> Belinda Smith, 'Australian Anti-Discrimination Laws - Framework, Developments and Issues' (Paper submitted to the Japan Institute for Labour Policy and Training (JILPT), JILPT Report, 2008) 97.

<sup>16</sup> Beth Gaze and Belinda Smith, 'Basic Framework of Legislation' in *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 47, 63.

However, the individual complaints-based model has been widely critiqued as a regulatory framework for anti-discrimination law, as it is ineffective at addressing systemic and structural discrimination.<sup>17</sup> The three main limitations of the model are considered to be:

- **Negative standard:** The negative standard imposed through this system has been criticised as having limited utility in preventing discrimination or promoting equality more generally.<sup>18</sup> The essence of this limitation has been described as follows:

The imposition of a negative rule alone creates a fault-based system whereby an organisation is not required to do anything unless fault can be identified and attributed to it. If it cannot be proven that an organisation contributes to the inequality in the specifically prohibited way, then it will bear no responsibility for addressing the inequality. The negative, tort-like rule enables redress but does not require preventative measures, or positive steps, to be taken to promote equality.<sup>19</sup>

- **Victim-only prosecution:** A significant limitation of the individual complaints-based model is that the prosecution of (or enforcement of compliance with) anti-discrimination legislation is limited to victims.<sup>20</sup> The reliance of the system on individuals for enforcement of anti-discrimination legislation is seen as constituting a major barrier to achieving equality and means that the model is inherently limited in its ability to address systemic discrimination and disadvantage.<sup>21</sup> In this regard, it has been argued that:

Claimants under anti-discrimination legislation are, by the very nature of the legislation, members of traditionally disempowered groups. Expecting members of such groups to have the time, security and resources to alone identify breaches, press claims, and enforce outcomes without any public assistance represents a fundamental regulatory weakness even when the initial dispute resolution system is relatively informal and accessible.<sup>22</sup>

- **Compensation as a remedy:** Remedies available under the individual complaints-based regulatory model are limited to compensating the harm caused to the particular individual bringing the complaint, rather than punishing the wrongdoer or preventing further harm to others.

In her submission to the Commission, Dominique Allen noted that:

Australian anti-discrimination laws have historically focused on addressing an individual instance of discrimination rather than targeting wider, systemic discrimination or tackling inequality. ... This review is an opportunity for modernising Western Australia's anti-discrimination law by re-orientating it towards tackling discrimination proactively and removing the overall burden of addressing discrimination from the individual. In its current form, the [Act] does not contain the tools necessary for effectively eliminating discrimination, particularly systemic discrimination, or promoting equality of opportunity. The law could also be aimed at achieving substantive equality which would benefit both the individual and the community more broadly.<sup>23</sup>

The Commission acknowledges that although a regulatory framework which is victim-driven and fault-based may resolve some disputes on an individual level and thereby promote formal equality, it offers

<sup>17</sup> Belinda Smith, 'It's About Time - for a New Regulatory Approach to Equality' (2008) 36(2) *Federal Law Review* 117, 131; Beth Gaze and Belinda Smith, 'Basic Framework of Legislation' in *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 47, 63; Dominique Allen, 'Rethinking the Australian model of promoting gender equality' in Kim Rubenstein and Katherine Young (eds) *The Public Law of Gender* (Cambridge University Press, 2016) 402; Alysia Blackham, 'Positive Equality Duties: The Future of Equality and Transparency?' (2021) 37(2) *Law in Context* 99.

<sup>18</sup> Belinda Smith, 'Australian Anti-Discrimination Laws - Framework, Developments and Issues' (Paper submitted to the Japan Institute for Labour Policy and Training (JILPT), JILPT Report, 2008) 94.

<sup>19</sup> Belinda Smith, 'It's About Time - for a New Regulatory Approach to Equality' (2008) 36(2) *Federal Law Review* 117, 132.

<sup>20</sup> Belinda Smith, 'Australian Anti-Discrimination Laws - Framework, Developments and Issues' (Paper submitted to the Japan Institute for Labour Policy and Training (JILPT), JILPT Report, 2008) 97.

<sup>21</sup> *Ibid* 101.

<sup>22</sup> *Ibid*.

<sup>23</sup> Submission from Dominique Allen, 5 November 2021, 1.



little in the way of achieving substantive equality. Moreover, the Commission recognises that, by adopting a purely complaints-based model for affording remedies for discrimination, the regulatory framework incorrectly conceptualises discrimination as comprised of isolated instances, rather than addressing institutional or systemic causes of discrimination.

A more proactive approach to regulation seeks to address inequality ‘not merely as a problem of individual acts of discrimination requiring a rights-based response but also as a social, structural and cultural problem that requires institutional change’.<sup>24</sup> Other jurisdictions have also recognised the limitations of the individual complaints-based model and have supplemented it with more proactive regulation. Such an approach aims to:

- (a) shift the focus of regulation from merely achieving formal equality to achieving substantive equality;
- (b) shift away from an approach to achieving equality which is victim-driven and fault-based; and
- (c) shift away from the traditional model of anti-discrimination law in which organisations and employers are only required to do something if, and when, they are identified as perpetrators of inequality.

In this Report, the Commission advocates adopting a more proactive approach to promoting equality and eliminating discrimination, to achieve the objectives of the Act.

### 2.2.5 Adopting best practice

The Commission seeks to ensure that Western Australian law is informed by, and remains consistent with, evolving best practice both in an Australian and international context.

In this regard, the Commission is guided by the principles identified in *Free & Equal* as driving reform at the federal level, many of which were echoed in the consultation process and in various submissions received. These principles include the need to:

- build a preventative culture in relation to discrimination;
- modernise the regulatory framework;
- improve the practical operation of laws; and
- enhance access to justice.

## 2.3 Legislative drafting

The Commission notes that across jurisdictions, including international jurisdictions, there are several different general approaches to drafting anti-discrimination legislation. Some statutes are highly prescriptive, whilst others are based on broad, general principles, with the precise meaning of those principles developing over time, through judicial and other consideration of the relevant legislation’s provisions.

There are competing views on whether an anti-discrimination statute should adopt a highly prescriptive approach. There are arguments to be made that a prescriptive approach supports certainty and clarity. These are important factors in ensuring that legislative objects and purposes can be achieved. However, some academic commentators note that a prescriptive approach can, in itself, create a barrier to access to justice as the resulting legislative frameworks are not accessible or user

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<sup>24</sup> Belinda Smith, ‘It’s About Time - for a New Regulatory Approach to Equality’ (2008) 36(2) *Federal Law Review* 117, 137.

friendly for lay persons. Further, it can limit the ability of the legislation to adapt and change over time with changing societal views and attitudes.

Whilst the Commission notes that prescriptive is not necessarily synonymous with complex, the current Act is very prescriptive in nature. Its provisions are both dense and complex. In the Commission's view, this potentially creates a barrier to achieving the purposes of the Act.

Stakeholders across the board supported the redrafting of the Act in a more modern style which establishes a clearer framework for its operation. In particular, stakeholders submitted that the Act should be modelled on the drafting of the *Discrimination Act 1991* (ACT) (ACT Act), the *Anti-Discrimination Act 1991* (Qld) (Queensland Act), the *Anti-Discrimination Act 1992* (NT) (Northern Territory Act) and the *Anti-Discrimination Act 1998* (Tas) (Tasmanian Act).

Importantly, stakeholders highlighted that many complainants are self-represented, which means that they may face difficulty in understanding the current Act.<sup>25</sup> If the Act were to adopt a more modern drafting approach, it was submitted that ordinary members of the public would be better able to understand their rights and responsibilities, as well as the rights and responsibilities of others.<sup>26</sup> It was submitted this drafting approach would also assist legal representatives, courts and tribunals in performing their roles.<sup>27</sup> One stakeholder observed that, if the Act does not adopt a modern drafting style and structure, the wide-ranging reforms contemplated by this review may risk adding further complexity to the Act.<sup>28</sup>

The Commission agrees that embracing a clearer framework for the operation of the Act would make the Act more accessible. Improving community understanding and accessibility in this way would likely further enhance the protections provided by the Act and align with the legislative object of promoting equality and eliminating discrimination in Western Australia. The Commission notes, however, that the precise manner in which this is achieved is ultimately a matter for the legislative drafter.

Stakeholders provided several suggestions as to how the drafting of the Act could be modernised. These suggestions included:

- Consolidating the protected attributes;
- Consolidating the grounds of public life to which the Act applies; and
- Consolidating the exceptions/exemptions.<sup>29</sup>

Stakeholder submissions also suggested that a modernised drafting approach could better support intersectionality of complaints, an issue which is discussed later in this Report.

The question of whether each of the protected attributes, and each of the areas of public life to which the Act applies, should be consolidated, is ultimately one for the legislative drafter that needs to be answered by reference to the precise content of the Act. The Commission notes that a number of its recommendations that follow in this Report are aimed, at least in part, at promoting greater consistency and uniformity in the Act. To the extent that is the case, the Commission notes that this may also facilitate legislative drafting which consolidates protected attributes and areas of public life in

<sup>25</sup> Submission from Circle Green Community Legal, 30 November 2021, 65.

<sup>26</sup> Ibid 65; Submission from YouthCare, 29 October 2021, 13 - 14.

<sup>27</sup> Ibid 13 - 14.

<sup>28</sup> Submission from ADLEG, 30 November 2021, 16.

<sup>29</sup> In Recommendation 69, the Commission recommends that the term exemptions should be used to refer to what the Act currently terms exceptions and exemptions. Throughout this Report, exceptions is used to refer to the current exceptions in the Act, and exemptions is used to refer to current exemptions in the Act as well as to proposed exceptions or exemptions.



the Act. The Commission ultimately supports an approach which ensures that the Act's provisions are clear, concise and accessible.

In this regard, the Commission notes that it has made a number of recommendations for amendment to the Act. The Commission notes that it may be that the extent of amendments required to implement the Commission's recommendations is so significant as to warrant a new Act rather than amendments to the existing Act. Whether it is better to amend the existing Act or create a new Act is a question that can only be resolved having regard to which, if any, of the Commission's recommendations are accepted and implemented by the government. The Commission notes that its recommendations with respect to amendment should be read as a recommendation to either amend the existing Act or to include a substantively equivalent provision of the kind recommended in any new Act. Similarly, any recommendation to retain a provision of the Act without amendment should be read as a recommendation to either retain the provision in the Act if the Act is amended or include a substantively equivalent provision in any new Act.

The Commission notes that a clear and simple framework for the Act will best achieve its objectives if it is also supported by measures aimed at enhancing education and awareness by the community. That is, the legislative model is only one part of the picture and the Act's objectives will only be achieved through investment in, and commitment to, awareness of the Act from all sectors. The Commission notes that throughout the public consultation process, it witnessed numerous invaluable examples of that investment and awareness by a range of individuals and groups.

### **Recommendation 1**

The Act should be redrafted in a clear, concise and accessible manner.

In the Discussion Paper, the Commission also asked whether it was appropriate for the Act to include an interpretation provision. Most stakeholder submissions were in favour of including an interpretation provision in the Act, with many submissions providing constructive comments on the types of drafting that might be considered.

Numerous stakeholders indicated support for a clause similar to that included in the ACT Act, which expressly provides that the Act must be interpreted in a way that is beneficial to a person who has a protected attribute, or combination of attributes, to the extent possible.

Some stakeholders were also in favour of an interpretation clause incorporating references to international norms of human rights. It was noted in the Discussion Paper that the intersection of international and state law could risk uncertainty and variability in the application of the Act.<sup>30</sup> Stakeholders offered constructive suggestions, however, including that the Act be interpreted, so far as possible, consistently with international human rights treaties to which Australia is a State Party, including the CERD, CEDAW, CRPD, ICESCR, ICCPR and CRC.

<sup>30</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 105.

Although the Commission agrees that the Act should be interpreted in a way that ensures that its protections for persons with protected attributes are recognised and realised to their full intent, the Commission considers that this can be achieved without the introduction of a specific provision clarifying that the Act should be given an interpretation beneficial to persons with protected attributes. The Commission considers that this outcome is best achieved through the use of clear and effective drafting in the legislation. The Commission further notes that the objects clause which it proposes below is one which encompasses a number of principles which have at their core, the protection of persons with protected attributes and that it is informed by international laws pertaining to human rights. In these circumstances, the Commission does not recommend the inclusion of a specific interpretive provision at this stage.

### 3. OBJECTS OF THE ACT

In its present form, the Act contains an objects clause. It does not contain a principles clause, nor a paramount considerations clause. Whilst principles and objects clauses are often drafted as operative provisions which impact on the manner in which rights and obligations are created by an Act, and the way in which powers conferred by an Act are able to be exercised, an objects clause operates as a motherhood statement of the purpose of the legislation. Notwithstanding that, as an express statement of what Parliament intends to achieve by the legislation, the objects clause of an Act can play an important role.

The Act's objects provide a prism through which to understand the purpose and intent of the provisions of the legislation, including the powers contained therein. Whilst an objects clause will not override clear and unambiguous language in the Act, nor determine how a discretion must be exercised in any particular case, the objects can nonetheless still play an important role in guiding how it is applied and in giving content to the protections afforded by the Act.<sup>31</sup> That is relevant not only to how those exercising powers under the Act may apply those powers, but also to how members of the public might understand the importance of the Act and the purposes of the protections it confers, and how those who have obligations under it might shape their behaviour.

#### 3.1 The current objects of the Act

Section 3 of the Act sets out the current objects as follows:

- (a) to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status or pregnancy, family responsibility or family status, sexual orientation, race, religious or political conviction, impairment, age, publication of relevant details on the Fines Enforcement Registrar's website or, in certain cases, gender history in the areas of work, accommodation, education, the provision of goods, facilities and services and the activities of clubs; and
- (b) to eliminate, so far as is possible, sexual harassment and racial harassment in the workplace and in educational institutions and sexual harassment and racial harassment related to accommodation; and
- (c) to promote recognition and acceptance within the community of the equality of men and women; and
- (d) to promote recognition and acceptance within the community of the equality of all races and of all persons regardless of their sexual orientation, religious or political convictions or their impairments or ages.

#### 3.2 Scope of objects

The Discussion Paper noted that amendments to the objects of the Act to date have been incremental, reflecting the growing number of attributes protected under the legislation.<sup>32</sup> It was observed in submissions, however, that there was further work to be done to ensure that the objects of the Act align with its operative provisions.

Submissions were received reiterating support for the recommendation, outlined in the Discussion Paper, that section 3(d) be broadened to include ethnic or cultural backgrounds.<sup>33</sup>

<sup>31</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 101-02.

<sup>32</sup> Ibid 102.

<sup>33</sup> Ibid.

Stakeholders also noted that the language of the provision as currently drafted overlooks trans and gender-diverse persons, as well as people with variations in sex characteristics. Submissions to the Commission asked if section 3(c) of the Act might be more inclusively drafted to reflect 'equality for all'.

The Commission acknowledges that the objects clause as it is currently drafted does not fully encompass the range of attributes protected under the Act. As one stakeholder submitted, however, a substantive overhaul of the objects provision, rather than the incremental inclusion of additional references to protected attributes, may be a more appropriate means of capturing the contemporary, progressive intent of the Act.<sup>34</sup> In this regard, the Commission notes that reformulating the objects clause in line with the objects and principles of the Victorian and ACT Acts would capture the wide scope of the legislation without recourse to piecemeal amendments.

### 3.3 Reformulating the objects clause

Drawing from the objects and principles set out at section 3 of the *Equal Opportunity Act 2010* (VIC) (Victorian Act) and section 4 of the ACT Act, in the Discussion Paper<sup>35</sup> the Commission asked whether the objects of the Act should be widened to:

- expressly acknowledge the need to combat systemic causes of discrimination;
- better or fully promote both formal and substantive equality; and
- reinforce the broader investigative and educational powers of the EOC and the Equal Opportunity Commissioner.

The Commission received a significant number of submissions in support of broadening the objects of the Act in these areas, in line with the approaches taken in the Victorian and ACT Acts. Several submissions also proposed amendments not expressly canvassed in the Discussion Paper, including to the language and nuances in the drafting of the objects clause. It was noted that the legislative objects not only ensure that the Act achieves its intended purpose; they carry symbolic importance, signalling community attitudes in relation to equal opportunity and anti-discrimination.

The Commission notes that some stakeholders were of the view that the objects provision in the Act should remain unchanged. The reasons for this view were varied and included, for example, that broadening the objects of the Act might increase the burden of legislative compliance on employers and that the expansion of the objects of the Act to expressly include addressing systemic causes of discrimination and substantive equality would be unduly burdensome for duty holders. However, it is apparent that the inclusion of such objects does not of itself place a burden on duty holders. It is the operative parts of the Act which may do that.

It was submitted also that the Act already provides a framework for effectively dealing with systemic discrimination and that the notion of substantive equality is also partially promoted throughout the Act, albeit not formally expressed. Although those points were advanced as reasons against amending the objects provisions, the Commission is of the view that to the extent that the Act already reflects a principle of substantive equality and recognises the need to deal with systemic discrimination, it is appropriate that those matters be reinforced as objects.

<sup>34</sup> Submission from Janine Freeman, 29 October 2021.

<sup>35</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 101-04.

The view of the Commission is that amending the objects of the Act is required to ensure that the Act is interpreted and applied in a way that best fulfils the objectives of promoting equality and eliminating discrimination.

### **3.4 Identifying and eliminating systemic causes of discrimination**

A number of stakeholder submissions supported broadening the objects of the Act to expressly acknowledge the need to identify and eliminate systemic causes of discrimination.

It was observed that, despite extensive research on the nature of discrimination and its relationship to prejudice and stereotyping, discrimination legislation generally has failed to make this link explicit, or to identify that an essential public purpose of discrimination law is to promote social cohesion and ensure equality of opportunities for all. One stakeholder suggested that it may be especially important to underscore these overarching objectives in circumstances where the legislation could otherwise be perceived as principally directed towards facilitating individual complaints in response to isolated incidents.<sup>36</sup>

Some stakeholders submitted that the objects should specifically extend to the identification and elimination of systemic causes of sexual harassment and victimisation, in terms similar to section 3(c) of the Victorian Act. Others suggested that the objects of the Act might also target systemic causes of other forms of discrimination, such as racism.

These submissions bring into sharp focus another of the general criticisms that might be made of the Act (and indeed other Acts employing a similar legislative model). That criticism is that individual complaints-based models of legislating equality are poorly adapted to promoting a proactive approach to eliminating discrimination.

The Commission has addressed the issue of managing systemic causes of discrimination, including through imposing a positive duty to eliminate discrimination, harassment, victimisation and vilification, in detail in subsequent parts of this Report. For the reasons discussed therein, the Commission considers that the objects of the Act should reflect that the Act recognises and seeks to eliminate systemic causes of discrimination.

### **3.5 Substantive equality**

A majority of stakeholders also supported the promotion of both formal and substantive equality in any amended objects provision.

As discussed above, formal equality is perhaps the more traditional understanding of equality. Its origins are often said to lie in Aristotle's dictum that equality essentially means that things that are alike should be treated alike. Formal equality's core premise is that equality is best achieved where people are treated consistently, irrespective of their individual differences, and without reference to how those individual differences might affect an outcome. Its focus is more towards equality through consistency, not equality of outcome.

Substantive equality, on the other hand, is focused on equality of outcomes, and the role that individual differences might play in that. It does not seek to ignore individual differences where those differences will not promote equality of outcome. Although the term is not often employed in Australian jurisdictions, affirmative action is an example of the principle of substantive equality in practice.

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<sup>36</sup> Submission from ALSWA, 25 November 2021, 10-11.

In the Discussion Paper, the Commission considered that an express acknowledgement of the kind contained in section 3(d) of the Victorian Act<sup>37</sup> would properly underscore that people ought not simply be treated the same but be given equal opportunities to achieve similar outcomes.<sup>38</sup>

One stakeholder submitted that expressly promoting substantive equality as an object of the Act may go towards addressing issues such as the gender pay gap and cultural biases.<sup>39</sup>

Modern anti-discrimination regulation seeks to facilitate the protection and furtherance of both formal and substantive equality. The Commission considers that an express acknowledgement in the objects that the Act seeks to further substantive equality would accurately reflect the modern aims of anti-discrimination law which the Act seeks to implement. This would complement the recommendations directed at enhancing substantive equality in this Report, including the introduction of a positive duty to eliminate discrimination, harassment, victimisation and vilification.

### 3.6 Role of the EOC and the Commissioner

Several stakeholders thought that it would be beneficial to include an object confirming and reinforcing the broader enforcement and educational powers of the EOC and the Equal Opportunity Commissioner. As noted in the Discussion Paper, this would not add much from a statutory interpretation standpoint.<sup>40</sup> However, stakeholders also submitted that an inclusion of this nature would help to frame the Act as a proactive piece of legislation. The Commission recognises the value of the enforcement and educational powers of the EOC and the Equal Opportunity Commissioner in ensuring that the Act supports proactive measures to eliminate discrimination. However, the Commission considers that such an outcome can be achieved through the express conferral of those functions on the EOC and the Equal Opportunity Commissioner. Those powers are the means through which the objects of the Act are to be achieved, rather than objects in themselves.

### 3.7 International human rights laws

Many stakeholders also expressed the view that the objects of the Act ought to expressly promote and protect principles enshrined in international human rights law. Some were concerned to ensure that the Act reflects the equal status in international law of the right to exercise and practice one's faith, consistent with the recommendations of the Ruddock Review on Religious Freedom,<sup>41</sup> which were outlined in the Discussion Paper.<sup>42</sup> Other stakeholders, cautious of cherry-picking certain principles for special consideration, recommended a more expansive reference to well-developed principles of international human rights law.

The equal opportunity legislation in jurisdictions where express human rights legislation has been enacted, namely, in Victoria with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and in the ACT with the *Human Rights Act 2004* (ACT), has sought to address international human rights. The objects of the Victorian and ACT Acts refer to the promotion and protection of the rights set out in their respective human rights statutes.

<sup>37</sup> Section 3(d) of the *Equal Opportunity Act 2010* (Vic) is quoted below,

<sup>38</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 103-04.

<sup>39</sup> Submission from Janine Freeman, 29 October 2021.

<sup>40</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 104.

<sup>41</sup> Australian Government, Department of the Prime Minister and Cabinet, *Expert Panel Report: Religious Freedom Review* (18 May 2018) (Ruddock Review on Religious Freedom).

<sup>42</sup> Ibid 104-05.

## 3.8 Possible models

Several stakeholders suggested implementation of an objects clause similar to that contained in the Victorian and ACT Acts. These clauses are set out below.

### 3.8.1 The Victorian model

The objects set out in section 3 of the Victorian Act are as follows:

- (1) to eliminate discrimination, sexual harassment and victimisation, to the greatest possible extent;
- (2) to further promote and protect the right to equality set out in the Charter of Human Rights and Responsibilities;
- (3) to encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation;
- (4) to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that—
  - (a) discrimination can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society;
  - (b) equal application of a rule to different groups can have unequal results or outcomes;
  - (c) the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures;
- (5) to enable the Victorian Equal Opportunity and Human Rights Commission to encourage best practice and facilitate compliance with this Act by undertaking research, educative and enforcement functions;
- (6) to enable the Victorian Equal Opportunity and Human Rights Commission to resolve disputes about discrimination, sexual harassment and victimisation in a timely and effective manner, and to also provide direct access to the Victorian Civil and Administrative Tribunal for resolution of such disputes.

### 3.8.2 The ACT Model

The objects set out in section 4 of the ACT Act are as follows:

- (a) to eliminate discrimination to the greatest extent possible; and
- (b) to promote and protect the right to equality before the law under the Human Rights Act 2004, including—
  - (i) the right to enjoy a person's human rights without distinction or discrimination of any kind; and
  - (ii) the right to the equal protection of the law without discrimination; and
  - (iii) the right to equal and effective protection against discrimination on any ground; and
- (c) to encourage the identification and elimination of systemic causes of discrimination; and
- (d) to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that—
  - (i) discrimination can cause social and economic disadvantage and that access opportunities are not equitably distributed throughout society; and
  - (ii) equal application of a rule to different groups can have unequal results or outcomes; and
  - (iii) the achievement of substantive equality may require the making of reasonable adjustments, reasonable accommodation and the taking of special measures.

### 3.8.3 An alternative model

ADLEG proposed an objects provision, based largely on the drafting in both the Victorian and ACT Acts, but also including recognition that actions and conduct founded in prejudice and stereotypes undermine the right to equality and damage social cohesion.<sup>43</sup> Its proposed objects clause is as follows:

The objects of this Act are —

- (1) to eliminate discrimination, attribute-based harassment, including sexual harassment, and victimisation, to the greatest possible extent;
- (2) to promote and protect the right to equality set out in international human rights law, including:
  - a. the right to enjoy a person's human rights without distinction or discrimination of any kind; and
  - b. the right to the equal protection of the law without discrimination; and
  - c. the right to equal and effective protection against discrimination on any ground; and
- (3) to encourage the identification and elimination of systemic causes of discrimination, attribute-based harassment, including sexual harassment, and victimisation;
- (4) to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that—
  - a. discrimination can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society;
  - b. equal application of a rule can have unequal results or outcomes;
  - c. the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures;
- (5) to recognise that all forms of behaviour resulting from prejudice and stereotyping undermine the right to equality and damage social cohesion.

## 3.9 The Commission's view

While there are advantages to the simplicity of the objects of the current Act, they are outdated: modern equal opportunity laws have broader objects than were articulated in 1984 when the Act was passed. The objects in the Victorian and ACT Acts are not appropriate because they refer to the human rights statutes of those jurisdictions.

The Commission is of the opinion that ADLEG's proposed objects clause includes the appropriate objects, save that it excludes one object that the Commission considers should be included, namely the object of educating the community about anti-discrimination principles and practices. The Commission is of the opinion that there is a benefit in articulating community education as a statutory object. Further, whilst the Commission acknowledges the references to human rights, the Commission prefers an approach which enshrines and expressly refers to equality.

The Commission considers that such an approach to broadening the objects of the Act would effectively incorporate structural and systemic discrimination, substantive equality and principles enshrined in international human rights law. The Commission's view is that not only would this go to ensuring that the Act achieves its intended purpose, but it would also reflect a shift in community attitudes towards the elimination of discrimination as being a societal issue rather than a private, individual dispute. This would also align the objects of the Act with the Commission's other recommendations which take a more modern approach to anti-discrimination regulation.

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<sup>43</sup> Submission from ADLEG, 30 November, 17-18.



## **Recommendation 2**

The scope and objects of the Act should be:

- to eliminate discrimination, harassment, vilification and victimisation, to the greatest possible extent;
- to promote community education about principles of equality and the elimination of discrimination, harassment, vilification and victimisation;
- to promote and protect equality including through protecting:
  - enjoyment of equality without distinction or discrimination of any kind;
  - equal protection of the law without discrimination; and
  - equal and effective protection against discrimination on any ground;
- to encourage the identification and elimination of systemic causes of discrimination, harassment, vilification and victimisation;
- to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that—
  - discrimination, harassment, vilification and victimisation can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society;
  - equal application of a rule can have unequal results or outcomes; and
  - the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures;
- to recognise that all forms of behaviour resulting from prejudice and stereotyping undermine the right to equality and damage social cohesion.

## 4. DISCRIMINATION

This chapter of the Report considers discrimination. Currently, the Act protects people who possess a particular protected attribute and are subject to an act of discrimination in certain areas of public life in respect of specified activities within those areas. There are also exceptions which provide that certain conduct that may otherwise constitute discrimination under the Act is not discrimination. There is currently no express positive duty to eliminate discrimination. For discrimination under the Act to be made out, there will generally need to be a discriminatory act involving a protected attribute in a specific protected area of public life which is not excused by an exception.

This chapter sets out the Commission's discussion and recommendations relating to:

- how discrimination is defined in the Act;
- attributes protected from discrimination in the Act;
- the areas of public life in which discrimination is prohibited;
- the positive duty to eliminate discrimination; and
- defences/exceptions to discriminatory conduct.

### 4.1 Defining discrimination

While the Act outlines, in relation to each protected attribute, the type of conduct which constitutes direct and indirect discrimination,<sup>44</sup> neither term is defined. In the Discussion Paper, the Commission asked whether a definition of discrimination should be inserted into the Act.<sup>45</sup>

The majority of stakeholders supported the introduction of definitions for direct and indirect discrimination. Stakeholders submitted that definitions may make the Act clearer, simpler and more accessible to laypersons, even if the concepts of direct and indirect discrimination are widely understood amongst practitioners in the field. Others observed that defining these terms in the Act would have the advantage of simplifying the drafting, by removing the need to repeat the test for direct and indirect discrimination in relation to each ground.

Some stakeholders submitted that a single definition of discrimination should be inserted into the Act, with this definition including both direct and indirect discrimination. It was submitted that this definition should not make the concepts of direct and indirect discrimination mutually exclusive. This submission was put primarily on the basis that the distinction between direct and indirect discrimination can be conceptually difficult (for both complainants and decision-makers) and can add unnecessary complexity to claims where complainants might plead both types of discrimination out of an abundance of caution. It was submitted that clarifying the concept of discrimination in this way would ease the regulatory burden of complying with the Act and assist people in understanding and complying with the Act.

The absence of a clear distinction between direct and indirect discrimination is reflected in section 3(1) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRCA), which defines discrimination as:

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<sup>44</sup> See, for example, *Equal Opportunity Act 1984* (WA) ss 8(1)-(2).

<sup>45</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 131.

- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
- (b) any other distinction, exclusion or preference that:
  - i. has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
  - ii. has been declared by the regulations to constitute discrimination for the purposes of this Act...

A similar approach is taken in section 9(1) of the *Racial Discrimination Act 1975* (Cth) (RDA). Stakeholders submitted that the adoption of such an approach would better align any new definition of discrimination in the Act with internationally recognised definitions of discrimination, such as in CEDAW and the Convention Concerning Discrimination in Respect of Employment and Occupation,<sup>46</sup> both of which Australia has ratified.

An intermediate approach would be to define discrimination as being inclusive of both direct and indirect forms of discrimination, with each form expressly defined. This approach has been taken in the ACT and Tasmanian Acts.<sup>47</sup> Stakeholders submitted that this would clearly define discrimination as encompassing both direct and indirect discrimination, without expressing these concepts as being mutually exclusive. The Commission favours the approach taken in the Tasmanian Act which avoids the segmented approach taken in the Act of separately prohibiting discrimination on the basis of every protected attribute.

The Commission ultimately supports the use of terminology and drafting in the Act which enhances its clarity and readability for all persons to whom the provisions of the Act will apply, as well as decision makers who ultimately bear responsibility for the application of the Act's provisions. The Commission considers that adopting an approach which defines discrimination as being inclusive of both direct and indirect forms of discrimination, with each form expressly defined, would most effectively improve the clarity and accessibility of the Act.

The Commission notes that the form of any particular amendment to the Act is ultimately one for the drafter, and not for the Commission to determine. In some respects, however, there is a fine line between the identification of appropriate policy positions to ensure that the Act achieves its objects, and the precise form of words to be used. To the extent that precise wording is significant to ensure that particular concepts are very clear in the Act and properly address matters of particular importance to the Act's ability to achieve its purpose, the Commission has made comment upon those issues. In that regard, the ways in which direct and indirect discrimination should be defined are discussed below.

### **Recommendation 3**

Discrimination should be defined as occurring when a person discriminates either directly or indirectly, or both, against someone else. The concepts of direct and indirect discrimination should also be defined, ensuring that they are not expressed to be mutually exclusive.

<sup>46</sup> *Discrimination (Employment and Occupation) Convention 1958* (No III), opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960) (Convention concerning Discrimination in Respect of Employment and Occupation).

<sup>47</sup> *Discrimination Act 1991* (ACT) ss 8(1)-(3); *Anti-Discrimination Act 1998* (Tas) ss 14 - 15.

#### **Recommendation 4**

The Act should prohibit discrimination on the grounds of a protected attribute, define discrimination as being direct or indirect and then list the protected attributes, in a similar manner to Part 4 Division 1 of the *Anti-Discrimination Act 1998* (Tas).

#### **4.1.1 Meaning of direct discrimination and use of the comparator test**

Direct discrimination requires that:

- (a) a person has a protected attribute;
- (b) the discriminator has treated the person less favourably than another person without the protected attribute in circumstances that are the same or not materially different.

In the Discussion Paper, the Commission raised a number of questions about the provisions of the Act incorporating the elements of direct discrimination. Those elements are discussed in detail below.

##### **4.1.1.1 Removing the comparator test**

The Act currently includes a comparator test for claims of direct discrimination. This involves comparing the treatment of the complainant with the real or hypothetical treatment of a comparator person who does not have the complainant's protected attribute, in circumstances that are the same or not materially different.<sup>48</sup>

In the Discussion Paper, the Commission asked whether the comparator test should be removed and, if so, what alternative test might best be inserted into the Act.<sup>49</sup>

Numerous submissions supported removing the comparator test. Many stakeholders referred to the difficulty of applying this test in certain scenarios, as illustrated by the case of *Purvis v New South Wales* (Purvis).<sup>50</sup>

That case concerned a young person with an intellectual disability caused by a severe encephalopathic illness experienced as an infant. The person's disability manifested itself in occasional violent acts of kicking or hitting. The young person's legal guardian, Purvis, brought an action under the *Disability Discrimination Act 1992* (Cth) (DDA) on behalf of the young person after they were expelled from school for acts of violence.

The applicant argued that since the violent acts were a result of the young person's disability, the appropriate comparator under the law was a nonviolent student whose circumstances were otherwise the same.

However, the majority (comprised of Gummow, Hayne and Heydon JJ, with whom Gleeson CJ and Callinan J agreed) adopted a narrow interpretation of the Act and held that the comparator was in fact a student who was not disabled, but who had acted in the same violent manner as the young person had. The majority considered that the words contained in section 5 of the DDA, namely 'in circumstances that are the same or are not materially different' allowed them to impute the young person's behaviour to the hypothetical comparator. In essence, the majority's view was that the

<sup>48</sup> The comparator test was discussed in detail in the Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 132-5.

<sup>49</sup> Ibid.

<sup>50</sup> (2003) 217 CLR 92. Discussed in Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 132-3.

manifestations of the young person's disability, and matters connected with those manifestations, were part of the circumstances to be ascribed to the comparator.

Critics of the High Court's position in *Purvis* noted that the position taken by the majority created a significant internal tension in the operation of section 5(1) and went against principles of statutory interpretation.

The central task of section 5(1) is to ascertain whether the alleged discriminator treated the person with the disability less favourably than they would have treated someone without the disability. Hence, suggesting that the comparator be someone who has the manifestations of the disability, but not the disability itself, creates a situation whereby the comparator does not in fact have the disability, but may come very close to doing so in their physical appearance and may appear to do so from the perspective of the alleged discriminator. Critics noted that this position is particularly problematic in situations where the physical manifestations of a disability can only be attributed to the disability. This position also ignores the fundamental difference between situations where the behaviour is uncontrolled, for example because of a disability, and where it is an act of free will.

Critics of the majority position also noted that this position diminished the efficacy of the comparator test and went against the fundamental objects and purposes of the DDA.

Stakeholders also submitted that the comparator test provides only one method of determining whether an individual has been treated detrimentally on the basis of a protected attribute, and that an alternative test might better promote equality and the functionality of the DDA.

The comparator must be a person in the same or similar circumstances who does not have the protected attribute of the person who makes the complaint. In some circumstances, it is possible for the complainant to identify an extant comparator. However, in other cases the circumstances are such that there is no such comparator, and one must be hypothesised. This may be difficult for the complainant (or indeed a respondent or decision maker) to conceptualise. The process is likely to divert attention from important considerations: how the complainant was treated; whether the treatment was unfavourable; whether they were treated that way because of their protected attribute; and if so, whether the treatment was justified. It was suggested that removing the comparator test would facilitate access to justice for vulnerable individuals.

In the Discussion Paper, the Commission noted that the potential adverse impacts of the comparator test on people with impairments may be less significant in Western Australia than, for example, under the DDA (which was the relevant anti-discrimination statute considered in *Purvis*).<sup>51</sup> This is because the Act, in its current form, extends protections to characteristics appertaining generally to persons with the same protected attribute as the complainant, as well as characteristics that are generally imputed to persons with that attribute. It was for this reason that the EOC, in its first comprehensive review of the Act in May 2007,<sup>52</sup> dismissed the need to amend the Act so as to remove the comparator test.<sup>53</sup>

Be that as it may, the Commission is of the view that this does not provide a complete answer to the potential difficulties pertaining to the comparator test. The comparator test, as it appears in the Act, still has the potential to produce arbitrary results. This is illustrated by an account from one stakeholder of a complaint made under the Act, which was subsequently dismissed by the EOC:

<sup>51</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 133-134.

<sup>52</sup> Equal Opportunity Commission, *Review of the Equal Opportunity Act 1984* (Report, May 2007).

<sup>53</sup> In Queensland, *Purvis v New South Wales* was distinguished by *Woodforth v State of Queensland* [2018] 1 Qd R 289; [2017] QCA 100.

### Case example

*A young child in Western Australia with autism spectrum disorder was enrolled in a surf lifesaving skills program with a surf lifesaving club. The program was designed for children and young adults with disabilities who are aged six years and over. Alongside this program, the club also ran a program for children without disabilities.*

*The club imposed a condition that all children in the particular child's class were required to wear a life jacket during lessons. Over the course of these lessons and swimming practice that the child undertook elsewhere, their swimming abilities improved significantly to the point where they no longer required a life jacket. The child eventually became distressed at having to wear a life jacket during their lessons with the club (as it was limiting their movement and access to the water), so much so that the child was no longer able to participate in these lessons.*

*The child's parents requested that their child be allowed to participate in lessons without having to wear a life jacket. This request was refused by the club. The club typically, prior to each season, permitted children enrolled in their program for children who did not have a disability to undertake an ability test where, if they passed this test, the children would not be required to wear a life jacket during lessons. However, no such assessment was conducted for the participants in the other program for children and young adults with disability.*

*A claim of direct discrimination was made under the Act to the EOC by the child's parents. The complaint was dismissed on the basis that the appropriate comparator was seen to be, not those children undertaking lessons at the club without an impairment in the same age bracket as the child, but rather those children in the same class as the child that have a disability. As none of the other children in the child's class were individually assessed, it could not be said that the child was treated less favourably than the other children in the class.*

#### 4.1.1.2 Introducing an unfavourable treatment test

The anti-discrimination Acts in the ACT,<sup>54</sup> Northern Territory,<sup>55</sup> Tasmania<sup>56</sup> and Victoria<sup>57</sup> each contain an unfavourable treatment test rather than comparator test.<sup>58</sup> Generally speaking, in each of those jurisdictions, a claim of direct discrimination can be established where an alleged discriminator treats, or proposes to treat, another person unfavourably because that other person has one or more protected attributes.

A significant number of stakeholders were in support of introducing an unfavourable treatment test into the Act in lieu of the comparator test. The basis for that support appears to stem from the fact that the unfavourable treatment test would be less onerous from a practical point of view for a complainant, as it would focus on the detrimental impact of the alleged discriminatory conduct on the complainant. Once it was established that the complainant had been treated unfavourably, the evidence could then focus on the important issue as to whether any unfavourable treatment arose because of the complainant's protected attribute.

The Commission recognises that replacement of the comparator test with the unfavourable treatment test has a potentially negative impact: namely, a loss of certainty for the parties. Currently parties know that unless the complainant can show that they were treated less favourably than a comparator,

<sup>54</sup> *Discrimination Act 1991* (ACT) s 8(2).

<sup>55</sup> *Anti-Discrimination Act 1992* (NT) s 20(2).

<sup>56</sup> *Anti-Discrimination Act 1998* (Tas) s 14(2).

<sup>57</sup> *Equal Opportunity Act 2010* (Vic) s 8(1).

<sup>58</sup> See Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 51.

their complaint will fail. Were an unfavourable treatment test to be introduced, it would require the exercise of judgement by the decision maker, unrestrained by the need to show less favourable treatment than a comparator would have received. Whilst certainty itself is clearly no substitute for justice, it can, however, be beneficial to ensuring that a party does not invest time, money and emotional energy on a case that, on a plain reading of the Act, can only ultimately fail.

On balance, the Commission considers that removing the comparator test and adopting the unfavourable treatment test in its place would simplify the application of the Act. This reform would also provide greater access to the anti-discrimination jurisdiction for certain complainants in situations where it may be difficult to identify a hypothetical comparator, such as in the example outlined above.

Further, on balance, the Commission agrees with stakeholder submissions that introducing an unfavourable treatment test would be beneficial to all parties, including complainants and respondents, as it would make the concept of direct discrimination simpler to understand and explain to members of the community. Stakeholders submitted that the introduction of an unfavourable treatment test would be a welcome improvement on the existing, overly complex comparator test. In the Commission's view, such an amendment will serve to improve access to justice for all parties, which must be one of the predominant aims of the legislation.

As noted in the Discussion Paper,<sup>59</sup> the unfavourable treatment test may, in some cases, entail drawing comparisons in a manner not dissimilar to the comparator test. This is because, where a comparator who received more favourable treatment exists or is able to be hypothesised, drawing a comparison between the complainant's treatment and the treatment of a comparator is likely to be the most direct way of convincing a decision-maker that unfavourable treatment has occurred. However, removing the comparator test will provide flexibility by making the drawing of comparisons permissible, rather than mandatory.

### **Recommendation 5**

The definition of direct discrimination should include an unfavourable treatment test. It should not include a comparator test.

#### **4.1.1.3 Operation of the unfavourable treatment test**

Submissions were also sought as to the preferred meaning of unfavourable treatment, and whether it should eliminate the need to identify an appropriate comparator. The Discussion Paper outlined three potential conceptualisations of unfavourable treatment (as identified by Dr Campbell and Dr Smith).<sup>60</sup>

The meaning of unfavourable treatment was considered by the Supreme Court of the United Kingdom in *Williams v The Trustees of Swansea University Pension & Assurance Scheme and another*.<sup>61</sup> In that case, the relevant section provided that:

- A person (A) discriminates against a disabled person (B) if –
  - (a) A treats B unfavourably because of something arising in consequence of B's disability, and

<sup>59</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 134 -135.

<sup>60</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 135. See generally, Colin Campbell and Dale Smith, 'Direct Discrimination Without a Comparator? Moving to a Test of Unfavourable Treatment' (2015) 43 *Federal Law Review* 91, 92.

<sup>61</sup> *Williams v The Trustees of Swansea University Pension & Assurance Scheme and another* [2018] UKSC 65.



- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

Lord Carnworth (with whom the rest of the Court agreed) said he was substantially in agreement with the reasoning of the Court of Appeal, which had in turn agreed with the reasoning of Langstaff J (President) of the Employment Appeal Tribunal. Lord Carnworth stated that Langstaff J had said:

16. [Unfavourable treatment] was to be measured “against an objective sense of that which is adverse as compared with that which is beneficial”. He noted that the same word was used elsewhere in the Act, ... in relation to discrimination on the grounds of pregnancy ... In that context it had the sense of “placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person ...”. It was likely to be intended to have “much the same” sense in section 15.
17. It was “for a tribunal to recognise when an individual has been treated unfavourably”, and it was not possible to be prescriptive. However, in his view - “... treatment which is advantageous cannot be said to be ‘unfavourable’ merely because it is thought it could have been more advantageous, or, put the other way round, because it is insufficiently advantageous. The determination of that which is unfavourable involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life. Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be.”

The Supreme Court decided the appeal on the application of these considerations to the facts of the case. In deciding that there was no unfavourable treatment, Lord Carnworth noted ‘the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section’.

The Commission is of the view that the term unfavourable treatment is not one that lends itself to easy definition and attempts to do so are unlikely to yield any real benefit. These words are ordinary words in the English language and bear their ordinary meaning.

The Commission notes that the Victorian Act provides guidance by way of two factual examples of direct discrimination. The Commission is of the opinion that examples may be helpful but makes no recommendation in this regard as the matter is ultimately one for the drafter.

Section 8(2) of the Victorian Act also requires that in determining whether a person directly discriminates it is irrelevant—

- (a) whether or not that person is aware of the discrimination or considers the treatment to be unfavourable;
- (b) whether or not the attribute is the only or dominant reason for the treatment, provided that it is a substantial reason.

Section 14(3) of the Tasmanian Act addresses these issues differently by providing that:

For direct discrimination to take place, it is not necessary –

- (a) that the prescribed attribute be the sole or dominant ground for the unfavourable treatment; or
- (b) that the person who discriminates regards the treatment as unfavourable; or
- (c) that the person who discriminates has any particular motive in discriminating.<sup>62</sup>

The Commission is of the opinion that it is helpful to proscribe irrelevant considerations. However, the Commission regards the Tasmanian phrasing as preferable to that in the Victorian Act.

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<sup>62</sup> *Anti-Discrimination Act 1992* (NT) s 20(3) is in similar terms.



In that regard, the Commission considers that while a lack of ill-intent on the part of the discriminator does not excuse discriminatory conduct, it may be relevant for the respondent to adduce evidence that they did not consider their treatment of the complainant to be unfavourable. Whilst it is unlikely to be determinative, together with other evidence, it may be relevant to the question of whether the treatment was objectively unfavourable. If the Act provides that that issue is irrelevant, it may be difficult for a respondent to produce evidence of their state of mind and the basis for it. Therefore, the Commission considers sections 14(3)(b) and (c) of the Tasmanian Act accurately state the relevant principles, rather than the Victorian approach of deeming the issue to be irrelevant altogether.

Although the Commission agrees with the underlying premise of the matter, it does not support an approach which reflects the Victorian Act's second prescribed irrelevancy. The position is, in the Commission's respectful view, somewhat awkwardly expressed: it not only says that it is irrelevant that the complainant's protected attribute is not the only or dominant reason for the unfavourable treatment, but it goes on to say that it must be a substantial reason for the unfavourable treatment. The Commission is of the view that these very valid requirements would be better expressed by way of a positive statement that:

The attribute (or attributes) must be a substantial reason for the unfavourable treatment but does not (or do not) need to be the only or dominant reason for the unfavourable treatment.

#### **Recommendation 6**

The unfavourable treatment test should not be defined.

#### **Recommendation 7**

The Act should provide that the complainant's protected attribute (or attributes) must be a substantial reason for the unfavourable treatment but does not (or do not) need to be the only or dominant reason for the unfavourable treatment.

#### **Recommendation 8**

The definition of direct discrimination should specify that it is not necessary for alleged discriminators to regard the treatment as unfavourable or to prove motive.

### **4.1.2 Meaning of indirect discrimination and use of the proportionality test**

The Act currently requires complainants to establish five elements of an indirect discrimination claim:

- (a) they have a protected attribute;
- (b) the discriminator has imposed a requirement or condition on them;
- (c) a substantially higher proportion of persons without the protected attribute comply or are able to comply with the requirement or condition (the proportionality test);
- (d) the requirement or condition imposed is not reasonable in the circumstances; and
- (e) they do not or are not able to comply with the requirement or condition.

The Discussion Paper and stakeholder submissions raised a number of issues relating to these elements. These are explored below.<sup>63</sup>

#### 4.1.2.1 *The proportionality test*

In the Discussion Paper, the Commission asked whether the meaning of indirect discrimination should be amended to remove the proportionality test.<sup>64</sup> The majority of submissions on this issue supported the removal of the proportionality test. As with the comparator test, a significant challenge of the proportionality test is that it can be difficult to ascertain an appropriate group of persons without the complainant's protected attribute against which the complainant can be compared. Stakeholders who supported removing the proportionality test generally cited their reason as being the high evidentiary burden that it imposes on complainants, and particularly those complainants who do not have the resources or knowledge to meet the evidentiary burden.

Feedback from stakeholders indicated that it can be difficult for a complainant to identify the relevant group of people who do not have the attribute and who are able to comply with the requirement. It was further noted that collecting and presenting evidence to meet the proportionality test can involve a disproportionate investment of time and resources. What is in issue is whether a requirement has disadvantaged the complainant and whether it was imposed because of a protected attribute. In reality, the proportionality test is but one means of proving indirect discrimination. A number of stakeholders took the view that a complainant should not be bound to a particular method of proving their case.

One stakeholder submission suggested that the evidentiary requirements imposed by the proportionality test create an access to justice issue, as it is often those who are most likely to seek the protections provided by the Act, in respect of indirect discrimination, who face the greatest difficulty with meeting its requirements.<sup>65</sup>

As outlined in the Discussion Paper,<sup>66</sup> anti-discrimination legislation in other jurisdictions, such as the ACT,<sup>67</sup> Tasmania<sup>68</sup> and Victoria,<sup>69</sup> does not contain a proportionality test in relation to indirect discrimination claims. The same is also true of the DDA, *Age Discrimination Act 2004* (Cth) (ADA) and *Sex Discrimination Act 1984* (Cth) (SDA). Rather, the test for indirect discrimination under these statutes generally only requires complainants to establish that a respondent's imposition of, or proposed imposition of, a requirement or condition has, or is likely to have, the effect of disadvantaging them based on a protected attribute. Numerous stakeholders supported replacing the proportionality test with a disadvantage-based test, to bring the Act in line with these other legislative regimes.

The Commission ultimately agrees with those stakeholder submissions. It recommends that the proportionality test should be removed from the Act and replaced with a test which focuses on the disadvantage suffered, or likely to be suffered, by a complainant. The Commission considers that amending the Act in this way will alleviate the various evidentiary and other challenges that complainants currently face in meeting the proportionality test.

<sup>63</sup> The question of when a person should be considered to possess an attribute is addressed in section 4.2.1. The onus of proving discrimination complaints is addressed in section 4.8.

<sup>64</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 135 - 138.

<sup>65</sup> Submission from Circle Green Community Legal, 30 November 2021, 42.

<sup>66</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 136.

<sup>67</sup> *Discrimination Act 1991* (ACT), s 8(3)-(5).

<sup>68</sup> *Anti-Discrimination Act 1998* (Tas) s 15.

<sup>69</sup> *Equal Opportunity Act 2010* (Vic), s 9.

### **Recommendation 9**

The definition of indirect discrimination should include a test which considers whether a condition or requirement has, or is likely to have, the effect of disadvantaging a complainant. It should not include a proportionality test.

#### **4.1.2.2 Guidance as to reasonableness**

The Commission does not make any recommendation for removing the reasonableness requirement for indirect discrimination. Some stakeholders highlighted in their submissions the utility of the Act setting out various factors which the finder of fact may consider in determining whether a particular condition or requirement is reasonable. This is the case under the ACT Act,<sup>70</sup> Queensland Act,<sup>71</sup> Victorian Act<sup>72</sup> and the SDA.<sup>73</sup>

Those Acts contain some common factors. Section 9(3) of the Victorian Act contains the most comprehensive list of factors. It states:

Whether a requirement, condition or practice is reasonable depends on all the relevant circumstances of the case, including the following—

- (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the requirement, condition or practice;
- (b) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the requirement, condition or practice;
- (c) the cost of any alternative requirement, condition or practice;
- (d) the financial circumstances of the person imposing, or proposing to impose, the requirement, condition or practice; or
- (e) whether reasonable adjustments or reasonable accommodation could be made to the requirement, condition or practice to reduce the disadvantage caused, including the availability of an alternative requirement, condition or practice that would achieve the result sought by the person imposing, or proposing to impose, the requirement, condition or practice but would result in less disadvantage.<sup>74</sup>

The Queensland Act only includes provisions similar to (c) and (d) in the Victorian Act, but it has an additional factor, being:

...the consequences of failure to comply with the [requirement].<sup>75</sup>

However, the consequences of failure to comply with the requirement is incorporated in a consideration of the other factors in the Victorian provision.

The Commission considers that providing a non-exclusive list of factors would be helpful for complainants, respondents, representatives and decision-makers by assisting them in their understanding and application of the reasonableness requirement in indirect discrimination claims. The Victorian Act provides a model for such a provision.

<sup>70</sup> *Discrimination Act 1991* (ACT) s 8(5).

<sup>71</sup> *Anti-Discrimination Act 1991* (Qld) s 11(2).

<sup>72</sup> *Equal Opportunity Act 2010* (Vic) s 9(3).

<sup>73</sup> *Sex Discrimination Act 1984* (Cth) s 7B(2).

<sup>74</sup> *Equal Opportunity Act 2010* (Vic) s 9(3).

<sup>75</sup> *Anti-Discrimination Act 1991* (Qld) s 11(2).

### **Recommendation 10**

The Act should include a non-exhaustive list of factors to be considered by the decision-maker when determining whether a requirement is reasonable.

#### **4.1.2.3 Requirement to establish non-compliance**

In the Discussion Paper, the Commission asked whether the meaning of indirect discrimination should be amended to remove the requirement that the complainant does not or is not able to comply with the requirement or condition.<sup>76</sup>

Numerous stakeholders supported the removal of this requirement. It was observed that this requirement is usually unnecessary because non-compliance can invariably be assumed (as a complainant who can comply with an impugned requirement or condition is not as likely to challenge the requirement or condition as a person who can or has complied with a requirement).

Stakeholders also submitted that complainants may be physically capable of complying with a requirement or condition (and thus not able to satisfy the test of indirect discrimination) but may nevertheless choose not to comply because compliance may be detrimental or harmful to them or their dependants. To this end, requiring complainants to prove their inability to comply with a requirement or condition could be overly burdensome and may deter claims.

The effect of the Western Australian provision may, to some extent, be relieved by the way in which it and similar provisions in other jurisdictions have been interpreted. Courts in both the United Kingdom and Australian jurisdictions where inability to comply must be established have tended to be practical, and to extend beyond a completely literal interpretation of the term 'can'. The approach is one which emphasises a clear distinction between coping with a requirement and the ability to comply with it,<sup>77</sup> by finding that coping with a requirement is not complying with it.

The case of *Hurst v Queensland*<sup>78</sup> perhaps provides a useful illustration. That case involved a decision of Education Queensland not to supply a deaf student with education in her first language, Auslan. At first instance, Lander J held that in light of evidence of the student's ability to cope with her education being in spoken English, her case failed as she could not satisfy the requirement set out in s 6(c) of the DDA that she was 'not be able to comply' with the requirement imposed on her. In essence, Lander J concluded that being able to 'cope' and being able to 'comply' were analogous.

On appeal, the Full Federal Court held that Lander J had erred in this characterisation. The Court held that the relevant test for proof of indirect discrimination was not whether the student could cope, but whether she would 'suffer serious disadvantage in complying with' the requirement to receive her education in spoken English and not her native language of Auslan. The Court acknowledged there was evidence that she was sufficiently academically advanced, but relied on a substantial body of evidence that indicated that the student would suffer serious disadvantage and could not reach her full educational potential without Auslan teaching for the remainder of her education. The Court reasoned that Lander J's reasoning could not be reconciled with the earlier case of *Catholic Education Office v Clarke*,<sup>79</sup> which was resolved in favour of the applicant. In that case, Madgwick J indicated that

<sup>76</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 135 – 138.

<sup>77</sup> Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (The Federation Press, 2018, 3<sup>rd</sup> ed) para 3.8.29.

<sup>78</sup> *Hurst v Queensland* [2006] FCAFC 100; (2006) 151 FCR 562.

<sup>79</sup> *Catholic Education Officer v Clarke* [2004] FCAFC 197; (2004) 138 FCR 121.

'compliance must not be at the cost of being thereby put in any substantial disadvantage in relation to the comparable base group'. The Court also highlighted that the DDA is aimed at ensuring equality of treatment, not of ensuring equality of outcome, noting that there is no suggestion that the DDA should be construed as precluding positive discrimination in favour of a disabled person.

The Court's position is summarised at [134]:

We have concluded that Lander J erred in his construction of the 'not able to comply' component of s 6(c). His Honour's own findings ought to have led him to conclude that [the student] was relevantly 'not able to comply' with the requirement or condition that [the student] be taught in English, without the assistance of Auslan. In our view, it is sufficient to satisfy that component of s 6(c) that a disabled person will suffer serious disadvantage in complying with a requirement or condition of the relevant kind, irrespective of whether that person can 'cope' with the requirement or condition. A disabled person's inability to achieve his or her full potential, in educational terms, can amount to serious disadvantage. In [the student's] case, the evidence established that it had done so.

The relevant legislation in the ACT, Tasmania and Victoria does not require proof that the complainant does not, or is not able to, comply with a relevant requirement or condition; although inability to comply may still be relevant to the extent that it may assist in establishing that the conduct has a disadvantageous effect.<sup>80</sup> Stakeholders were generally in support of amending the Act to align with the legislation in these jurisdictions.

The Commission concurs and recommends the removal of the requirement for complainants in indirect discrimination claims to establish that they do not, or are not able, to comply with a requirement or condition. This would further promote and protect the right to equality under the Act by removing an impediment which, in practice, does not prove that a person has or has not been discriminated against.

### **Recommendation 11**

The definition of indirect discrimination should not require a complainant to be incapable of complying with a requirement or condition.

#### **4.1.2.4 Specifying that the discriminator need not be aware of their indirect discrimination or have a motive for discriminating**

In the Discussion Paper, the Commission asked whether the meaning of indirect discrimination should be amended to specify that it is not necessary for the discriminator to be aware of the indirect discrimination.<sup>81</sup>

Section 9(4) of the Victorian Act contains an express statement to this effect:

In determining whether a person indirectly discriminates it is irrelevant whether or not that person is aware of the discrimination.

Other jurisdictions contain statements as to it being unnecessary to prove the respondent's motive in imposing the requirement under consideration.

Section 15(2) of the Tasmanian Act expresses the position as follows:

<sup>80</sup> Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (The Federation Press, 2018, 3<sup>rd</sup> ed) para 3.8.29.

<sup>81</sup> Review of the *Equal Opportunity Act 1984 (WA)*: Project 111 Discussion Paper, 135 – 139.

For indirect discrimination to take place, it is not necessary that the person who discriminates is aware that the condition, requirement or practice disadvantages the group of people.

Most, although not all, stakeholders were of the view that it should not be necessary for an alleged discriminator to be aware of their indirect discrimination. Their reasoning included that:

- (a) a discriminator's motives generally do not lessen the impact of the discriminatory conduct faced by a complainant;
- (b) a complainant may otherwise be required to adduce evidence of what was in the mind of the discriminator (which would be an overly burdensome, if not impossible, requirement to meet); and
- (c) discriminatory requirements or conditions are often the result of long-held patterns and practices within organisations and other structures which are rarely deliberately implemented to produce, or are otherwise understood as producing, a discriminatory result.

One stakeholder submitted that inserting an express provision in the Act that discriminators do not need to be aware of their indirectly discriminatory conduct would simply codify the existing law and, as such, a clearly drafted provision of this kind would assist with promulgating the Act's requirements.<sup>82</sup> The same can be said of a statement regarding proof of motive.

The Commission agrees with the above views. However, whilst it is perhaps difficult to envisage a situation in which the respondent's knowledge of their discrimination would be relevant to whether it had occurred, the Commission considers that the determination of relevance is best left to the fact finder. Rather than deeming the issue irrelevant, the Commission favours an approach similar to that which it has recommended in relation to direct discrimination, and which in part reflects the position in section 15(2) of the Tasmanian Act. That position is to the effect that for indirect discrimination to take place, it is not necessary –

- (a) that the person who imposed the requirement regards the requirement as discriminatory; or
- (b) that the person who imposed the requirement has any particular motive in discriminating.<sup>83</sup>

The Commission considers that the Act should, as far as is possible, provide guidance to the parties and decision-makers. In furtherance of this principle, the Commission considers that it is appropriate to include provisions of the above nature in the Act. The Commission recognises that incorporating an express statement of this kind would provide clarification for respondents that knowledge is not a requirement for an indirect discrimination claim and neither is motive a necessary element of indirect discrimination. As observed by stakeholders, such an amendment would also bring the Act closer in line with anti-discrimination legislation in Queensland,<sup>84</sup> Tasmania<sup>85</sup> and Victoria.<sup>86</sup>

### **Recommendation 12**

The definition of indirect discrimination should specify that it is not necessary for alleged discriminators to be aware that their conduct is indirectly discriminatory or to prove motive.

<sup>82</sup> Submission from Circle Green Community Legal, 30 November 2021, 44.

<sup>83</sup> *Anti-Discrimination Act 1992* (NT) s 20(3) is in similar terms.

<sup>84</sup> *Anti-Discrimination Act 1991* (Qld) s 11(3).

<sup>85</sup> *Anti-Discrimination Act 1998* (Tas) s 15(2).

<sup>86</sup> *Equal Opportunity Act 2010* (Vic) s 9(4).

### 4.1.3 Intersecting or overlapping grounds of discrimination

In the Discussion Paper the Commission asked whether the Act should be amended to make discrimination based on two or more overlapping grounds unlawful.<sup>87</sup> The Commission refers to the following two case examples, provided by the EOC, which highlight the reality of intersectional discrimination:<sup>88</sup>

#### **Case examples**

*An older Aboriginal person arrived at a hotel with two younger, white, work colleagues. The colleagues were upgraded to a superior room, whilst the Aboriginal person was offered a standard room. The apartment owner claimed this was because the colleagues' rooms were not ready, whilst the Aboriginal person alleged less favourable treatment because of his age and/or race.*

*A person employed for a number of years applied to their employer to undertake a different role. The person claims the coordinator of the new role was reluctant to accept them because they were too old and their English was poor. After several attempts, the person was eventually accepted into the new role, although from the outset they were treated differently, and in a very short timeframe they were terminated from the role due ultimately to racism and ageism.*

Overall, there was stakeholder support for amending the Act to make discrimination unlawful based on two or more overlapping grounds. Stakeholders perceived a need for the Act to represent the intersectionality of discrimination in practice, noting that for a substantial proportion of the population, discrimination is in relation to multiple protected characteristics, across multiple contexts.

The Act, as it is currently drafted, is said not to be reflective of all experiences of discrimination on the basis that there is a disconnect between the legal framework, which focuses on separate and distinct grounds of discrimination, and the overlapping experiences of discrimination in reality. Submissions also suggested that introducing this amendment could bring the Act into line with best practice internationally, and better legislate the complexity of intersectional discrimination.

Conversely, it was submitted that the introduction of provisions for treating multidimensional complaints instead of sequential complaints would introduce unnecessary difficulty to an already complex area.

Allowing a complaint to be brought on intersecting or overlapping grounds may increase the length and complexity of a case. However, given that the basis of a claim of indirect discrimination is that a requirement imposed by the respondent is discriminatory, the success of the complaint should not depend on whether the complainant can prove that the requirement was imposed on one ground as opposed to a combination of grounds.

The Commission has considered the submissions and recommends that the Act should be amended to recognise complaints of discrimination on overlapping grounds by making discrimination caused by two or more overlapping grounds unlawful.

<sup>87</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 189 – 190.

<sup>88</sup> Submission from the EOC, 29 October 2021, 19.



### **Recommendation 13**

The Act should allow complaints to be made on the basis of two or more overlapping protected attributes.

## **4.2 Protected Attributes**

This section considers the various protected attributes that currently exist under the Act, and those which have been suggested for inclusion. They are addressed in alphabetical order. It also considers when a person should be considered to possess a protected attribute.

The discussion in this section addresses whether particular attributes that are not currently protected by the Act ought to be protected. It also considers whether currently protected attributes ought to be modified.

There are no compelling reasons to remove the protection the Act gives to existing protected attributes. The questions of the areas of life in which the attribute should be protected, and possible exceptions or defences to discrimination on a particular ground, are addressed in sections 4.3, 4.5 and 4.6 below.

The question of whether additional protected attributes need to be included in the Act involves, to some extent, a consideration of the underlying justifications and rationales for the existing protected attributes. In the Commission's view, whilst there are a range of justifications which might underpin one or more of the existing protected attributes, there is no single justification which underpins **all** of the existing protected attributes. That is, other than to suggest that they reflect the rationale that the law should protect people from discrimination based on a personal attribute that has been, and is being, used to unjustifiably marginalise and exclude people with that attribute from important areas of public life by denying them:

- access to areas of public life, goods and services that the majority of people enjoy; or
- the ability to exercise freedoms which the majority of people enjoy.

Different people may have different views as to whether the statutory protection of an attribute is supported by this rationale. People may disagree on what constitutes marginalisation and exclusion. People may also disagree on what is unjustifiable marginalisation and exclusion. These determinations require consideration of the nature of the discrimination and disadvantage suffered by people with the personal attribute, as well as the nature of the personal attribute. Whilst still potentially warranting protection, if the personal attribute is a personal choice about their dress or appearance, it may not necessarily justify the same protection as an attribute which a person cannot change, such as race, or which is an inherent part of their culture or religious observances.

Whether discrimination on the basis of a personal attribute is justified and what discrimination is unjustified can sometimes be managed by protecting the attribute, but providing for exceptions (that is, situations where discrimination on the ground of the attribute may be warranted). Sometimes, however, the extent of the exceptions that may be required if the attribute is to be protected are an indicator that there is insufficient justification for protecting that attribute.

The Commission has also taken into account the need to clearly identify any protected attribute so that potential discriminators can understand the nature of their obligations, potential complainants can understand their rights and decision makers can ensure consistent decisions.



#### 4.2.1 Possessing a protected attribute

Presently, the Act requires a complainant to possess a recognised protected attribute in order to prove indirect discrimination. In the Discussion Paper the Commission asked whether it should be sufficient that the aggrieved person has a characteristic which generally pertains to people who have a protected attribute.<sup>89</sup>

Most stakeholders were in support of amending the Act so that in order to prove indirect discrimination, it would be sufficient for the complainant to have a characteristic pertaining to people who have a protected attribute. Some stakeholders observed that this would bring the concept of indirect discrimination more into line with the prohibitions against direct discrimination in the Act (which extend to characteristics that appertain generally to persons with a protected attribute).

It was noted that while it may only be in limited circumstances that an individual does not have a protected attribute, those who are in this situation can be some of the most disadvantaged and marginalised individuals. While arguments could be made that such individuals are, or will be, covered by other grounds, this would require a level of understanding and technical knowledge that many applicants do not possess, particularly those who are self-represented. Thus, it was submitted that this amendment would reduce the level of interpretation necessary to bring a claim.

The Commission concurs with these submissions and considers that such an amendment would provide greater clarity and align with the Commission's proposed amended objects of the Act.

Some jurisdictions provide that discrimination (and sometimes both direct and indirect discrimination) on the grounds of an attribute occurs if the treatment is on the basis of a broader list of characteristics that may be relevant to a person with the relevant attribute. There is not a universal approach to this issue, but a broad example is contained in section 7(2) of the ACT Act which provides that:

For this Act, **protected attribute** includes—

- (a) a characteristic that people with the attribute generally have; and
- (b) a characteristic that people with the attribute are generally presumed to have; and
- (c) the attribute that a person has; and
- (d) the attribute that a person has had in the past, whether or not the person still has the attribute; and
- (e) the attribute that a person is thought to have, whether or not the person has the attribute; and
- (f) the attribute that a person is thought to have had in the past, whether or not the person has had the attribute in the past.<sup>90</sup>

In the Commission's view, there is no reason why it should be unlawful to discriminate against a person on the basis of a protected attribute but not unlawful to discriminate against them on the basis of any of the above attributes and/or characteristics.

Further there is no basis for limiting this extended definition to indirect discrimination.

Finally, the Commission recognises that it will not always be the case that the person has the attribute at the point in time at which discrimination might arise, but rather might be proposing to have the attribute in the future and risks discrimination as a consequence. The Commission supports the amendment of the Act to ensure that persons are equally protected from discrimination on the basis of an attribute that they do not yet have but are proposing to adopt in the future.

<sup>89</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 135 – 138.

<sup>90</sup> Other examples can be found in *Equal Opportunity Act 2010* (Vic) s 7(2); *Anti-Discrimination Act 1992* (NT) s 20(2) and *Anti-Discrimination Act 1998* (Tas) s 15(1).

## Recommendation 14

The Act should provide that a protected attribute includes:

- a characteristic that people with the attribute generally have;
- a characteristic that people with the attribute are generally presumed to have;
- an attribute that a person has;
- an attribute that a person has had in the past, whether or not the person still has the attribute;
- an attribute that a person is thought to have, whether or not the person has the attribute;
- an attribute that a person is thought to have had in the past, whether or not the person has had the attribute in the past; and
- an attribute a person is planning or proposing to adopt in the future.

### 4.2.2 Accommodation status

The protected attribute of accommodation status refers to a person's status as, for example, a tenant. It differs from the question of whether a person has been discriminated against in the provision of housing. As referred to in the Discussion Paper, the ACT Act makes accommodation status a ground of discrimination, defined to include the status of being a tenant, an occupant within the meaning of the *Residential Tenancies Act 1997* (ACT), in receipt of or waiting to receive, housing assistance and homeless.<sup>91</sup> In the Discussion Paper the Commission asked whether accommodation should be included as a protected attribute in Western Australia.<sup>92</sup>

Submissions generally supported the inclusion of accommodation status as a ground of discrimination. It was submitted that protection on the basis of accommodation status is needed to address and prevent social inequality. Stakeholders outlined several aspects of accommodation status that suggest protection on this basis should be included in the Act. First, people who are homeless experience a range of structural disadvantages, including being denied employment, missing out on housing opportunities, as well as stigma and prejudice attaching to their status. Second, accommodation-related prejudice and discrimination can impact on people who live in certain types of housing, such as public housing, and in certain areas, including areas known for their low or lower social economic status, or rural or remote areas.

With respect to the employment relationship, it was noted that the absence of an address can create practical barriers or complications for a person completing the necessary administrative activities associated with employment, such as obtaining a police clearance check or opening a superannuation account. One stakeholder submitted that this should be addressed through the government taking additional practical steps to improve access to, and take-up of, stable accommodation for those who are homeless, on the basis that the Act is a poor tool for assisting homeless people to gain employment.<sup>93</sup> The Commission acknowledges this submission but notes that the provision of additional government services to assist with the provision of stable accommodation is beyond the scope of the Act. This does not mean that the inclusion of a ground of accommodation status is unnecessary, as the aim of such a provision is to protect people from discrimination on the basis of

<sup>91</sup> *Discrimination Act 1991* (ACT) s 7(1)(a).

<sup>92</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 125 – 126.

<sup>93</sup> Submission from Chamber of Commerce and Industry WA, 29 October 2021, 14.

any accommodation status, including but not limited to homelessness. Programmes and services aimed at taking positive steps to assist people in securing accommodation may well complement its protections but are not properly implemented through the Act.

The considerations affecting the introduction of accommodation status as a protected attribute are perhaps best illustrated by reference to homelessness. Homelessness is plainly an attribute that may be used as a discriminator by which to deny someone their rights to things such as work and services. Whilst homelessness should not itself form a basis for discrimination, there may be situations where it is a relevant consideration for decisions such as offers of employment (for example, where employees must work from home) or the provision of services (for example, where services can only be provided in the complainant's home).

Although it is apparent that there may well need to be some exceptions to the protection of accommodation status, in the Commission's view those exceptions are not so wide and so frequently occurring to warrant not extending protection to the attribute. On balance, the Commission is of the view that adding a ground of accommodation status would extend protections under the Act to people who may be vulnerable to unfavourable treatment and, in the absence of the Act's protection, might otherwise serve to entrench inequality. This would align with the underlying principle for the identification of protected attributes and the proposed expanded objects of the Act. The issue of exceptions has been considered at sections 4.5 and 4.6 below.

In relation to the scope of the protection, the Commission is of the view that the ground should be similarly defined to the ACT Act. The ACT Act relies on the definition of occupant in the *Residential Tenancies Act 1997* (ACT). Section 71B(1) of the *Residential Tenancies Act 1997* (ACT) defines an occupant as a person who has 'a right of occupation under an occupancy agreement.' An occupancy agreement is defined in section 71C of the ACT legislation. As defined, it shares three features with a residential tenancy agreement under the *Residential Tenancies Act 1987* (WA) being that under the agreement:

- A person has given another person a right to occupy stated premises;
- The premises are for the person to use as a home; and
- The right is given for value.<sup>94</sup>

Under section 71C(1)(b) of the *Residential Tenancies Act 1997* (ACT), an agreement will be an occupancy agreement, rather than a residential tenancy agreement, if it is an agreement:

- (i) to occupy premises in the grantor's principal place of residence;
- (ii) to occupy premises in a residential facility associated with, or on the campus of, or provided under an arrangement with, an education provider;
- (iii) to exclusively occupy a sleeping space in a building with other sleeping spaces with related access to shared facilities or provision of domestic services (such as a bedroom in a boarding house or a bed in a dormitory style room);
- (iv) for emergency accommodation for people in crisis;
- (v) to occupy premises provided under a housing support program;
- (vi) to occupy premises because of membership in a club or other entity;

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<sup>94</sup> *Residential Tenancies Act 1997* (ACT) ss 71C(1)(a) and 6A(1); *Residential Tenancies Act 1987* (WA) s 3. The WA Act refers to the provision of valuable consideration instead of value. It also uses the phrase 'for the purposes of residence' in place of 'to use as a home'.

- (vii) to occupy premises provided by the grantor in a residential park; or a site in a residential park, for the purpose of the occupant placing a manufactured home or a mobile home on the site.

Each of the agreements prescribed in (iii) to (vi) must also state it is an occupancy agreement, in order to be an occupancy agreement.

The Commission notes that the *Residential Tenancies Act 1987* (WA) does not define or refer to a similar category of 'occupant', but rather refers only to a 'tenant' who is a person who is granted a right of occupancy of residential premises under a residential tenancy agreement.<sup>95</sup> The Commission considers that the Act should protect people with the protected attribute of being an occupant, where occupant has the same broader meaning as in the *Residential Tenancies Act 1997* (ACT).

#### **Recommendation 15**

A new protected attribute of accommodation status should be included in the Act.

#### **Recommendation 16**

Accommodation status should be defined to include being a tenant, an occupant, in receipt of or waiting to receive housing assistance, or homeless.

#### **Recommendation 17**

An occupant should be defined in a manner so as to have a similar meaning as that in the *Residential Tenancies Act 1997* (ACT).

### **4.2.3 Age**

Age is a protected attribute under the Act. The Commission did not receive any substantive submissions on the issue of age discrimination, although one stakeholder did raise the issue in the public consultation sessions. The Commission has considered the question of whether any amendments to the Act are required to ensure that the provisions operate effectively. The Commission does not make any recommendation for the Act's amendment in relation to the ground of age. The Commission notes that this does not mean that age discrimination does not occur, but rather that the Act's protections are sufficiently clear and comprehensive as drafted to address this issue.

### **4.2.4 Assistance animals**

Currently, the Act only provides limited protection for people who are accompanied by assistance animals: protection is restricted to people who are blind, deaf, partially blind or partially deaf and who possess or are accompanied by guide dogs or hearing dogs.<sup>96</sup> This reflects a traditional view of what constitutes an assistance animal and the traditional functions that assistance animals provide. In the

<sup>95</sup> *Residential Tenancies Act 1987* (WA) s 3. It refers to 'residential premises' rather than 'premises'. 'Residential premises' means 'premises that constitute or are intended to constitute a place of residence': s 3.

<sup>96</sup> *Equal Opportunity Act 1984* (WA) s 66A(4).

Discussion Paper, the Commission asked whether this ground should be extended to cover other animals, particularly having regard to the increasing recognition of the significant functions and supports that assistance animals are able to provide.<sup>97</sup>

Submissions identified that the role of assistance and therapeutic animals has expanded well beyond assisting people with sight and hearing impairments. For example, the current protections do not cover people who require an assistance or therapeutic animal for epileptic seizures or autism spectrum disorder. This gap illustrates the need for an extension of legal protections beyond guide or hearing dogs to any assistance animal certified by regulation.

#### **4.2.4.1 Consistent approach**

Stakeholders submitted that any decisions about amending the Act should consider consistency and clarity with the approaches in other states and territories, as well as the DDA. This is particularly important for people who travel interstate, where inconsistent regimes can cause both practical and logistical difficulties.

One submission suggested that public access rights posed a significant challenge between different jurisdictions, and that this has prevented greater consistency. Currently, handlers of animals other than guide or hearing dogs can lawfully be refused access to some premises under some State legislation but may be able to bring a complaint under the DDA.<sup>98</sup>

The need for a consistent approach between jurisdictions is highlighted in the following case example that was provided by a stakeholder.

##### **Case example**

*A person had an assistance dog trained to alleviate their illness-related symptoms. The person wanted to fly to Queensland on a well-known air carrier. The carrier refused the assistance dog on the basis that it was trained in WA by an independent dog trainer who was not in the regulations of the DDA and not a recognised organisation. The carrier relied heavily on the Guide, Hearing and Assistance Dogs Act 2009 (Qld) and did not agree that the assistance dog was trained for the purpose of the definition of assistance animal in the DDA. Ultimately the person and their assistance dog were unable to travel with that carrier.<sup>99</sup>*

#### **4.2.4.2 Therapeutic animals**

Some submissions supported the extension of protections to assistance animals certified by regulation, but did not support the extension to therapeutic or emotional support animals. These submissions highlighted the limited evidence that animals, other than accredited assistance animals, can provide the same level of support for people living with impairments.

Submissions highlighted the difference in training and accreditation of assistance animals as compared to therapeutic or emotional support animals. Assistance animals were said to be highly trained and reliable in public spaces. Further, assistance animals are trained to alleviate symptoms of physical, sensory, psychiatric, intellectual or other mental disability, whereas therapeutic animals are

<sup>97</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 106 – 107.

<sup>98</sup> Submission from the Department of Communities, 29 October 2021, 2.

<sup>99</sup> Submission from the Sussex Street Community Law Service, 29 October 2021, 7.

not required to accompany a handler in their day-to-day activities and are not accredited to support a person with a disability or medical condition.

Submissions noted that the DDA does not include therapeutic or companion animals. It requires all assistance animals to have passed a Public Assessment Test, be trained and accredited in order to be classified as an assistance animal.

The Commission concurs with the submissions supporting the extension of protections under the Act to accredited assistance animals but not to therapeutic animals. Accordingly, the term assistance animal should be used in the Act as opposed to therapeutic animal.

#### **4.2.4.3 Accreditation of assistance animals**

The Department of Local Government, Sport and Cultural Industries provides an accreditation system for assistance animals in Western Australia under the provisions of the *Dog Act 1976* (WA). Under the system, an authorisation card is issued as evidence that the dog is 'accredited under a law of a State or Territory that provides for the accreditation of animals trained to assist a persons [sic] with a disability to alleviate the effect of the disability'<sup>100</sup>. The Commission considers that protection should be extended to any animal accredited as an assistance animal under the *Dog Act 1976* (WA) or a similar law in another jurisdiction, but that the scope for accreditation ought not to be limited to dogs, as discussed below.

#### **4.2.4.4 Possible models**

Some submissions encouraged a definition of assistance animal as it is defined in the DDA. The DDA defines assistance animal as a dog or other animal:

- (a) accredited under a law of a State or Territory that provides for the accreditation of animals trained to assist a persons [sic] with a disability to alleviate the effect of the disability; or
- (b) accredited by an animal training organisation prescribed by the regulations for the purposes of this paragraph; or
- (c) trained:
  - i. to assist a person with a disability to alleviate the effect of the disability; and
  - ii. to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.<sup>101</sup>

It was submitted that aligning with the federal framework will ease the compliance burden on obligation holders.

Other submissions recommended adopting the approach taken in South Australia or the ACT. In the *Equal Opportunity Act 1984* (SA) (South Australian Act), assistance animal means:

- (a) a dog that is an accredited assistance dog under the Dog and Cat Management Act 1995; or
- (b) an animal of a class prescribed by regulation.<sup>102</sup>

In the ACT Act, assistance animal means an assistance animal trained to assist a person with a disability to alleviate the effect of the disability (including by guiding a person who is blind or vision

<sup>100</sup> *Disability Discrimination Act 1992* (Cth) s 9(2)(a).

<sup>101</sup> *Disability Discrimination Act 1992* (Cth) s 9(2).

<sup>102</sup> *Equal Opportunity Act 1984* (SA) s 5.

impaired or alerting a person who is deaf or hearing impaired to sounds), that satisfies any requirements prescribed by regulation.<sup>103</sup>

The Commission considers that adopting an approach to extending the protections in the Act in a similar manner to the DDA, would help to provide greater clarity and consistency in determining the scope of animals that may be assistance animals and the requirements to prove that an animal is an assistance animal for the purposes of the Act. The Commission considers this would, in turn, alleviate the practical difficulties that currently result from the patchwork of regulatory approaches across jurisdictions. There should also be a provision allowing for animals or classes of animals to be prescribed by regulation so that the provision is future proofed and can be adapted to suit changing circumstances.

### **Recommendation 18**

Assistance animal should be defined in similar terms to the way it is defined in the *Disability Discrimination Act 1992* (Cth). Section 9(2) of that Act defines assistance animal as a dog or other animal:

- (a) accredited under a law of a State or Territory that provides for the accreditation of animals trained to assist persons with a disability to alleviate the effect of the disability; or
- (b) accredited by an animal training organisation prescribed by the regulations for the purposes of this paragraph; or
- (c) trained:
  - i. to assist a person with a disability to alleviate the effect of the disability; and
  - ii. to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

The definition should also include an animal of a class prescribed by regulation.

## **4.2.5 Breast feeding and bottle feeding**

Breast feeding or bottle feeding an infant, or proposing to do so, is a protected attribute under the Act. No issues were raised by stakeholders in relation to this attribute, and the Commission makes no recommendation for its amendment. The Commission notes, however, that there are numerous media reports of discrimination on the basis of this protected attribute, and indeed the EOC's 2020-2021 Annual Report cites multiple examples of breast feeding or bottle feeding discrimination. While the Commission is of the view that the Act's current provisions adequately deal with this protected attribute, there may well be other non-legislative steps that remain necessary to ensure that those provisions achieve their intended purpose.

## **4.2.6 Carer responsibility**

At present, carer responsibility falls under the broad heading of family responsibility or family status, which is defined in section 4(1) of the Act to mean:

- (a) having responsibility for the care of another person, whether or not that person is a dependant, other than in the course of paid employment; or
- (b) the status of being a particular relative; or
- (c) the status of being a relative of a particular person[.]

<sup>103</sup> *Discrimination Act 1991* (ACT) s 5AA(3).



In its submission to the Commission, the EOC noted that family responsibility and family status are conceptually distinct from each other and should be separated.<sup>104</sup> The Commission agrees and recommends the separation of these grounds.

The Commission considers that parts (b) and (c) of this definition relate to the concept of family status and should be retained under that ground. This is addressed in section 4.2.9.

Part (a) appears to have been intended to relate to the concept of family responsibility. However, the Commission is of the view that this protection extends beyond the family, to provide protection to any person who has caring responsibilities that are not related to paid employment. Thus, a new protected attribute should be added which encompasses this aspect of the definition. It should retain the same definition and should be titled carer responsibility.

### **Recommendation 19**

The Act should separate the protected attributes of carer responsibility and family status.

### **Recommendation 20**

Carer responsibility should be defined as having responsibility for the care of another person, whether or not that person is a dependant, other than in the course of paid employment.

## **4.2.7 Disability**

Disability is not currently a protected attribute under the Act. However, many disabilities will be captured under the ground of impairment, which is defined to mean one or more of the following conditions:

- (a) any defect or disturbance in the normal structure or functioning of a person's body; or
- (b) any defect or disturbance in the normal structure or functioning of a person's brain; or
- (c) any illness or condition which impairs a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour, whether arising from a condition subsisting at birth or from an illness or injury and includes an impairment —
- (d) which presently exists or existed in the past but has now ceased to exist; or
- (e) which is imputed to the person...<sup>105</sup>

In the Discussion Paper the Commission asked whether this definition should be amended.<sup>106</sup>

Some submissions focussed on the breadth of the definition, arguing that it should be extended. Proposals to expand the definition included incorporating:

- Behaviour that is a symptom or manifestation of an underlying disability, in accordance with the decision of Purvis.<sup>107</sup>

<sup>104</sup> Submission of EOC, 1 November 2021, 4.

<sup>105</sup> *Equal Opportunity Act 1984* (WA) s 4.

<sup>106</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 109 – 111.

<sup>107</sup> (2003) 217 CLR 92.



- Behaviours associated with neurological conditions and other behaviour disorders, such as attention deficit hyperactivity disorder, and other social or emotional difficulties.
- Future impairment and future imputed impairment,<sup>108</sup> as well as any permanent or temporary psychiatric or psychological condition.

Other submissions critiqued the terminology used in the current definition. For example, it was submitted that:

- References to normal physiological and bodily characteristics perpetuate a view of people with impairments as other than normal.
- Wording such as disturbed behaviour is problematic as it presents as something which relates to aggression or violence rather than nuances associated with particular conditions.
- The use of defect or disturbance compares unfavourably to the United Nations CRPD, which recognises in its preamble that disability is an evolving concept: it results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.

The questions of whether the Act should better reflect a social rather than medical model of disability, and whether the word disability should be used in place of impairment were also the subject of stakeholder submissions. Unlike the medical model of disability, a social model distinguishes between impairment and disability, with ‘impairment...not viewed as individual deficit but as a personal characteristic that is one aspect of human diversity’.<sup>109</sup> Disability on the other hand relates to how the relevant community engages with the person with the impairment. This socialised conception shifts the emphasis to the response of society to the impairment. For this reason, some stakeholders, such as ADLEG, preferred the retention of impairment.

Conversely, other stakeholders proposed that the term impairment should be replaced with a ground or protected attribute of disability. This would be consistent with the language of the DDA, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability and the CRPD, as well as WA legislation such as the *Disability Services Act 1993* (WA).

There was considerable support for this approach from stakeholders, including People with Disabilities WA, because the definition in the DDA gives a broad meaning to the term, which is more in line with the community’s understanding of what disability encompasses. It is terminology supported by those most affected by it.<sup>110</sup>

The Commission acknowledges there are different views about this issue and that it is a dynamic area which may require revision over time. While conscious of the distinction between impairment and disability, the Commission considers that at this point, the current protected attribute of impairment should be replaced with disability as defined in section 4 of the DDA:

Disability is defined in section 4 of the DDA:

**disability**, in relation to a person, means:

- i. total or partial loss of the person’s bodily or mental functions; or
- ii. total or partial loss of a part of the body; or

<sup>108</sup> Some stakeholders submitted that employees have faced workplace issues up to and including dismissal on the basis of an imputed future impairment.

<sup>109</sup> Rosemary Kayess and Therese Sands, *Research Report for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: Convention on the Rights of Persons with Disabilities: Shining a Light on Social Transformation* (2020) 8.

<sup>110</sup> Submission from PWDWA, 29 October 2021, 3.

- iii. the presence in the body of organisms causing disease or illness; or
- iv. the presence in the body of organisms capable of causing disease or illness; or
- v. the malfunction, malformation or disfigurement of a part of the person's body; or
- vi. a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- vii. a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;

and includes a disability that:

- viii. presently exists; or
- ix. previously existed but no longer exists; or
- x. may exist in the future (including because of a genetic predisposition to that disability); or
- xi. is imputed to a person.

To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.

This definition extends to a disability that may exist in the future, thus protecting discrimination on that basis. The express extension of the disability to behaviour that is a symptom or manifestation of the disability also addresses the issues raised in the decision of Purvis, which is discussed earlier in this Report. Disabilities that presently exist, existed in the past or that are imputed will be addressed by the general recommendation for all protected attributes set out at Recommendation 14 above.

### **Recommendation 21**

The Act should use the term disability rather than impairment.

### **Recommendation 22**

Disability should be defined to mean:

- total or partial loss of a person's bodily or mental functions;
- total or partial loss of a part of the body;
- the presence in the body of organisms causing disease or illness;
- the presence in the body of organisms capable of causing disease or illness;
- the malfunction, malformation or disfigurement of a part of the person's body;
- a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.

It should include a disability that may exist in the future (including because of a genetic predisposition to that disability).

It should also include behaviour that is a symptom or manifestation of a disability.

#### 4.2.8 Employment status

In the Discussion Paper, the Commission asked whether employment status should be included as a protected attribute, as is the case in section 7(1) of the ACT Act.<sup>111</sup> In the ACT Act, employment status is defined as including:

- being unemployed; and
- receiving a pension or another social security benefit; and
- receiving compensation; and
- being employed on a part-time, casual or temporary basis; and
- undertaking shift or contract work.<sup>112</sup>

No other Australian jurisdiction includes employment status as a protected attribute.

Various stakeholders supported extending the Act in this way. It was submitted that there is often prejudice and stereotyping associated with the receipt of Centrelink payments such as Job Keeper and the Disability Support Pension (DSP), and the requirements for work while in receipt of the DSP can be seen to be prohibitive to employers. In particular, the inclusion of employment status as a protected attribute may make it easier for people with disabilities to raise a complaint about discrimination based on their status as a DSP recipient.

The Commission also received submissions opposing the inclusion of employment status as a protected attribute. In particular, some stakeholders raised a potential risk of increased litigation and the concern that including this as a protected attribute may encourage unsuccessful job applicants to make complaints alleging that a decision not to hire them was made in light of their job history.

It was submitted that small businesses are already cautious in hiring new employees due to perceived risks with legal claims, such as unfair dismissal and discrimination, being brought against them. The ability for potential workers to bring a claim for discrimination on the ground of employment status may generate greater uncertainty for organisations looking to hire new personnel. It was submitted that this may impact adversely on the job market, by potentially dampening the creation of new jobs.

Submissions were received which outlined potential alternatives to protecting employment status as an attribute, such as developing vocational training programs and other assistance to support individuals who are disadvantaged in the employment market by equipping them with the skills and attributes to be marketable within the workforce. Whilst these initiatives may well have merit, they are outside the scope of the Terms of Reference.

Whilst it would include full time employment status, the definition of employment status in the ACT Act, is focussed on statuses other than full time employment status ranging from unemployment status to shift work status. The Commission acknowledges that these are attributes that may be used as a discriminator by which to deny someone their rights to things such as work, goods and services. On balance, the Commission is of the view that adding a ground of employment status would extend protections under the Act to people who may be vulnerable to unfavourable treatment, which would align with the underlying principles for the identification of protected attributes and the proposed expanded objects of the Act.

In reaching this conclusion, the Commission acknowledges that discrimination and stigma can have a profoundly negative impact on the health and wellbeing of people who are unemployed. The Commission recognises the difficulty for people who are unemployed and unsuccessful in conscientious attempts to secure work. Consideration has been given to the increasing variety and

<sup>111</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 119 – 120.

<sup>112</sup> *Discrimination Act 1991* (ACT) s 2 and the Dictionary to the Act.

reliance on non-standard work arrangements, such as casual, short term, independent contracting or gig economy work. It was submitted that increased reliance on these arrangements increases the opportunities for discriminatory treatment of those workers,<sup>113</sup> and is exacerbated by the COVID-19 pandemic. The Commission also acknowledges that women are overrepresented in casual, temporary, shift or contract work, and insecure or precarious employment. Further, women are more likely to be reliant on government income support when compared to men, which can adversely affect women's employment prospects in some circumstances.

Whilst acknowledging that it does not remove the potential for complaints to be made, the Commission notes that employers' concerns about increased complaints by unsuccessful applicants for jobs (if this attribute were to become a protected attribute) will at least in part be mitigated by the inclusion of appropriate exceptions for legitimate employment qualifications or requirements. The issue of exceptions is considered in sections 4.5 and 4.6 below.

### **Recommendation 23**

A new protected attribute of employment status should be included in the Act.

### **Recommendation 24**

Employment status should be defined to include:

- being unemployed;
- receiving a pension or another social security benefit;
- receiving compensation;
- being employed on a part-time, casual or temporary basis; and
- undertaking shift or contract work.

## **4.2.9 Family status**

### **4.2.9.1 Separation into two distinct grounds**

As noted in section 4.2.6 above, the Act currently combines family responsibility and family status into the one ground of discrimination. The Commission has recommended separating these into two distinct grounds: family status and carer responsibility.

The protected attribute of family status should continue to cover the matters currently covered by sections 4(1)(b) and (c) of the Act:

- the status of being a particular relative; or
- the status of being a relative of a particular person.

<sup>113</sup> In Australia, roughly 40% of all employment is 'non-standard', meaning it could be classified as casual, short term, dependent contracting or 'gig' economy work: Submission from UnionsWA, 29 October 2021, 6.

### **Recommendation 25**

The protected attribute of family status should be defined to mean:

- the status of being a particular relative; or
- the status of being a relative of a particular person.

#### **4.2.10 Fines Enforcement Registrar's website**

The Act currently protects a person from discrimination on the basis of the publication of relevant details on the Fines Enforcement Registrar's website. No questions were raised in, or responses submitted to, the Discussion Paper in relation to this ground, which the Commission notes is a more recent amendment to the Act and is comprehensive and clear. Accordingly, no recommendations are made for its amendment.

#### **4.2.11 Frailty**

In the Discussion Paper, the Commission also asked whether frailty should be specifically included within the definition of impairment or added as a protected attribute. Frailty is not specifically protected in any of the anti-discrimination laws of the other States or Territories or the Commonwealth, although in some instances it would fall within provisions that deal with impairment.

The meaning of frailty was considered in a decision of the Full Court of the Supreme Court of Victoria as the trait of being 'frail and without much physical or mental agility'.<sup>114</sup> However, that decision did not seek to define the condition and was made over 60 years ago.

Frailty, as defined by the Royal Australian College of General Practitioners (RACGP), is a syndrome of physiological decline that occurs in later life and is associated with vulnerability to adverse health outcomes.<sup>115</sup> Relevantly, the RACGP notes that, while older age is associated with increased frailty, old age alone is not definitive and frailty is not an inevitable consequence of ageing.<sup>116</sup>

Frailty is an attribute that may be used as a discriminator by which to deny someone their rights to things such as freedom of movement and education. However, because of its association with other protected attributes such as age and disability, the Commission does not consider it necessary to either specifically include frailty within the definition of disability, or to add it as an additional protected attribute.

### **Recommendation 26**

Frailty should not be specifically included in the Act as a protected attribute.

<sup>114</sup> *Quinn v Hill* [1957] VR 439, 447.

<sup>115</sup> The Royal Australian College of General Practitioners, 'Frailty' (Web Page) <https://www.racgp.org.au/clinical-resources/clinical-guidelines/key-racgp-guidelines/view-all-racgp-guidelines/silver-book/part-a/frailty#ref-num-1>; Zoe Wryko, 'Frailty at the front door' (2015) 15(4) *Clinical Medicine* 377, 377.

<sup>116</sup> *Ibid.*

## 4.2.12 Gender identity

### 4.2.12.1 Experiences of discrimination based on gender identity

Currently the Act protects a gender reassigned person from discrimination on the grounds of their gender history. A gender reassigned person is someone who has been issued with a recognition certificate under the *Gender Reassignment Act 2000* (WA) or an equivalent certificate under similar legislation in another jurisdiction. Under the current provisions of the Act, the person's gender history is limited to their identification as 'a member of the opposite sex by living, or seeking to live, as a member of the opposite sex'.<sup>117</sup>

In the Discussion Paper, the Commission asked whether the protections in the Act should be expanded beyond its current protection of gender reassigned persons on the ground of gender history, and, if so, whether there should be any exceptions.<sup>118</sup>

As discussed further in the context of the attributes of sex and sex characteristics below, it is important to note that although people often use the terms sex and gender interchangeably, sex and gender identity are separate concepts. A person's sex is typically assigned at birth based on biological sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns). Broadly speaking, the term gender identity has been used to refer to 'a person's deeply felt sense of being a man, a woman, both, in between, neither, or something other'.<sup>119</sup> A person's designated sex at birth may or may not correspond with their gender identity.

Many stakeholder submissions highlighted the prevalence of discrimination based on gender identity (as distinct from gender history as defined in the Act at present), noting that such discrimination can result in difficulty securing employment and accessing healthcare, as well as social isolation.

Moreover, one stakeholder emphasised that, as people within the LGBTIQ+ community are at an increased risk of exposure to institutionalised and interpersonal discrimination and marginalisation, their vulnerability to mental illness and psychological distress is increased.<sup>120</sup> Relevantly, in respect of gender identities within the LGBTIQ+ community, various stakeholders pointed to concerning statistics in relation to people who identify as trans<sup>121</sup> and non-binary, including:

- The *Trans Pathways Report* found that 74.6% of young trans people in the study had been diagnosed with depression and 72.2% had been diagnosed with an anxiety disorder.<sup>122</sup>
- The *Writing Themselves In 4 Report* found that 65.8% of non-binary young people who participated in the study felt unsafe or uncomfortable at their educational institution and 52.8% of non-binary young people had experienced verbal, physical or sexual harassment based on gender identity, with 13.2% of non-binary participants having attempted suicide in the previous 12 months.<sup>123</sup>

<sup>117</sup> *Equal Opportunity Act 1984* (WA) s 35AA.

<sup>118</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 107 – 109.

<sup>119</sup> Law Reform Commission of Western Australia, *Project 108: Review of Western Australian Legislation in Relation to the Registration or Change of a Person's Sex and/or Gender and Status Relating to Sex Characteristics* (2018) 12.

<sup>120</sup> Submission from The Royal Australian & New Zealand College of Psychiatrists, 27 October 2021, 1.

<sup>121</sup> Penelope Strauss et al, *Trans Pathways: the mental health experiences and care pathways of trans young people. Summary of results* (Telethon Kids Institute, Perth, 2017) 9, explained their use of trans as follows: 'We use the word trans to be open to people who describe themselves as transgender or transsexual or as having a transgender or transsexual experience or history. Trans people generally experience or identify their gender as not matching their sex assigned at birth. This includes people who identify as transgender, non-binary, agender, genderqueer and more.' The Commission has referred to 'trans, gender diverse and non-binary.'

<sup>122</sup> *Ibid.*

<sup>123</sup> Adam Hill et al, *Writing Themselves in 4: The Health and Wellbeing of LGBTQ+ Young People in Australia*, (Australian Research Centre in Sex, Health and Society, 2021).

- The submission from WACOSS noted that trans people between the ages 14 and 25 years of age are 15 times more likely to attempt suicide, and trans and gender-diverse people aged 16 years of age and over are nearly four times more likely to have experienced sexual violence or coercion.<sup>124</sup>

The submission from the Commissioner for Children and Young People WA referred to the *Speaking Out Survey 2021*, in which thousands of children and young people from all regions of Western Australia shared their experiences and views on safety, mental health, engagement in education, connection to community and how they access sources of support.<sup>125</sup> The submission highlighted the following comment, made by a student in the survey, as illustrative of the experience some children and young people have of gender-related discrimination:

#### ***Speaking Out Survey 2021 – Student comment***

*We live in a growing world and yet society only accepts ... identifying as your birth gender... [it] is the cause for much anxiety, stress and mental health disorders. But it goes beyond mental health. It extends to not feeling safe and respected in school and at home. To not feeling like you can explore who you are for fear of being told off and for being wrong. There is nothing wrong with being who you want to be, but currently many young people don't feel this way as the general message given from schools and society is pretty hostile*

A number of stakeholders therefore consider it critical that protections under the Act be reformed to provide protection from discrimination for all gender identities.

Other submissions expressed concern that protecting people with gender identities other than male and female birth gender, would detract from the protections given to the protected attribute of sex. Concern was expressed that anti-discrimination laws that currently protect biological females, would be eroded or destroyed by recognising what some stakeholders regard as the social construct of gender identity.

#### **4.2.12.2 Removing the requirement of a gender recognition certificate**

A recognition certificate issued under the *Gender Reassignment Act 2000* (WA) is a certificate that 'identifies a person who has undergone a reassignment procedure as being of the sex to which the person has been reassigned.'<sup>126</sup> A reassignment procedure 'means a medical or surgical procedure (or a combination of such procedures) to alter the genitals and other gender characteristics of a person, identified by a birth certificate as male or female, so that the person will be identified as a person of the opposite sex and includes, in relation to a child, any such procedure (or combination of procedures) to correct or eliminate ambiguities in the child's gender characteristics.'<sup>127</sup>

Under the *Gender Reassignment Act 2000* (WA), recognition certificates are only issued to adults who have medically or surgically transitioned from the male sex as identified on their birth certificate to female or vice versa. The effect of this requirement is that people who are trans and are unable to, or choose not to, undertake such medical or surgical treatments, cannot attain a recognition certificate, meaning that they are not protected against discrimination under the Act. Similarly, a person who does not identify as male or female cannot obtain a certificate. This absence of protection is reinforced by

<sup>124</sup> Submission from WACOSS, 19 October 2021, 2.

<sup>125</sup> Submission from the Commissioner for Children and Young People WA, 2 November 2021, 2. See also <https://www.ccyp.wa.gov.au/our-work/projects/speaking-out-survey/>.

<sup>126</sup> *Gender Reassignment Act 2000* (WA) s 3.

<sup>127</sup> Ibid.



the Act's definition of gender history. It further limits the protected attribute to discrimination on gender history grounds. The definition in the Act of gender history requires the complainant to be living or seeking to live 'as a member of the opposite sex' to which the person was at birth.<sup>128</sup> Persons who identify their gender in any other way are not protected by this ground.

Western Australia is currently the only jurisdiction in Australia that limits protection in this way. The Commission received many submissions commenting on the inappropriateness of this requirement and the significant adverse impacts for members of the LGBTIQA+ community that result from the current limitations of the Act. The Commission also received a number of submissions relating to the role and functions of the Gender Reassignment Board. The Commission notes that issues pertaining to the Gender Reassignment Board are beyond the scope of the Terms of Reference but notes the relevance of the Commission's Report 108 in this regard.<sup>129</sup>

The other protected attributes in the Act beyond gender history provide minimal protection for gender identity. The protected attribute of sexual orientation does not provide protection for gender identity as it relates to a person's sexual attraction or lack of it.<sup>130</sup>

The Act does not define sex. Traditionally, a person's sex is considered to be determined at birth, depending on anatomy and chromosomes. The Commission is of the view that equating gender and sex would conflate two distinct attributes. A person's gender identity may or may not reflect their biological sex. The Commission does not support an approach which deals with these two distinct attributes as one.

The Commission agrees with the stakeholder submissions that Western Australia currently has the most limited protection for gender identity discrimination in Australia, and that gender identification diversity is not accurately reflected in the Act, meaning that not all gender-related identities are currently protected.

As noted above, the Act as currently drafted only provides protection on the ground of gender history if a person has obtained a recognition certificate. The Commission notes that a number of stakeholder submissions described the process for obtaining a gender recognition certificate as 'difficult', 'humiliating', 'expensive', 'onerous', and 'confusing.' The Commission accepts that trans people (and anyone whose gender history is a source of discrimination) who cannot, or choose not to, obtain medical or surgical treatment to affirm their gender are no less deserving of protection from discrimination on the basis of their gender history than those who can or do obtain a recognition certificate.

The Commission has come to this view after considering submissions that express concern about the ease with which people can change their gender identity, as opposed to their sex and can abuse the ability to do so in order to gain access to women and children's spaces. One submission reasoned that the protection of gender identity infringes women's sex based rights in many areas.<sup>131</sup> These areas were said to include lesbian social groups, women's domestic violence refugees and women's sporting clubs and teams.

The Commission acknowledges that there can be conflict between the exercise of different rights. The assertion that some people may adopt a gender identity for ulterior or even criminal purposes is not a reason to deny protection to people who have and are suffering from discrimination because they

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<sup>128</sup> *Equal Opportunity Act 1984* (WA) s 35AA.

<sup>129</sup> Law Reform Commission of Western Australia, *Project 108: Review of Western Australian Legislation in Relation to the Registration or Change of a Person's Sex and/or Gender and Status Relating to Sex Characteristics* (2018).

<sup>130</sup> *Equal Opportunity Act 1984* (WA), Part IIB.

<sup>131</sup> Submission from Feminist Legal Clinic, 29 October 2021, 1.



genuinely have a different gender identity to the sex which was assigned to them at birth. It is not possible to read the reports cited earlier in this section and not acknowledge the discrimination faced by people with different gender identities and the harm caused by such discrimination. The challenge for the legislature is to balance the protections for people with different protected attributes. The Commission is of the view that this is best done by providing targeted exceptions to the statutory protections.

In addition, the Commission notes Principle 3 of the *Yogyakarta Principles*:<sup>132</sup>

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse ... gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined ... gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their ... gender identity.

Moreover, the Commission notes that the *Yogyakarta Principles Plus 10* emphasise the right of everyone to State protection from violence, discrimination and other harm (whether by government officials or by any individual group), regardless of their gender identity.<sup>133</sup>

Accordingly, the Commission recommends that the requirement for a gender recognition certificate be removed from the Act, along with the terminology of gender reassigned person. As noted above, other issues surrounding the Gender Reassignment Board generally are outside the scope of this review.

#### **4.2.12.3 Replacing gender history with gender identity**

The Act currently prohibits discrimination on the ground of gender history. It provides that a person has a gender history if they identify as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex.<sup>134</sup> This definition fails to protect people with gender identities that do not fit within the purported gender binary, for example those who identify as gender-diverse or non-binary.

It was submitted that the Act should instead use the term gender identity and adopt the definition in the Victorian Act, which provides that gender identity:

means a person's gender-related identity, which may or may not correspond with their designated sex at birth, and includes the personal sense of the body (whether this involves medical intervention or not) and other expressions of gender, including dress, speech, mannerisms, names and personal references.<sup>135</sup>

This definition would protect not only people who identify as trans, but also those identifying as gender-diverse or non-binary, thereby recognising the gender diversity of the broader LGBTIQA+ community.

As referred to above, the Commission also received submissions opposing the inclusion of gender identity as a protected ground. Some submissions raised the concern that if the Act were to recognise the inherent fluidity of gender identity, the law would become increasingly unclear. These submissions noted that fixed ideas of sex and gender give clarity to equal opportunity law and enable institutions

<sup>132</sup> International Commission of Jurists, 'Yogyakarta Principles: Principles on the application of international human rights laws in relation to sexual orientation and gender identity', March 2007.

<sup>133</sup> International Commission of Jurists, 'The Yogyakarta Principles Plus 10: Additional principles and State obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles', November 2017.

<sup>134</sup> *Equal Opportunity Act 1984* (WA) s 35AA(1).

<sup>135</sup> *Equal Opportunity Act 2010* (Vic) s 4.

and individuals to understand their rights and obligations. However, others argued that such concerns are misplaced, as the diversity of gender is a ‘medical, social, and psychological reality’.<sup>136</sup>

With the reformed objects of the Act in mind, the Commission recommends that the expression gender history be replaced with a protected attribute of gender identity. The term gender identity should be defined in line with the Victorian Act, and expanded to expressly include trans, gender-diverse or non-binary gender identities.

Further, insofar as it is necessary to include references to other genders, the Act’s use of the term opposite sex should be replaced with ‘another gender’, in order to recognise diversity of gender.

### ***Recommendation 27***

The Act should:

- use the term gender identity rather than gender history;
- not include a requirement that the complainant hold a gender recognition certificate under the Gender Reassignment Act 2000 (WA); and
- not use the terminology of gender reassigned person.

### ***Recommendation 28***

Gender identity should be defined to mean a person’s gender-related identity, which may or may not correspond with their designated sex at birth. It should include the personal sense of the body (whether this involves medical intervention or not) and other expressions of gender, including dress, speech, mannerisms, names and personal preferences.

### ***Recommendation 29***

The Act should provide that gender identity includes trans, gender-diverse and non-binary gender identities.

### ***Recommendation 30***

If it is necessary to include references to another gender or sex in the Act, the term another gender or another sex should be used rather than opposite gender or opposite sex.

<sup>136</sup> Submission from Aidan Ricciardo, 20 October 2021, 3.

## 4.2.13 Immigration status

### 4.2.13.1 Overview of discrimination based on immigration status

Currently, the Act does not expressly provide for protection on the basis of immigration status. In the Discussion Paper, the Commission asked whether the Act should be expanded to include immigration status as a protected attribute.<sup>137</sup>

The Commission received various submissions noting that discrimination on the ground of immigration status was common and should be protected under the Act. Some submissions stated that this would align the Act with the RDA, which protects workers and future employees from being discriminated against because they are or have been immigrants.

One stakeholder highlighted that immigrant communities, especially individuals on temporary visas, are in need of protection from discrimination. It was submitted that they are highly vulnerable and experience significant exploitation and disadvantage in a number of areas of public life as a result of their visa status.<sup>138</sup> The following example was provided (which has been adapted for greater anonymity):

#### **Case example**

*An individual was on a temporary visa. The individual was successful in an application for a job. However, the employer decided to revoke their offer of employment, as they wanted to employ a candidate with permanent residency status. The individual had already started working for the employer. It would have been difficult for the individual to argue that the employer discriminated against them based on their race, as both the individual and the other candidate were of the same race.*

It was noted that there is often an intersection between discrimination on the basis of immigration status, race, impairment, family and domestic violence, and family and caring responsibilities. A recent analysis of data on migrants and discrimination in the UK<sup>139</sup> found that migrants frequently experience discrimination for multiple reasons which can be difficult to disentangle; their ethnicity, skin colour or religion, as well as having 'foreign qualifications or a foreign accent'.<sup>140</sup>

Many stakeholders were in favour of including immigration status in the Act. However, the Commission received varying suggestions as to how immigration status should be protected under the Act. While some stakeholders suggested that it be included as a new protected attribute, others suggested that it should be expressly included in the ground of race by amending the definition of race accordingly. These suggestions are considered below.

### 4.2.13.2 Inclusion of immigration status in the definition of race

Several stakeholders referred to the current definition of race under the Act and submitted that it was either, (1) restrictive in that it does not extend to those who are immigrants, or (2) unclear as to whether immigrants fall within its scope.

<sup>137</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 126 – 127.

<sup>138</sup> Submission from Circle Green Community Legal, 30 November 2021, 36.

<sup>139</sup> Mariña Fernández-Reino, 'Migrants and discrimination in the UK' (Briefing, The Migration Observatory, Centre on Migration, Policy and Society, University of Oxford, 20 January 2020).

<sup>140</sup> Ibid 4.

The Northern Territory and Tasmanian Acts both include immigration status, or the status of being a migrant, in their definitions of race.<sup>141</sup> It was submitted that, given that the current definition of race in section 4 of the Act includes national origin or nationality, these categories are likely to overlap with the category of immigration status. As such, it was submitted that it is more appropriate to include immigration status within the definition of race in the Act, rather than as a separate ground.

#### **4.2.13.3 Inclusion of a separate ground of ‘immigration status’**

Other submissions considered that immigration status should be included as a new protected attribute. This is the approach taken in the ACT Act.<sup>142</sup> It was submitted that including immigration status as a separate ground is more appropriate than including it as part of race, as immigration status and race are quite different categories (for example, a person could be a member of a majority racial group whilst being a migrant).

Submissions emphasised that those migrants who have sought asylum or who are on protection visas have often experienced significant trauma and sometimes torture, such that the threat of returning to their home country is significantly distressing and is a powerful and coercive tool. This exploitation can take the form of underpayment, unpaid overtime, unreasonable additional hours, cash-back schemes, and working in unsafe workplaces. Stakeholders highlighted that this form of discrimination is often distinct from discrimination on the ground of race, as it is the uncertainty of residency that is used to pressure, coerce or force individuals into accepting unlawful conditions. It was noted by stakeholders that existing enforcement mechanisms under the *Migration Act 1958* (Cth) and *Fair Work Act 2009* (Cth) (FW Act) are often burdensome and intimidating for people who are subjected to threats of return to their home country if they defy their employer.

In light of the above submissions, the Commission considers that extending the protection of the Act by adding a new ground of immigration status will better recognise the distinct nature of discrimination on the basis of immigration status and achieve the proposed objects of the Act. The Commission refers to the issue raised by stakeholders that any amendments to the Act in this regard must appropriately recognise that a person’s immigration status may impose restrictions on whether they can work, where they are able to work, the number of hours they can work and the employment conditions under which they may work. The Commission concurs and recommends that careful consideration be given to the new ground to ensure that it is compatible with the *Migration Act 1958* (Cth).

#### **Recommendation 31**

Provided careful consideration is given to compatibility with the *Migration Act 1958* (Cth), a new protected attribute of immigration status should be included in the Act.

<sup>141</sup> *Anti-Discrimination Act 1992* (NT) s 4 (definition of ‘race’); *Anti-Discrimination Act 1998* (Tas) s 3 (definition of ‘race’).

<sup>142</sup> *Discrimination Act 1991* (ACT) s 7(1)(i).

### **Recommendation 32**

Immigration status should be defined in similar terms to the way it is defined in the Discrimination Act 1991 (ACT). The Dictionary to that Act provides:

immigration status includes being an immigrant, a refugee or an asylum seeker, or holding any kind of visa under the *Migration Act 1958* (Cth).

#### **4.2.14 Industrial activity**

At present, the Act does not specifically protect any form of industrial, trade union or employment activity. By contrast, these types of activities are included in anti-discrimination statutes in the ACT, Tasmania, Queensland, Victoria and the Northern Territory. In the Discussion Paper, submissions were sought on whether these activities should be added as a protected attribute.<sup>143</sup>

The Commission received a number of submissions in favour of including these matters within the Act. One submission noted that, although both State and federal employment laws operate in Western Australia, there are still some gaps in protections against discrimination on the grounds of industrial, trade union or employment activity.<sup>144</sup> In this regard, one stakeholder expressed a long-standing view that trade union activity is insufficiently protected under the current industrial laws, submitting that the *Industrial Relations Act 1979* (WA) (IR Act) and the FW Act have failed to live up to the International Labour Organisation Conventions such as the Freedom of Association and Protection of the Right to Organise Convention (No. 87) and the Right to Organise and Collective Bargaining Convention (No. 98).<sup>145</sup>

Amendments to the IR Act have been passed to prohibit an employer from taking damaging action against an employee for reasons that include the employee making an employment-related inquiry or complaint to the employer or another person. When the amendments commence, a contravention of the prohibition will not be an offence, but rather a civil penalty provision.<sup>146</sup> Once an employee proves that the employer took damaging action against them, the burden of proof shifts to the employer to prove that the employee took the relevant action or proposed to do so.

The Commission received some submissions stating that even if protections against discrimination on industrial, trade union or employment activity are adequately covered by employment laws, there is still significant merit in including this as a ground in the Act. The Commission notes that stakeholder feedback included that employees frequently face and fear discrimination in respect of these activities in their employment, and that this fear is often exacerbated for vulnerable and disadvantaged employees. The Commission acknowledges that people can experience discrimination on multiple grounds and when this occurs, they are faced with having to make multiple claims across several different jurisdictions which can be very difficult given the barriers to accessing legal services. It was submitted that adding these grounds to the Act would simplify the legal framework and streamline the resolution process for people discriminated against on multiple grounds.

It was also submitted that under the FW Act, where a matter escalates to the Federal Court or the Federal Circuit Court, there can be extensive costs for lodging the application and there are strict formalities of the Court to be complied with. In comparison, there are no fees in the State

<sup>143</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 118 – 119.

<sup>144</sup> Submission from Circle Green Community Legal, 30 November 2021, 31.

<sup>145</sup> Submission from UnionsWA, 29 October 2021, 4-5.

<sup>146</sup> *Industrial Relations Legislation Amendment Act 2021* (WA) s 61, uncommenced.

Administrative Tribunal (SAT) for matters relating to the Act and it is a less formal process. Therefore, if this attribute were to be included in the Act, it would provide an avenue of recourse which is more accessible to all.

Further, while this attribute is often regarded as a matter of industrial law, it was submitted that this is also an issue of citizen rights which requires consideration in anti-discrimination and human rights law. The Commission has taken into account that discrimination on the basis of industrial activity may occur outside of the employment context and may not be protected by industrial laws. For example, a member of a trade union who is on strike may be denied goods and services in the community because they have taken industrial action.

In addition, it was submitted that the mere fact that these matters are addressed in industrial law should not pose a bar to their inclusion in anti-discrimination law, as is the case in several other jurisdictions. It was submitted that if this ground is included in the Act, it should apply to both pre-employment and post-employment contexts.

However, a majority of stakeholders who responded on this issue were not supportive of including industrial, trade union or employment activity as a protected attribute. Several stakeholders contended that these protections are already adequately covered in the IR Act and the FW Act. It was submitted that the IR Act and the FW Act contain very broad and significant protections against discrimination on the bases of engaging in industrial and trade union activity. As a result, various stakeholders were of the view that it is unnecessary to include this area of protection in the Act and doing so would only result in additional complexity. These stakeholders also stated that potential discrimination on this ground would ultimately be linked to the employment relationship and as such should be dealt with by industrial laws.

To the extent there are any perceived inadequacies in the IR Act and the FW Act, it was suggested that these inadequacies would best be addressed through amendments to the IR Act and the FW Act, rather than the inclusion of industrial, trade union or employment activities as a protected attribute in the Act.

The Commission acknowledges the coverage of industrial laws in this area, but on balance considers that industrial, trade union or employment activity should be included as a protected attribute in the Act. Discrimination on this basis should be extended to the areas of public life covered by the Act.

### **Recommendation 33**

A new protected attribute of industrial, trade union or employment activity should be included in the Act.

#### **4.2.15 Irrelevant criminal record**

In the Discussion Paper, the Commission asked whether irrelevant criminal record should be included as a protected attribute.<sup>147</sup> The Commission received a number of submissions in support of this extension to the Act.

These submissions emphasised the stigma associated with criminal offending and the potential for a person's irrelevant criminal record to hinder employment opportunities. They argued that if a person's

<sup>147</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 120 – 121.

criminal record does not impact on the inherent requirements of a role, and that person is the best candidate for the job in every other way, then the person should not be denied equal opportunity because of that criminal record.

Further, various stakeholders strongly agreed that an irrelevant criminal record can also act as a barrier to inclusion and accessing social opportunities, making it difficult for people with a criminal record to re-enter and integrate into the community. One submission asserted that a person's criminal record should not affect their access to education, accommodation, places and services, if the record is irrelevant for that purpose.<sup>148</sup>

#### **4.2.15.1 Disproportionate impact on Aboriginal and Torres Strait Islander peoples**

It was submitted that discrimination based on an irrelevant criminal record is likely to have a disproportionate impact due to the overrepresentation of Aboriginal and Torres Strait Islander peoples in the criminal justice system. One submission highlighted that, by jurisdiction in Australia, Western Australia had the highest rate of imprisonment of Indigenous adults (4,106 per 100,000).<sup>149</sup> It was submitted that this overrepresentation is due to systemic discrimination, including discriminatory laws and practices such as mandatory sentencing laws, lack of access to Aboriginal language interpreters, lack of culturally appropriate rehabilitation programs, lack of access to diversionary options and over-policing.

Further, it was submitted that Aboriginal and Torres Strait Islander peoples are more likely to be arrested by police instead of cautioned or diverted. It was also submitted that these factors mean that Aboriginal and Torres Strait Islander peoples are more likely to have contact with the criminal justice system, and therefore more likely to be impacted by discrimination on the basis of an irrelevant criminal record. One stakeholder noted that Aboriginal and Torres Strait Islander peoples who have had contact with the criminal justice system are more likely than their non-Aboriginal counterparts to be unemployed.<sup>150</sup> It was submitted that Aboriginal and Torres Strait Islander peoples are frequently discriminated against on the basis of their criminal records in employment situations, including where the particular conviction is not relevant to their duties or the requirements of the employment role.

#### **4.2.15.2 Existing avenues of protection**

Some stakeholders highlighted that there are already some avenues of protection against discrimination on the grounds of irrelevant criminal record such as those contained in the *Spent Convictions Act 1988* (WA) (SCA), the *Historical Homosexual Convictions Expungement Act 2018* (WA), the *Public Sector Management Act 1994* (WA) and the Western Australian Industrial Relations Commission's (WAIRC) unfair dismissal provisions. These are considered in turn below.

##### ***Spent Convictions Act 1988 (WA)***

In Western Australia, the SCA makes discrimination on the ground of a person's spent conviction unlawful in the area of employment.<sup>151</sup> Under the SCA, a conviction becomes spent after a prescribed period (which varies depending on the type of conviction and the person's criminal history), either by application to the Commissioner of Police (in the case of lesser offences) or by order of a judge in the District Court (for serious offences).<sup>152</sup>

<sup>148</sup> Submission from the EOC, 20 November 2020, 3.

<sup>149</sup> Submission from UnionsWA, 29 October 2021, 6-7.

<sup>150</sup> Ibid.

<sup>151</sup> *Spent Convictions Act 1988* (WA) Pt 3, Div 3.

<sup>152</sup> Ibid ss 6-8, 11.



It was submitted, however, that members of particularly vulnerable groups face major obstacles when seeking a spent conviction. Further, it was noted that there are many exceptions under the SCA, depending on the type of offence committed and the nature of the employment. In addition, convictions only become spent after an application is granted, not automatically after a period of time, like in some other States. Several stakeholders asserted that the prescribed period of 10 years, which applies in most cases, is a lengthy waiting period, meaning that people with convictions continue to have barriers to accessing social activities, employment and other ways of integrating with society, long after they may otherwise have been able to. One stakeholder provided the following example:<sup>153</sup>

#### **Case example**

*In 2018, a person was convicted of possession of a prohibited drug. They were sentenced to a fine of \$750, a relatively minor punishment which reflected the lesser nature of the charge. In 2021, they had made changes in their life and they were attempting to obtain employment. However, due to the drug-related conviction on their criminal record, their applications for jobs were repeatedly rejected. They are unable to apply for their conviction to be spent until 2028.*

The protection of the SCA regime only extends to spent convictions (due to age of conviction) and does not address the issue of irrelevant convictions or criminal proceedings that did not result in convictions. These limitations in the existing protection under the SCA were raised by some stakeholders in support of the need for a ground of irrelevant criminal record in the Act. However, other submissions suggested that this ground would be more appropriately addressed through a review of the SCA.

#### **Historical Homosexual Convictions Expungement Act 2018 (WA)**

Section 17 of the *Historical Homosexual Convictions Expungement Act 2018* (WA) extends the discrimination protection of the SCA to expunged homosexual convictions.<sup>154</sup> It does not provide further protection beyond this.

#### **Public Sector Management Act 1994 (WA)**

The *Public Sector Management Act 1994* (WA) allows the lodgement of a breach of standard where employment was not offered and the process of recruitment was unfair. This could apply to acts of discrimination on the basis of irrelevant criminal record (for example, if not all candidates for the position were required to produce a police clearance). It was submitted that this would be difficult to know or prove, and that the avenues for appeal are limited by virtue of the absence of an employer-employee relationship and the limits of the jurisdiction of the Public Service Arbitrator with respect to breach of standards matters.<sup>155</sup> Further, this avenue is limited to discrimination in relation to potential employment, and does not relate to other irrelevant criminal record discrimination (such as that occurring after a person is employed).

<sup>153</sup> Submission from ALSWA, 25 November 2021, 12.

<sup>154</sup> *Historical Homosexual Convictions Expungement Act 2018* (WA) s 17.

<sup>155</sup> Submission from CPSUCSA, 5 November 2021, 24.



## WAIRC's unfair dismissal provisions

It was noted that the WAIRC's unfair dismissal provisions have been used successfully in the past to challenge decisions made on the basis of irrelevant criminal record. One submission referred to the matter of *Thi Le Nguyen v Commissioner of Police*,<sup>156</sup> where the Public Service Appeal Board ordered that an employee be reinstated after they were dismissed following conviction of an indictable offence.<sup>157</sup> The reasons for this decision confirmed that each case will include consideration of the employee's particular circumstances and of issues specific to that case.<sup>158</sup> The Board expressed 'considerable reservation' in concluding the employee should be reinstated. Its decision was based on factors such as the employee's difficulty of finding alternative employment, as well as the financial and social consequences of dismissal.<sup>159</sup>

Despite some success using these provisions, it was submitted that this avenue of protection only applies to a criminal conviction arising after the person was employed and does not cover potential employment.

### 4.2.15.3 Introducing a new ground in relation to irrelevant criminal record

The Commission is of the view that the patchwork of existing protections outlined above do not deal with the range of ways in which discrimination on the basis of irrelevant criminal record may manifest. It is necessary, therefore, to consider whether additional protections should be afforded under the Act.

Many stakeholder submissions were in favour of including irrelevant criminal record as a new ground under the Act. Several stakeholders identified that introducing irrelevant criminal record as a protected attribute would bring Western Australia in line with the existing legislative protections in other parts of Australia. Moreover, it was submitted that as the practice of requiring criminal background checks for employees continues to grow, it would be reasonable for the Act to include protections against discrimination on the basis of an irrelevant criminal record. One stakeholder emphasised that such protection was important due to claims that employers presently have little regard to the relevancy of the criminal record to the role being advertised (including the ability to undertake the inherent requirements of the position).<sup>160</sup> It was also argued that the new ground should apply to both pre-employment and post-employment circumstances. One submission provided the following example:<sup>161</sup>

#### Case example

*B was a low-income earner with three children. After three months of B working for the employer, the employer told them that their employment was terminated as their police clearance was not up to the employer's standard. B had one traffic offence on their police clearance check, and their employment did not involve driving. B struggled to support their family and pay their bills after being dismissed.*

The Commission also received submissions which were against the inclusion of irrelevant criminal record as a protected attribute. These submissions considered that a person's criminal history is an important factor in determining their appropriateness for work. It was submitted that the nature of a

<sup>156</sup> *Thi Le Nguyen v Commissioner of Police* [1997] 77 WAIG 2815, 2819.

<sup>157</sup> Submission from CPSUCSA, 5 November 2021, 24.

<sup>158</sup> Ibid 23-26.

<sup>159</sup> *Thi Le Nguyen v Commissioner of Police* [1997] 77 WAIG 2815, 2819.

<sup>160</sup> Ibid.

<sup>161</sup> Submission from Circle Green Community Legal, 30 November 2021, 32.

person's criminal record may raise legitimate concerns about their reliability and trustworthiness, especially in relation to positions of trust and for certain offences reflecting on the honesty and integrity of an applicant. Although some of these submissions acknowledged that not having such a ground would make it more difficult for people with an irrelevant criminal record to re-enter the community, the view remained that it is a significant factor in demonstrating that persons' past conduct and is relevant to assessing whether persons are right for jobs. Some stakeholders were of the view that employers should have the right to assess whether an applicant's criminal history is relevant to their suitability for employment within their particular business.

The Commission acknowledges these submissions but is of the view that the concerns raised are outweighed by the benefit of including protections under the Act to ensure that proper regard is being had to the relevancy of a criminal record to a particular position, especially in light of the increase in recent years of employers conducting criminal background checks.<sup>162</sup> The Commission considers that protection from discrimination on the basis of irrelevant criminal record would assist in addressing structural and systemic discrimination, and moreover, promote substantive equality. Accordingly, the Commission recommends that a new attribute should be included in the Act to protect against discrimination on the basis of irrelevant criminal record.

#### 4.2.15.4 *Formulating the new ground*

In relation to the criminal record component, it was argued that this should not merely refer to matters of imprisonment, but also to records of arrests, police questioning where no charges were laid or where charges were withdrawn, or criminal proceedings where the person was found not guilty or where a conviction was annulled. This was argued on the basis that these matters may lead to discrimination in areas such as applying for a job.

There was some disagreement among stakeholders about whether the protected attribute should be criminal record or irrelevant criminal record. While it was generally agreed that people should be allowed to take a relevant criminal record into account in their decision-making, difficulties arise where people are discriminated against on the basis that they are imputed to have a criminal record. It was argued that people should be prevented from discriminating on the basis of an imputed criminal record, even if that record would be relevant if it were true. For this reason, other stakeholders suggested that the protection should be on the ground of criminal record rather than irrelevant criminal record. Whilst there is logic in this view, the Commission favours irrelevant criminal record to make it clear that the protected attribute is the existence of an irrelevant criminal record, not merely a criminal record.

The Commission favours creating a protected attribute of irrelevant criminal record and adopting the following proposed definition, based on the Tasmanian Act definition of irrelevant criminal record:

**Irrelevant criminal record**, in relation to a person, means a record relating to arrest, a criminal investigation or criminal proceedings where –

- further action was not taken in relation to the arrest, investigation or charge of the person;
- a charge has not been laid;
- the charge was dismissed;
- a charge has been laid but not completed;
- the prosecution was withdrawn;

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<sup>162</sup> Natalie Wells and Therese MacDermott, 'Taking a Fresh Look at Criminal Record Discrimination' (2021) 33 *Australian Journal of Labour Law* 270, 274.

- the person was discharged without a penalty, whether or not after conviction;
- the person was found not guilty;
- the person's conviction was quashed or set aside or is a spent conviction for the purposes of the *Spent Convictions Act 1988* (WA);
- the person was granted a pardon;
- the circumstances relating to the offence for which the person was convicted or given an infringement notice are not relevant to the situation in which the discrimination arises; or
- the person's charge or conviction was expunged under the *Historical Homosexual Convictions Expungement Act 2018* (WA)

and includes:

- the imputation of a record relating to arrest, criminal investigation or criminal proceedings of any sort; or
- a record relating to arrest, criminal investigation, criminal proceedings or criminal conviction of an associate of the person.

Under this approach, it would not be discriminatory for an employer to refuse to offer a job to a candidate with a criminal record that provides evidence that the person will not have the attributes that will enable them to fulfil the selection criteria and/or inherent requirements of the job. However, it would be discriminatory to refuse to offer a job to a candidate with a criminal record because of a perception about general propensity to commit offences.

#### **Recommendation 34**

A new protected attribute of irrelevant criminal record should be included in the Act.

#### **Recommendation 35**

The Act should provide that it is not discriminatory for an employer to refuse to offer employment to a candidate with a criminal record, if that criminal record provides evidence that the person does not have the attributes that will enable them to fulfil the selection criteria or inherent requirements of the job.

### Recommendation 36

The definition of irrelevant criminal record should be consistent with the following:

**Irrelevant criminal record**, in relation to a person, means a record relating to arrest, a criminal investigation or criminal proceedings where –

- further action was not taken in relation to the arrest, investigation or charge of the person;
- a charge has not been laid;
- the charge was dismissed;
- a charge has been laid but not completed;
- the prosecution was withdrawn;
- the person was discharged without a penalty, whether or not after conviction;
- the person was found not guilty;
- the person's conviction was quashed or set aside or is a spent conviction for the purposes of the *Spent Convictions Act 1988* (WA);
- the person was granted a pardon;
- the circumstances relating to the offence for which the person was convicted or given an infringement notice are not relevant to the situation in which the discrimination arises;
- the person's charge or conviction was expunged under the *Historical Homosexual Convictions Expungement Act 2018* (WA)

and includes

- the imputation of a record relating to arrest, criminal investigation or criminal proceedings of any sort; or
- a record relating to arrest, criminal investigation, criminal proceedings or criminal conviction of an associate of the person.

#### 4.2.16 Irrelevant medical record

In the Discussion Paper, the Commission asked whether irrelevant medical record should be included as a protected attribute.<sup>163</sup> The Tasmanian and Northern Territory Acts provide protection for this attribute. Particular issues were raised about the potential use of an individual's workers' compensation history to deny them employment. The Commission sought stakeholders' views on whether this should be specifically addressed in the Act.

Some stakeholder submissions expressed the view that there is no need to include irrelevant medical record in the Act given the overlap with the protected attribute of impairment. These stakeholders also suggested that concerns related to previous workers' compensation claims will be more appropriately dealt with by the draft Workers Compensation and Injury Management Bill 2021 (WA) which is yet to be enacted, but which was released for public consultation in August of 2021.

However, the majority of submissions suggested that irrelevant medical record should be included as a ground and should be extended to workers' compensation. In this regard, it was noted that while there may already be some protections that would potentially overlap with this protection, it has not always been clear whether individuals are protected against discrimination on this basis. It was therefore suggested that it be clarified in the Act.

<sup>163</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 121 – 122.

It was further submitted that protection against discrimination on the basis of irrelevant medical record is increasingly necessary as advances are made in medical diagnostics including, for example, the capacity to predict genetic predispositions to various illnesses. Irrelevant medical records may lead employers to impute an impairment to a person that does not yet exist or may never exist. By way of illustration, stakeholder feedback included a case example where a casual worker suffered a workplace accident, following which they made a workers' compensation claim. The worker recovered from the injury and was medically cleared to return to work, yet their employer remained concerned about the worker making a further workers' compensation claim in the future, and declined to roster the worker on for shifts.

Further to this example, it was submitted that people can be hesitant to make potentially valid workers' compensation claims because of a fear they would be forced to disclose the claim to future employers and risk being prejudiced in obtaining future employment. This is particularly relevant in the public sector, as applicants are required to respond to questions relating to health and previous workers' compensation claims. The inclusion of the attribute of irrelevant medical record may provide comfort to an applicant when applying for a job.

One stakeholder noted that while the existing protections in other jurisdictions refer to irrelevant medical record, it urged that protection should be on the ground of medical record where the issue of relevance is dealt with as part of the definition of that term.<sup>164</sup> Neither Tasmania nor the Northern Territory define the term irrelevant medical record.

The Commission has considered these views and recommends including irrelevant medical record as a protected attribute. It should be made clear that this includes workers' compensation history to remove any ambiguity or gaps in the law as it stands and to ensure that applicants feel confident in applying for jobs. The Commission is of the view that adding a ground of irrelevant medical record would extend protections under the Act to people who are vulnerable to unfavourable treatment, which would align with the proposed expanded objects of the Act.

#### **Recommendation 37**

A new protected attribute of irrelevant medical record should be included in the Act.

#### **Recommendation 38**

The definition of irrelevant medical record should specify that it includes a person's workers' compensation history.

### **4.2.17 Lawful sexual activity**

In the Discussion Paper, the Commission asked whether lawful sexual activity should be included as a protected attribute.<sup>165</sup> This ground is included in anti-discrimination legislation in Queensland, Tasmania and Victoria, although the scope of operation of those provisions differs in the different jurisdictions.<sup>166</sup> In Queensland, the attribute is generally limited to lawful sexual activity in the context of

<sup>164</sup> Submission from ADLEG, 30 November 2021, 23.

<sup>165</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 123 – 124.

<sup>166</sup> See *Anti-Discrimination Act 1991* (Qld) s 7(l); *Anti-Discrimination Act 1998* (Tas) s 16(d); *Equal Opportunity Act 2010* (Vic) s 6(g).

being a lawful sex worker, whilst the provisions are not restricted in their application to solely lawful sex workers in Tasmania and Victoria.

The Commission received a number of submissions in support of this proposal, in order to protect people who are engaged in sex work from discrimination. It was submitted that discrimination against workers in the industry is highly prevalent, and that such discrimination constitutes a significant barrier to sex workers being able to access services and report crimes which are committed against them. For example, the Western Australian Law and Sex Worker Health Study<sup>167</sup> found that while not all participants in the study reported having experienced direct discrimination due to their work, all avoided revealing their profession because of fear of discrimination. The most common source of discrimination was police officers, and accommodation was the most common setting.<sup>168</sup> It was suggested that any new ground should not only capture the job descriptor of sex worker, but should also include the industry in its entirety; and that it should include a person's status of engaging in lawful sexual activity, as well as the lawful sexual activity itself.

It was also pointed out that the jurisdictions which have included lawful sexual activity as a protected attribute have legislation establishing when sex work can lawfully be undertaken, while Western Australia has not. It was submitted that, as the status of sex work in Western Australia is generally unlawful, this creates a significant practical barrier to establishing the ground. The Commission agrees with this submission, given that under the *Prostitution Act 2000* (WA), the only form of prostitution that is not prohibited is non-solicited, between consenting adults, in private and where the prostitute does not have a relevant criminal conviction. Any new ground could only apply to discrimination on the ground of prostitution that is lawful under the *Prostitution Act 2000* (WA).

The Commission notes, however, that a protected attribute of lawful sexual activity would not be restricted to sex work. Rather, it would cover any form of lawful sexual act. In this regard, the Commission refers to a decision of the Federal Circuit Court in *Bunning v Centacare*,<sup>169</sup> where it was held that the prohibition of discrimination on the ground of sexual orientation in the SDA did not extend to polyamory, which was described as the pattern or practice of having multiple concurrent sexual relationships. Justice Vasta held that polyamory was best described as a sexual behaviour which may be a manifestation of a sexual orientation, rather than a sexual orientation or attraction in and of itself. Justice Vasta noted that he would also exclude sadomasochists from the scope of sexual orientation. If this construction of sexual orientation was to be adopted, people who participate in lawful sexual activities such as polyamory and consensual sadomasochism would not be covered by the existing protections. They would, however, be covered by a new ground of lawful sexual activity.

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<sup>167</sup> Linda Selvey et al, *Western Australian Law and Sex Worker Health (LASH) Study. A Summary Report to the Western Australian Department of Health*. (Perth: School of Public Health, Curtin University) 38.

<sup>168</sup> Submission from WA Council of Social Services, 19 October 2021, 2-3 quoting *The Western Australian Law and Sex Worker Health Study*.

<sup>169</sup> *Bunning v Centacare* [2015] FCCA 280; (2015) 293 FLR 37 [39]-[43] (Vasta J).

The decision of the Victorian Supreme Court in *Pearson v Martin*<sup>170</sup> provides a useful example of where the protected attribute of lawful sexual activity may operate. That case concerned an appeal from the Victorian Civil and Administrative Tribunal decision in *Martin v Padua College*.<sup>171</sup> The respondent to the appeal, Mr Martin was a teacher at a school. Shortly after the completion of the school year, he commenced a sexual relationship with a student who had just completed her year 12 studies. He was subsequently dismissed from his position at the school and argued that his lawful sexual activity was a substantial reason for his dismissal and therefore prohibited under section 6(g) of the Victorian Act. In upholding the appeal, the Court noted that whilst the reasons for his dismissal were multifaceted, it was open to the Tribunal to find that lawful sexual activity was a substantial reason for the termination.

The Commission also received several submissions which argued against including lawful sexual activity as a protected attribute, on the basis that such activity may conflict with religious views about sexual morals and ethics. The Commission acknowledges these concerns but is of the view that they are better dealt with as potential exceptions to the discrimination provision,<sup>172</sup> rather than as a reason for not protecting people from discrimination on the ground of lawful sexual activity. Further, the Commission notes that this protected attribute does not extend the range of sexual activity which is lawful, but rather serves to protect that which is already lawful.

Whilst the Commission acknowledges that this protected attribute may have more limited operation in Western Australia than in other jurisdictions where the scope of lawful sex work is broader, the Commission nonetheless considers that people have a right to engage in lawful sex work and lawful sexual activity in any consensual manner. Moreover, the Commission is of the view that prohibiting discrimination against someone for engaging in lawful sexual conduct would align the Act with human rights protections relating to sexual expression. Accordingly, the Commission recommends that the Act be amended to include a new protected attribute of lawful sexual activity.

In formulating the new ground, stakeholders suggested that an expansive definition similar to that contained in the Victorian Act should be used. Section 4 of the Victorian Act defines lawful sexual activity as: 'engaging in, not engaging in or refusing to engage in a lawful sexual activity'. The Commission recommends that the Act contain a similar definition. The Commission further notes that the question of what, if any, exceptions should be applied in relation to this protected attribute is addressed later in this Report.

### **Recommendation 39**

A new protected attribute of lawful sexual activity should be included in the Act.

### **Recommendation 40**

Lawful sexual activity should be defined to mean engaging in, not engaging in or refusing to engage in lawful sexual activity.

<sup>170</sup> *Pearson v Martin* [2015] VSC 696.

<sup>171</sup> *Martin v Padua College* [2014] VCAT 1652.

<sup>172</sup> See section 4.6.7 below.



#### 4.2.18 Marital status

Marital status is a protected attribute under the Act. No questions were raised in the Discussion Paper in relation to this ground. No recommendations are made for its amendment.

#### 4.2.19 Physical features

In the Discussion Paper, the Commission asked whether physical features should be added as a protected attribute.<sup>173</sup> At present, this attribute is not protected unless the attribute is considered to constitute an impairment.

In the May 2007 Report of the EOC's Review of the Act (2007 Review)<sup>174</sup>, it was recommended that it should be unlawful to discriminate on the basis of physical features which are irrelevant to the applicable circumstances. Various stakeholders agreed with this recommendation, suggesting that it should be added to the Act. It was noted that prejudice and discriminatory behaviour resulting from the stigma attaching to people who are considered to be overweight or of smaller stature, or considered to have prominent facial or other physical characteristics, is no less harmful than discrimination for attributes already protected under the Act.

One submission raised the following case example of discrimination on the basis of physical features.

##### **Case example**

*An employee was a young worker in the retail industry. The worker gained about 5 kilograms in weight over a two-month period after experiencing a stressful life change. The employer made negative comments about the employee's appearance and told them that they would be rostered on for fewer shifts to give them more time to exercise. The employee felt humiliated by their employer's conduct and resigned their employment, leaving them unemployed at a vulnerable time in their life.*<sup>175</sup>

One stakeholder observed that the community expectation is not only that protections in respect of physical features should exist, but that they do already exist.<sup>176</sup>

Concerns were raised about the difficulty of defining the ground's scope. It was seen to be essential that the Act include an extensive and exhaustive definition of the physical features that fall within the scope of the ground, to provide certainty as to which physical attributes are protected.

Some submissions provided support for inclusion of this ground only if it was limited to features which are immutable or innate. Therefore, hairstyles, tattoos, piercings and other body modifications would not be included, but height, weight, natural hair colour, hirsutism, alopecia, scarring and birthmarks would.

It was submitted that if tattoos were included within the definition of physical features, it may pose concerns with regard to the *Criminal Law (Unlawful Consorting and Prohibited Insignia) Act 2021* (WA), which makes it an offence to display insignia of an identified crime organisation, including tattoos, when in public.

<sup>173</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 117 – 118.

<sup>174</sup> Equal Opportunity Commission (WA), *Review of the Equal Opportunity Act 1984* (Report, May 2007).

<sup>175</sup> Submission from Circle Green Community Legal, 30 November 2021, 29.

<sup>176</sup> Submission from John Curtin Law Clinic, 28 October 2021, 7.



The Commission also received some submissions opposing the inclusion of the ground entirely. One stakeholder highlighted that it may become difficult for an employer to ensure personal presentation standards align with the business, to engender client confidence in that business.<sup>177</sup>

#### **4.2.19.1 Interaction with other protected attributes**

Various submissions highlighted that physical features could significantly overlap with other protected attributes, such as race, gender, impairment, pregnancy, ethnicity and religion. For example, it was submitted that features such as facial hair, the styling, colour and location of hair, and tattoos, provided that they are a characteristic of a race or religion, are already protected under those respective grounds, and therefore do not need separate protection.

The Commission acknowledges that there may be a degree of overlap between protected attributes. For example, alopecia may be considered a physical feature, but in some circumstances also may be considered a disability. It is the Commission's view that such overlap is inevitable. Whilst effort should be made not to duplicate protected attributes, sometimes that duplication is inevitable, or necessary to ensure that the Act provides broad coverage for protected attributes.

Another stakeholder submitted that it could be difficult to provide proof of the connection between the physical feature and the existing protected attributes. It was submitted that it would be more straightforward for the Act to be amended to directly protect individuals from discrimination based on these physical features. It was proposed that if a new ground of physical features did not extend to culturally relevant attributes connected to ethnicity, such as hairstyle and tattoos, the definition of race should be amended to expressly include these attributes for the avoidance of any doubt.<sup>178</sup>

The Victorian Act protects physical features and defines that term to mean a person's height, weight, size or other bodily characteristics.

The Commission notes that there is some academic commentary which advocates against the inclusion of physical features as a protected attribute. By way of example, discrimination law academics, Alice Taylor and Joshua Taylor have expressed the view that:

...while there are understandable reasons to prohibit discrimination on the basis of a range of physical features including weight and facial difference, the 'catch-all' category of physical features reflects a failure of the legislature and the courts to engage in the underlying reasons that discrimination occurs, why discrimination is wrongful and thus why discrimination should be unlawful. ... [T]he case law demonstrates a tension between two justifications for prohibition: one based upon immutability and the other based upon freedom of choice. ... [A] better approach is for a broader and intersectional interpretation of already existing grounds to understand discrimination. Such an approach understands how discrimination about someone's physical appearance or particular choices about their appearance is often tied to negative stereotypes, stigma and social subordination related to other aspects of their identity including race, gender, religion, class, disability and age.<sup>179</sup>

Taylor and Taylor note that although the Victorian Act has protected physical features since 1995, in 1999, the New South Wales Law Reform Commission recommended against including physical features as a protected attribute.<sup>180</sup> It reasoned as follows:

The question for the Commission, however, is whether appearance should be a ground of prohibited discrimination, independently of existing grounds. Where appearance is a matter of choice, this proposition is difficult to maintain. Appearance by choice may reflect beliefs or

<sup>177</sup> Submission from Chamber of Commerce and Industry WA, 29 October 2021, 7.

<sup>178</sup> Submission from John Curtin Law Clinic, 28 October 2021, 8.

<sup>179</sup> Alice Taylor and Joshua Taylor, 'The place of tattoos, beards and hairstyles in discrimination law' (2020) 26 *Australian Journal of Human Rights* 468, 469.

<sup>180</sup> Ibid 470-471.

opinions of the individual, but the [NSW Act] identifies those which are appropriate grounds and those which are not. There is no good basis for prohibiting discrimination in relation to conduct which reveals one facet of opinion or belief where the opinions or beliefs themselves are not otherwise protected.

There remains that aspect of appearance which may properly be described as an inherent characteristic or physical feature of the individual, namely a feature which cannot be changed by reasonable choice. In some cases, features will constitute a disability and will be covered by that ground. The question is whether those features which are not properly described as a “malfunction, malformation or disfigurement of a part of a person’s body” should be the subject of protection in their own right.

It may be argued that if an employer, for example, cannot discriminate on the grounds of disfigurement, it should not be entitled to discriminate on the basis of a less significant physical feature. Against that proposition, three points may be made: first, a disability is not necessarily presumed to be irrelevant, but rather is subject to a requirement of reasonable accommodation. Secondly, a disfigurement may be established with a reasonable level of certainty, whereas a physical feature is a much vaguer concept which cannot be identified with adequate precision. Finally, employment decisions are frequently made on the basis of largely intuitive choices between people with adequate levels of competence and skill. The choice may reflect an assessment of any one of a number of characteristics which the employer may consider relevant in particular circumstances. Sometimes decisions will reflect conscious or unconscious prejudice on prohibited grounds. Such a case may be hard to prove, but, on the other hand, the standard can be clearly articulated. The concept of “physical features” or “appearance” is not one which can be articulated with any level of precision. Accordingly, in the absence of clear evidence that there is a significant social problem reflected in this proposed ground, the Commission is not inclined to adopt it as a further prohibition.

Beyond these matters, the Commission is not satisfied that there is a significant issue of human rights and fundamental freedoms raised by these concerns. The right of an individual to explore his or her personality in particular ways must be accepted: but such matters are not necessarily irrelevant to decisions made by employers and others. Indeed, the choice of appearance is often intended to be noticed, not ignored. Consequently, the [NSW Act] should not be extended to cover this ground.<sup>181</sup>

The different views reflected by the Victorian Act’s protection of physical attributes and the New South Wales Law Reform Commission’s decision not to recommend the inclusion of such protection in the *Anti-Discrimination Act 1977* (NSW) (NSW Act), indicate how reasonable judgements about whether an attribute ought to be protected can result in different conclusions.

The Commission is of the view that it is common knowledge that discrimination on the basis of physical features occurs and can result in harm and stigmatisation. It agrees that this is no less harmful than the stigma attaching to people with attributes that are already protected under the Act.

While these matters favour including a protection for physical features in the Act, there are two issues that must be considered before a determination is made to include physical features as a protected attribute. The first is identifying whether every physical feature should be protected. The second is, if not every physical feature is to be protected, which physical features should be subject to statutory protection.

The Commission is of the view that not every physical feature should be protected. Physical features should be protected in two circumstances. First, where features cannot reasonably be changed and secondly, where features are a manifestation of another personal attribute that is protected by the Act.

The Act and the Commission’s recommendations for changes to the Act will, to a large extent, cover the second circumstance. For example, the recommended definition of disability will include total or partial loss of a part of the body; or the malfunction, malformation or disfigurement of a part of a person’s body. Protected attributes such as sex, race, religious conviction and age include protections

<sup>181</sup> Law Reform Commission of New South Wales *Project 92: Review of the Anti Discrimination Act 1977* (NSW) (November 1999).

for characteristics that pertain generally to persons of the complainant's sex, race, religious conviction and age.

That leaves the question of physical characteristics that cannot be reasonably changed. The Commission accepts that there are physical features that are used to discriminate against people that fall into the first category but outside the second category. These physical features include such things as height, shape, facial features, weight, natural hair colour, alopecia, hirsutism and birthmarks. The Commission is persuaded that these personal characteristics warrant protection under the Act even where they are not related to another protected attribute.

The Commission recommends adopting a definition of physical features that includes a person's height, shape, facial features, weight, natural hair colour, alopecia, hirsutism and birthmarks, but excludes piercings, tattoos and bodily modifications. Piercings, tattoos and body modifications may be protected if they are a characteristic that appertains generally to a person with a protected attribute (such as in the case of religious tattoos), but not if they are a voluntary choice of public appearance. In the rare case that a piercing, tattoo or bodily modification is involuntarily inflicted on a person it will be protected. An example of this latter protected attribute is a prisoner of war tattoo. In the Commission's view this will expand people's rights to be treated with respect and dignity and thereby further promote and protect the right to equality. It will leave unprotected physical attributes that are a person's choice as to how they wish to portray themselves.

The Commission acknowledges that in some circumstances, the determination of whether a particular piercing, tattoo or bodily modification is a voluntary choice of public appearance or not, or whether it falls within some other protected attribute will be an evidentiary issue.

#### ***Recommendation 41***

A new protected attribute of physical features should be included in the Act.

#### ***Recommendation 42***

Physical features should be defined to include a person's height, shape, facial features, weight, natural hair colour, alopecia, hirsutism and birthmarks but to exclude voluntarily obtained piercings, tattoos and bodily modifications.

## **4.2.20 Political conviction**

### ***4.2.20.1 Separation of political and religious conviction***

In the current Act the grounds of discrimination based on political conviction and religious conviction are grouped together. However, many stakeholders submitted that these grounds raise distinct issues and should be protected separately. The Commission concurs with these submissions and considers that the current religious or political conviction ground does not adequately reflect the distinctiveness of these concepts. The Commission therefore recommends that religious or political conviction should be separated into two grounds.

This section solely considers a ground of political conviction. The issue of religious conviction is addressed in section 4.2.24.

### **Recommendation 43**

The Act should separate the protected attributes of political and religious conviction.

#### **4.2.20.2 Defining political conviction**

Currently, there is no definition of political conviction in the Act. In the Discussion Paper, the Commission asked whether the concept should be defined in the Act.

Stakeholders submitted that, consistent with the approach taken in the ACT,<sup>182</sup> the Act should be amended to include a definition of political conviction. Stakeholders noted that the lack of a definition created a risk of inconsistency in the interpretation of the attribute and its application. They emphasised the need for clarity.

Stakeholders supported adopting the same approach to defining political conviction as the ACT Act. Section 2 of that Act defines political conviction as:

- (a) having a political conviction, belief, opinion, or affiliation; and
- (b) engaging in political activity; and
- (c) not having a political conviction, belief, opinion, or affiliation; and
- (d) not engaging in political activity.

The Commission agrees with these submissions. In its view, defining political conviction would clarify the law and would more adequately meet the Act's aims of protecting members of the community from discrimination on this basis.

The Commission recommends adopting a definition of political conviction that is similar to that contained in section 2 of the ACT Act. This would provide greater clarity and aid in the interpretation of these concepts. The Commission notes that having regard to Recommendation 14, the protection will extend to past, future and presumed political convictions. The Commission considers that this amendment would advance the protection of the human rights sought to be protected by the Act.

The Commission is of the view that the term political is a term of ordinary understanding that does not need to be given a special meaning by the Act. Not defining this term will allow for flexibility in meaning, rather than attributing a meaning fixed at a particular point in time.

### **Recommendation 44**

Political conviction should be defined as:

- having a political conviction, belief, opinion, or affiliation;
- engaging in political activity;
- not having a political conviction, belief, opinion, or affiliation; and
- not engaging in political activity.

Political should not be defined.

<sup>182</sup> *Discrimination Act 1991* (ACT) s 2.

#### **4.2.20.3 Political conviction of relatives and associates**

In the Discussion Paper, the Commission asked whether the protection for political conviction should be extended to relatives or associates of a person who is protected on the ground of political conviction.<sup>183</sup> Stakeholders generally supported the extension of this ground (and others) to relatives and associates, by including a catch-all provision similar to that contained in section 16(s) of the Tasmanian Act, which prevents discrimination on the ground of ‘association with a person who has, or is believed to have, any of [the protected] attributes’. This provision has been used by family members of well-known political figures who have experienced discrimination in employment because of political affiliations and activity of family members.

The Commission agrees that the protection should be extended to associates and relatives, but is of the view that this should be a general protection that applies to all protected attributes. Consequently, it is addressed in section 4.2.23 below.

#### **4.2.20.4 Coverage of the political conviction protection**

In the Discussion Paper, the Commission asked whether the protection for political conviction should be extended to all areas covered by the Act.<sup>184</sup> As discussed in section 4.2.23 below, the Commission recommends that all grounds be extended to apply to all areas of public life under the Act. This recommendation extends to the ground of political conviction.

### **4.2.21 Pregnancy**

#### **4.2.21.1 Broadening the protection to potential pregnancy**

Pregnancy is currently a protected attribute under the Act. It is unclear, however, whether the protection applies to potential pregnancy and child-bearing capacity. In the Discussion Paper, the Commission asked whether the situation should be clarified by making it clear that the protections do apply in these areas.<sup>185</sup>

Most stakeholders supported broadening the protections for pregnancy to include potential pregnancy. It was submitted that this could be achieved by inserting potential pregnancy as a ground under the Act, or by inserting a definition of pregnancy that includes potential pregnancy.

Section 10(1) of the Act currently prohibits discrimination on the grounds of a characteristic that appertains generally to or is imputed to persons who are pregnant. On one view, it is possible that these provisions include potential pregnancy on the basis that discrimination against someone who may become pregnant is discrimination against them on what is perceived as an undesirable characteristic that appertains generally to or is imputed to persons who are pregnant. Stakeholders, however, submitted that it is unclear whether potential pregnancy is covered by the current Act. It was submitted that explicitly including potential pregnancy in the Act would solidify the protection offered to women, without it needing to be read into the current definition or without having to argue discrimination under a separate protected attribute such as a characteristic of being female (and therefore within the protected attribute of sex).<sup>186</sup>

In support of the need for such expansion, several submissions emphasised that discrimination on the basis of potential pregnancy affects women in the workplace in various ways; from applying for jobs

<sup>183</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 111- 114.

<sup>184</sup> Ibid.

<sup>185</sup> Ibid 114 – 116.

<sup>186</sup> Submission from ADLEG, 30 November 2021, 26.

and promotions, to selection for redundancy and termination. One submission gave the following example of discrimination on the basis of potential pregnancy:<sup>187</sup>

#### **Case example**

*A person was employed with the same employer for over 7 years when the person went on parental leave for their first child. A few months after returning to work, the person was made redundant. The employer suggested one of the reasons they selected them for redundancy was because the employer presumed the person would want to have another child in the near future.*

It was also submitted that the ground should be broad enough to cover ongoing assisted reproductive treatment, such as IVF, to ensure that it is unlawful to discriminate against employees undergoing such treatment. It was submitted that undergoing IVF should not affect a person's employment position if they are trying to conceive. One submission gave the following example of such discrimination:<sup>188</sup>

#### **Case example**

*A person was employed for over three years in a male-dominated industry. The employee commenced IVF and told their employer about it, as they had a few upcoming medical appointments. About two weeks later, the employer made the employee redundant and readvertised their role with a slightly different job title. The employee believed the employer's conduct was because of their undergoing IVF and potential pregnancy.*

It was further submitted that broadening the protections to include potential pregnancy would align the Act with the SDA,<sup>189</sup> as well as other jurisdictions' legislation which expressly prohibits discrimination based on potential pregnancy, such as the ACT,<sup>190</sup> NSW<sup>191</sup> and South Australian Acts.<sup>192</sup> Including child-bearing capacity within the definition would also align with the Tasmanian and Northern Territory Acts.<sup>193</sup>

The ACT approach was seen to be particularly desirable. The Dictionary to the ACT Act defines pregnancy as 'including potential pregnancy', and section 5A of the ACT Act defines potential pregnancy as including the fact that the woman is or may be capable of bearing children, the fact that the woman has expressed a desire to become pregnant, and the fact that the woman is likely, or is perceived as being likely, to become pregnant.

The Commission is of the view that clarity is desirable and recommends that the Act be amended to explicitly provide that discrimination on the basis of potential pregnancy is unlawful in Western Australia. The Commission recommends that an approach similar to the ACT Act be adopted, as it

<sup>187</sup> Submission from Circle Green Community Legal, 30 November 2021, 26.

<sup>188</sup> Ibid.

<sup>189</sup> Sex Discrimination Act 1984 (Cth) s 7.

<sup>190</sup> Anti-Discrimination Act 1991 (ACT) ss 5A, 7, Dictionary.

<sup>191</sup> Anti-Discrimination Act 1997 (NSW) s 24(1B).

<sup>192</sup> Equal Opportunity Act 1984 (SA) s 85T(4).

<sup>193</sup> Anti-Discrimination Act 1998 (Tas) s 3; Anti-Discrimination Act 1992 (NT) ss 4, 19.

expressly protects against discrimination on the basis of potential pregnancy and, by its definition, incorporates the concept of child-bearing capacity.

#### **Recommendation 45**

Pregnancy should be defined to include potential pregnancy.

Potential pregnancy should be defined to include:

- the fact that the person is or may be capable of bearing children;
- the fact that the person has expressed a desire to become pregnant; and
- the fact that the person is likely, or is perceived as being likely, to become pregnant.

#### **4.2.21.2 Reasonableness requirement in both direct and indirect discrimination**

Under section 10(1)(b) of the current Act, to prove direct discrimination the complainant must prove that their less favourable treatment was not reasonable in the circumstances. Similarly, under section 10(2)(b), to prove indirect discrimination a complainant must prove that the relevant requirement or condition was not reasonable having regard to the circumstances of the case. In the Discussion Paper, the Commission asked whether these reasonableness requirements should be removed from the Act.<sup>194</sup>

A number of stakeholders submitted that the reasonableness requirement in section 10(1)(b) of the Act should be removed. It was submitted that incorporating a justification provision for direct discrimination on the ground of pregnancy had the capacity to give the public the impression that pregnancy discrimination is a less serious and more justifiable form of discrimination than discrimination on the basis of other protected attributes. It was submitted that there are no circumstances where it is appropriate or reasonable to treat a pregnant person less favourably than a person who is not pregnant. It was argued that removing the reasonableness requirement from section 10(1)(b) would make it clear that pregnancy discrimination is not less serious, and that duty-bearers cannot justify direct discrimination on the basis of pregnancy.

There was less concern with the reasonableness requirement in section 10(2)(b) since that provision relates to indirect discrimination. It was submitted that keeping this provision maintains consistency with the indirect discrimination provisions adopted in respect of other protected attributes.

The Commission is of the view that the reasonableness requirement for direct pregnancy discrimination should be removed so that it is consistent with the prohibition of direct discrimination in respect of other protected attributes. The Commission notes that this recommendation is dependent upon the inclusion of a health and safety exemption as recommended in section 4.5.6.2 below.

The Commission is of the view that the reasonableness requirement for indirect pregnancy discrimination will be addressed by the new definition of indirect discrimination. The same test will apply to indirect discrimination on the basis of pregnancy as applies to other protected attributes.

<sup>194</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 114 – 115.



#### **Recommendation 46**

The reasonableness requirement should no longer apply to direct discrimination on the basis of pregnancy as there will be a single definition of direct discrimination applying to all protected attributes.

#### **Recommendation 47**

The reasonableness requirement should apply to indirect discrimination on the basis of pregnancy as there will be a single definition of indirect discrimination applying to all protected attributes.

### **4.2.22 Race**

The Act currently includes race as a protected attribute. The current definition of race in the Act provides that:

**race** includes colour, descent, ethnic or national origin or nationality and the fact that a race may comprise 2 or more distinct races does not prevent it being a race for the purposes of this Act[.]

In the Discussion Paper, the Commission asked whether the protections for race discrimination should be broadened.<sup>195</sup>

Some stakeholders submitted that the current definition of race is interpreted liberally and construed consistently with the RDA and, therefore, does not require amendment. The RDA prohibits discrimination on the grounds of 'race, colour, descent or national or ethnic origin'.<sup>196</sup> However, other stakeholders considered the current definition to be outdated and ambiguous. The majority of submissions supported clarifying and broadening the protection by amending the Act to provide a more comprehensive definition.

Submissions called for the expansion of the definition of race to expressly protect the following characteristics:

- colour;
- nationality (current, past or proposed);
- descent;
- ethnic, ethno-religious or national origin;
- status of being, or having been, an immigrant;
- ancestry;
- Aboriginal and Torres Strait Islander peoples; and
- language.

<sup>195</sup> Ibid 116 – 117.

<sup>196</sup> *Race Discrimination Act 1975* (Cth) s 9(1).



Submissions recognised that broadening the existing definition in this way would provide certainty and ‘better reflect the complex nature of race and modern understandings of race as they apply to discrimination’.<sup>197</sup>

The ordinary dictionary meaning of race is ‘the differentiation of people according to genetically determined characteristics’.<sup>198</sup> That definition can be compared to the ordinary dictionary meaning of ethnicity, which is ‘relating to or peculiar to a human population or group, especially one with a common ancestry, language’.<sup>199</sup> Thus, the distinction between the terms is that race is usually associated with physical characteristics and ethnicity with cultural expression and association. However, there are many characteristics other than physical characteristics that are often associated with a person’s racial background. The Act, like some other Australian anti-discrimination laws including the RDA, has attempted to pick up some of these characteristics and to include them within the definition of race.

The Commission acknowledges that people are discriminated against on the grounds of race as well as characteristics that are associated with a person’s race or are imputed to a person of a particular race, such as language, colour and descent. These characteristics are immutable, or in the case of language, it is not reasonable to expect a person to abandon the use of a language associated with a person’s race, descent or ancestry.

The detrimental effect that racial discrimination can have on mental health and wellbeing is well known.<sup>200</sup> The Act should protect against discrimination faced by individuals from diverse racial and ethnic backgrounds. The question is whether the current definition of race is broad enough to pick up all the personal attributes often associated with a person’s race and that are used as a basis on which to discriminate.

The Commission accepts that the current legislative framework fails to prohibit discrimination based on particular racial characteristics that are part of, or are connected to a person’s racial heritage. These characteristics are prohibited in other jurisdictions. The Commission is of the view that these characteristics should be identified in the Act in order to put their protection beyond doubt. In the sections below the Commission considers each of the additional racial characteristics proposed by stakeholders for inclusion in the definition of race under the Act.

#### **4.2.22.1 Past or proposed nationality**

Currently, the Act merely protects nationality. By contrast, the South Australian Act includes reference to nationality that is current, past or proposed.<sup>201</sup> While the Commission is of the view that amending the Act to specify that it encompasses protection for current, past or proposed nationality would further the object of promoting equality for all, the Commission notes that this will be addressed by the scope of Recommendation 14 discussed above.

#### **4.2.22.2 Ethno-religious origin**

Various stakeholders suggested that the definition of race should include ethno-religious origin. It is argued that this will provide protection for individuals whose religion differs from their ethnic heritage, in circumstances where the protections based on religious conviction would not be relevant to them.

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<sup>197</sup> Submission from Circle Green, 30 November 2021, 29.

<sup>198</sup> *Macquarie Dictionary* (Macquarie Library).

<sup>199</sup> *Ibid.*

<sup>200</sup> See, for example, Submission from the Royal Australian and New Zealand College of Psychiatrists, 27 October 2021, 2.

<sup>201</sup> *Equal Opportunity Act 1984* (SA) s 5 (definition of race).

The Commission notes that academic commentators Thornton and Luker argue that the inclusion of ethno-religious origin in the definition of race provides an avenue for complaints where the discrimination is based on an ethnicised identity that is seen to be formed in relation to religion. Thornton and Luker note that the incorporation in certain jurisdictions of religious belief as a characteristic of ethnicity (alongside language, culture and history) in anti-discrimination legislation has demonstrated a significant shift in focus from 'metaphysical notions of theology and faith to subjective embodiment via ethnicisation and racialisation'.<sup>202</sup>

The NSW Act expanded its definition of race in 1994 to include ethno-religious origin. Parliamentary speakers asserted that this was done in order to clarify that ethno-religious groups, including Jewish, Muslim and Sikh persons, were protected against discrimination (and vilification) on that basis.<sup>203</sup> However, as the decision in *Khan v Commissioner, Department of Corrective Services* explained, the diverse ethnic and religious origins of large religious groups such as those, mean that the members of those religions do not necessarily share a ethno-religious origin.<sup>204</sup> The meaning of ethno-religious origin in the NSW Act's definition of race was considered again in 2011 in a matter before the Appeal Panel.<sup>205</sup> In *Jones and Harbour Radio Pty Limited v Trad [No 2]* (Jones), the Panel rejected the narrower interpretation of the term. However, the Panel still considered that it required commonality of religion 'and other characteristics that can fairly be seen as so closely akin to those of an ethnic group that it is reasonable to call the group one of ethno-religious origin, even if in current, ordinary language it would not fairly be said that the group has an ethnic origin'.<sup>206</sup>

In *Jones*, the Appeal Panel stressed that there was no dictionary or technical meaning of the term ethno-religious origin. It said that the term's meaning could change over time and that a range of factors could be considered to determine whether protection should be given. The meaning of ethno-religious origin arose because Trad had brought a complaint alleging vilification on the ground of race, including ethno-religious origin, in circumstances where under New South Wales law, vilification on the grounds of race (including ethno-religious origin) is unlawful, but vilification on the ground of religion is not unlawful. The same situation may arise in Western Australia if, contrary to the Commission's recommendations, vilification on the ground of religion is not prohibited in the Act but vilification on the ground of race is, and the definition of race includes ethno-religious origin.

The Tasmanian Act also includes ethno-religious origins in its definition of race.<sup>207</sup>

The Commission is of the view that the considerations for including this protected attribute are finely balanced, and that there remains a degree of uncertainty as to precisely who would fall within the meaning of the term ethno-religious. Notwithstanding those reservations, the Commission considers that on balance, including ethno-religious origin within the definition of race would appropriately ensure protection for those groups who may not be able to gain protection under the ethnic origin component of the race ground, but whom share a religion 'and other characteristics that can fairly be seen as so closely akin to those of an ethnic group that it is reasonable to call the group one of ethno-religious origin, even if in current, ordinary language it would not fairly be said that the group has an ethnic

<sup>202</sup> Margaret Thornton and Trish Luker, 'The Spectral Ground: Religious Belief Discrimination' (2009) 9 *Macquarie Law Journal* 71, 79.

<sup>203</sup> *Anti-Discrimination Act 1997* (NSW), s 4 (definition of 'race'); The Hon J P Hannaford, Second Reading Debate for the Anti-Discrimination (Amendment) Bill 1994, 11 May 1994: <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-5399>.

<sup>204</sup> *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 209, [18]-[20].

<sup>205</sup> *Jones and Harbour Radio Pty Limited v Trad (No 2)* [2011] NSWADTAP 62.

<sup>206</sup> *Ibid* [38].

<sup>207</sup> *Anti-Discrimination Act 1998* (Tas), s 3 (definition of 'race').

origin'.<sup>208</sup> Accordingly, the Commission recommends that the definition of race under the Act should be amended to include reference to ethno-religious origin.

#### **Recommendation 48**

The definition of race should include ethno-religious origin.

#### **4.2.22.3 Immigration status**

Many stakeholders were in favour of including immigration status in the Act. However, the Commission received varying suggestions as to how immigration status should be protected under the Act. While some stakeholders suggested that it be included as a new protected attribute, others suggested that it should be expressly included in the ground of race by amending the definition of race accordingly.

As discussed above (see section 4.2.13), it is the Commission's view that immigration status does not necessarily relate to race and, accordingly, that discrimination based on immigration status is better protected through the inclusion of a distinct new protected attribute.

#### **4.2.22.4 Ancestry**

The Northern Territory, Queensland, South Australian and Victorian Acts include the ancestry of a person in their definitions of race.<sup>209</sup> Ancestry refers to one's '[a]ncestral lineage or descent, now frequently in relation to ethnic or national origins'.<sup>210</sup>

On balance, submissions were in favour of broadening the definition of race to include ancestry within its scope. One stakeholder submitted that an extension of the term race to include ancestry would avoid some of the complexities around terms like race and colour.<sup>211</sup> The Commission considers that comprehensively defining race will ensure that people in need of protection are not prevented or deterred from challenging race based discrimination because their particular characteristics are not expressly included. The Commission's view is that amending the definition of race to include ancestry will promote substantive equality, as well as put it beyond doubt that ancestry is protected and, accordingly, the Commission makes this recommendation.

#### **Recommendation 49**

The definition of race should include ancestry.

#### **4.2.22.5 Aboriginal and Torres Strait Islander peoples**

Aboriginal and Torres Strait Islander peoples frequently experience discrimination in various aspects of their lives. The Aboriginal Legal Service of Western Australia (ALSWA) provided numerous

<sup>208</sup> *Jones and Harbour Radio Pty Limited v Trad (No 2)* [2011] NSWADTAP 62, [38].

<sup>209</sup> *Anti-Discrimination Act 1992* (NT) s 4 (definition of 'race'); *Anti-Discrimination Act 1991* (Qld) s 4 (definition of 'race'); *Equal Opportunity Act 1984* (SA) s 5 (definition of 'race'); *Equal Opportunity Act 2010* (Vic) s 4(1) (definition of 'race').

<sup>210</sup> *Oxford English Dictionary Online* (Oxford University Press).

<sup>211</sup> Submission from Royal Australian and New Zealand College of Psychiatrists, 27 October 2021, 2.

examples of complaints they have received in respect of discrimination against Aboriginal and Torres Strait Islander peoples, including:<sup>212</sup>

- Requiring Aboriginal and Torres Strait Islander people to pre-pay for petrol at petrol stations and not requiring the same of non-Aboriginal people;
- Checking the bags and conducting other security checks of Aboriginal and Torres Strait Islander people at retail stores and not conducting the same checks of non-Aboriginal people;
- Changing the ticketed seating arrangements of Aboriginal and Torres Strait Islander people to the back of a bus, in circumstances where non-Aboriginal people were all seated towards the front;
- Refusing access to Aboriginal and Torres Strait Islander people at pubs, hotels and stores;
- Racial comments and practices being carried out against Aboriginal and Torres Strait Islander people in the course of their employment; and
- Racial comments and racially motivated decisions made against Aboriginal and Torres Strait Islander people in organised sports.

It is likely that this type of behaviour would fall within the definition of racial discrimination, either on the basis that it is discrimination on the basis of colour or descent. It may also fall within the scope of ancestry, which the Commission has recommended including in the Act. However, some stakeholders argued that this is not sufficient, and that the status of Aboriginal and Torres Strait Islander peoples should be expressly included in the definition of race so as to put it beyond doubt.

The Commission acknowledges that Aboriginal and Torres Strait Islander peoples experience discrimination on a systemic and daily basis in a myriad of different contexts and should be protected by the Act. The Commission is satisfied that the Aboriginal and Torres Strait Islander peoples are protected by the current and proposed definition of race.

The Discussion Paper did not expressly raise the possibility of specifically including Aboriginal and Torres Strait Islander peoples within the definition of race in the Act. Consequently, while the Commission is strongly of the view that it should be impermissible to discriminate against Aboriginal and Torres Strait Islander peoples on the grounds of their race, and that it currently extends to that, if it was considered that they should be named in the definition of race, consultation with representative groups would need to occur to determine if this was appropriate. The Commission would be supportive of expanding the definition of race in that circumstance.

#### **4.2.22.6 Inclusion of language**

Various stakeholders recommended that the definition of race should specifically refer to language, to ensure that language based discrimination and barriers are eliminated. The express inclusion of accent was also proposed. It was submitted that broadening the definition in this manner would be consistent with Australia's international obligations, including under the United Nations Declaration on the Rights of Indigenous Peoples 2007 and the ICCPR. It would also facilitate the achievement of the goals of the WA Charter of Multiculturalism,<sup>213</sup> which directly references people who are of different linguistic backgrounds being able to live in an inclusive society.

However, it was also submitted that employers should be able to ensure that their employees have sufficient language skills to perform their role, particularly where employees need to be able to

<sup>212</sup> Submission from ALSWA, 25 November 2021, 5 – 9.

<sup>213</sup> WA Charter of Multiculturalism (2020) [www.omi.wa.gov.au/resources-and-statistics/publications/publication/wa-charter-of-multiculturalism](http://www.omi.wa.gov.au/resources-and-statistics/publications/publication/wa-charter-of-multiculturalism).

comprehend and/or convey communications relating to workplace health and safety. Conversely, it was submitted that, when English competency is not essential to the job, it should be prohibited to require it.

The Commission recognises the stakeholder views outlined above and agrees that it should be impermissible to discriminate on the basis of language. However, the Commission is of the opinion that language is already sufficiently protected under the Act, as it is a characteristic that appertains generally to persons of the race of the aggrieved person (or which is imputed to them). Consequently, the Commission does not consider it necessary to expressly include language in the definition of race.

#### **4.2.23 Relative or associate of someone with a protected attribute**

At present, the Act only protects the relatives or associates of people who have, or are assumed to have, the protected attributes of race, impairment, age or sexual orientation. In the Discussion Paper the Commission asked whether these protections should be extended to all protected attributes under the Act, such that being a relative or associate of someone with a protected attribute is a protected attribute in its own right.<sup>214</sup>

Submissions supported the protections for relatives and associates being extended to all protected attributes. This was proposed on the basis that the prejudice, stigma and discriminatory conduct directed at people who have, or are assumed to have, a protected attribute is often also experienced by people who are related to, or associated with, them. It was submitted that, given that the core purpose of discrimination law is to protect people against decisions or actions based on irrelevant characteristics and stereotyped views of people with those characteristics, it is important to ensure that the stigma and prejudice attaching to those who are relatives or associates of people with such characteristics are also covered under the Act. Another stakeholder argued that there is no reasonable basis for protections for relatives or associates not being extended to all protected attributes, even if discrimination against relatives or associates of people with certain protected attributes may be uncommon or infrequent.<sup>215</sup>

One stakeholder, although agreeing with these protections in principle, submitted that, in light of the safeguards already contained in the Act, the SDA and the FW Act, extending the Act in this way may introduce unnecessary complexity and duplication into the legislation.<sup>216</sup> The Commission acknowledges this submission but considers that a separate ground protecting relatives and associates of people who have, or are assumed to have, any protected attribute under the Act would appropriately extend protection across all protected attributes, rather than unjustifiably limiting protection on this basis to some attributes but not others. The Commission is of the view that such an approach would fill current gaps in protection and thereby promote equality for all under the Act. It will still be necessary for the relative or associate to show that they were subject to discriminatory conduct because of their relationship or association with a person with a protected attribute.

The Commission therefore recommends that a new protected attribute of 'personal association (whether as a relative or otherwise) with a person who is identified by reference to another protected attribute' should be included in the Act. The specific references to relatives and associates currently contained in relation to race, impairment, age and sexual orientation should be removed.

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<sup>214</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 125.

<sup>215</sup> Submission from Circle Green Community Legal, 30 November 2021, 35.

<sup>216</sup> Submission from AMMA Australian Resources and Energy Group, 29 October 2021, 11.

### **Recommendation 50**

A new protected attribute of personal association (whether as a relative or otherwise) with a person who is identified by reference to another protected attribute should be included in the Act. The references to relatives and associates currently contained in other sections of the Act should be removed.

#### **4.2.24 Religious conviction**

As discussed in section 4.2.20.1, the current Act groups together the grounds of political and religious conviction. However, the Commission has recommended that these should be separated into two grounds. This section solely considers the ground of religious conviction. The issue of political conviction is addressed above.

##### **4.2.24.1 Defining religious conviction**

Religious conviction is a protected attribute, but the Act does not contain a definition of the term. Neither is there a definition of either of the term's component words; religious and conviction.

In the Discussion Paper, the Commission asked whether the concept should be defined.<sup>217</sup> Submissions were generally supportive of including a definition in the Act. They noted that the current approach creates a risk of inconsistency in its interpretation and application, emphasising the need for clarity. This would be consistent with the approach taken in the ACT Act.<sup>218</sup> A different approach taken, for example in the Victorian Act, is to use terminology other than religious conviction. Victoria uses the phrase 'religious belief or activity'.

Stakeholders submitted that an inclusive, rather than exclusive, definition of religious conviction should be adopted. They highlighted that an inclusive definition may assist in ensuring that the definition does not allow for the EOC or the SAT to become arbiters of religious doctrine. Stakeholders also submitted that the protection should include the status of not having a religious conviction.

One stakeholder supported the inclusion of a definition of religious conviction based on the meanings of religion that emerged from the decision in *Church of the New Faith v Commissioner of Pay-Roll Tax*.<sup>219</sup> In that case, the High Court was divided as to the meaning of religion. In summary:

Mason ACJ and Brennan J found that there are two key criteria of religion: a belief in a supernatural being, thing or principle; and the acceptance of canons of conduct in order to give effect to that belief (with the exception of those that offended against the ordinary laws). These criteria can vary in comparative importance, and there can be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion.

Wilson and Deane JJ considered religion as being, at its core, indicated by the collection of ideas and/or practices involving belief in the supernatural. Other key indicia include: the collection of ideas and/or practices relating to a person's nature and place in the universe and their relation to things supernatural; the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having

<sup>217</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 111 – 114.

<sup>218</sup> *Discrimination Act 1991* (ACT) s 2.

<sup>219</sup> *Church of the New Faith v Commissioner of Pay-Roll Tax* (1983) 154 CLR 120; Submission from Human Rights Law Alliance, 29 October 2021, 2, 9.



supernatural significance; the adherents constitute an identifiable group or identifiable groups; and the adherents themselves see the collection of ideas and/or practices as constituting a religion.

However, another stakeholder submitted that perception of religion reflected in the judgments in *Church of the New Faith v Commissioner of Pay-Roll Tax* are outdated, and that any definition included in the Act should not be based upon it.<sup>220</sup>

In relation to what is meant by conviction, the Discussion Paper asked whether the definition of religious conviction should expressly include religious beliefs and activities. Stakeholders were also generally supportive of this notion. Various stakeholders supported adopting the approach taken in section 2 of the ACT Act, which defines religious conviction as including:

- (a) having a religious conviction, belief, opinion or affiliation; and
- (b) engaging in religious activity; and
- (c) the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander peoples; and
- (d) engaging in the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander peoples; and
- (e) not having a religious conviction, belief, opinion or affiliation; and
- (f) not engaging in religious activity.

One key aspect of this definition is its reference to (engaging in) the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander peoples. Many submissions supported the ACT Act's recognition of the unique circumstances and realities created by Aboriginal and Torres Strait Islander peoples' cultural heritages and traditions.

It was submitted that the cultural demands of Aboriginal and Torres Strait Islander communities are particularly complex, with the capacity and tendency to impact Aboriginal and Torres Strait Islander peoples in all areas of their lives. For example, in the workplace setting, the breadth of responsibility to family in Aboriginal and Torres Strait Islander culture may mean that there are times when Aboriginal and Torres Strait Islander employees may have recurrent or unexplained absences from the workplace. This may occur where they are required to attend extended family events or partake in Sorry Business.

Stakeholders highlighted that Aboriginal and Torres Strait Islander peoples' identity is also largely defined by spiritual connections, connection to land and a person's kinship ties. It is important that Aboriginal and Torres Strait Islander peoples are not disproportionately or inappropriately discriminated against because of their cultural beliefs or activities associated with their cultural heritage, spiritual practices, observances and teachings.

In addressing this issue, it was argued that it is essential that the Act does not limit the interpretation of 'cultural heritage and distinctive spiritual practices, observances, beliefs and teachings' to one particular cohort or community of Aboriginal and Torres Strait Islander peoples. The protection should be broadly interpreted.

While the definition of religious conviction in the ACT Act is broad, it does not specifically include religious appearance and dress. In the Discussion Paper, the Commission asked whether these matters should be expressly protected.<sup>221</sup> Most stakeholders were of the view that they should be. One submission recommended that if the definition of religious conviction used in the ACT Act is adopted, it

<sup>220</sup> Submission from Renae Barker, 24 November 2021, 1-2.

<sup>221</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 114.

should be amended to expressly include ‘appearance or dress required by, or symbolic of, the person’s religious beliefs’.<sup>222</sup>

However, some submissions were concerned about the possibility that due to health and safety risks, employers may need to impinge upon a person’s choice of religious appearance or dress. This may be the case, for example, where religious dress may become entangled in machinery.

Having considered these submissions, it is the Commission’s view that it is necessary to define the concept of religious conviction. This would clarify the law and would more adequately meet the aims of the Act in protecting members of the community from discrimination on this basis.

The Commission recommends adopting a definition of religious conviction that is similar to that contained in section 2 of the ACT Act but amended to include reference to religious appearance or dress. While the Commission acknowledges that the inclusion of religious appearance or dress may raise health and safety concerns, it is of the view that these are best addressed by carving out an exception to the general protection where such a risk arises. Exceptions are addressed in sections 4.5 and 4.6 below.

The Commission acknowledges the strong stakeholder support for ensuring that the Act protects the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander peoples, as well as the people who engage in those practices, observances, beliefs and teachings. While the Commission recommends including these matters in the definition of religious conviction, it would also support protecting Aboriginal culture and heritage, and those who engage in its practices, observances, beliefs and teachings, through the development of a new protected attribute.

In the Commission’s view, its recommended approach to defining religious conviction would provide greater clarity to the law and aid in the interpretation of this complex concept. The Commission considers it appropriate that the definition include past, future and presumed religious convictions, and this is addressed by Recommendation 14. The Commission considers that these amendments would advance the protection of the human rights sought to be protected by the Act.

The Commission considers that the word religious is a word of ordinary understanding that does not need to be given a special meaning by the Act. Not defining this term will allow for flexibility in meaning, rather than attributing a meaning fixed at a particular point in time.

### ***Recommendation 51***

Religious conviction should be defined in the Act. It should be defined as:

- having a religious conviction, belief, opinion or affiliation;
- engaging in religious activity;
- appearance or dress required by, or symbolic of, the person’s religious conviction;
- the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander peoples;
- engaging in the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander peoples;
- not having a religious conviction, belief, opinion or affiliation; and
- not engaging in religious activity.

The word religious should not be defined.

<sup>222</sup> Submission from Circle Green Community Legal, 30 November 2021, 23.



In the Discussion Paper the Commission asked whether the protection for religious conviction should be extended to relatives or associates of a protected person by the ground.<sup>223</sup> Stakeholders generally supported the extension of this ground (and others) to relatives and associates, by including a catch-all provision similar to that contained in section 16(s) of the Tasmanian Act, which prevents discrimination on the ground of ‘association with a person who has, or is believed to have, any of [the protected] attributes’.

The Commission agrees that the protection should be extended to associates and relatives but is of the view that this should be a general protection that applies to all protected attributes. This is addressed in section 4.2.23 above.

#### 4.2.25 Sex

Sex is a protected attribute under the Act. In the Act, sex as a protected attribute has always been regarded as referring to whether a person is male or female as determined by their physical/biological sex characteristics at birth. Although sex is not defined in the Act, it contains a number of references, including a reference to the ‘opposite sex’ in the Part dealing with discrimination on the grounds of sex.<sup>224</sup> As the High Court of Australia has said, ‘[a]s a matter of the ordinary use of language, to speak of the opposite sex is to speak of the contrasting categories of sex: male and female’.<sup>225</sup> The implication is that when the Act refers to sex it means the male and female sex.

No questions were raised in the Discussion Paper in relation to this attribute, although the issue of sexual characteristics, which is discussed below, is related, and the distinct issues of gender identity and gender history is discussed at length earlier in this Report.

No recommendations are made for amendment to the ground of sex.

#### 4.2.26 Sex characteristics

At the outset, the Commission acknowledges that intersex issues have often been associated with, or subsumed into a broader discussion regarding, issues of gender identity. The Commission recognises that intersex issues are distinct and need to be treated as such. Against that background, it is also clear that the use of appropriate terminology is important, which is discussed below.

To frame the discussion and consideration of issues affecting this portion of the community, and how protections might be afforded under the Act, it is important to understand that intersex people are born with biological sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit the typical definitions for male and female bodies. For some intersex people, these traits are apparent at birth, while for others they become apparent later in life (often at puberty), and sometimes they are not physically apparent to the eye.<sup>226</sup>

Variations in sex characteristics relate to physical / biological sex characteristics, and not to a sense of gender identity. A person with variations in sex characteristics may have a particular gender identity (just as any person may have a particular gender identity), but those are separate issues, because

<sup>223</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 111 – 114.

<sup>224</sup> For example, *Equal Opportunity Act 1984* (WA) s 8(2).

<sup>225</sup> *NSW Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490, [1]; citing *Bellinger v Bellinger* [2003] 2 AC 467, 483 [59], 488-489 [76].

<sup>226</sup> Morgan Carpenter (2020) The OHCHR background note on human rights violations against intersex people, Sexual and Reproductive Health Matters, 28:1, DOI: [10.1080/26410397.2020.1731298](https://doi.org/10.1080/26410397.2020.1731298); Submission from Intersex Human Rights Australia, October 2021, 4; D C Ghattas, ‘Standing up for the human rights of intersex people – how can you help’, 2015, 9 (available at: [https://www.ilga-europe.org/sites/default/files/how\\_to\\_be\\_a\\_great\\_intersex\\_ally\\_a\\_toolkit\\_for\\_ngos\\_and\\_decision\\_makers\\_december\\_2015\\_updated.pdf](https://www.ilga-europe.org/sites/default/files/how_to_be_a_great_intersex_ally_a_toolkit_for_ngos_and_decision_makers_december_2015_updated.pdf))

gender and sex are separate. The High Court of Australia has recognised that not everyone can be classified by sex as either male or female.<sup>227</sup>

#### **4.2.26.1 Terminology**

The Commission acknowledges that terminology in this area is contested, and that experiences of sex characteristics are personal and vary from person to person. However, in order to have a discussion, and for any protection to be afforded under the Act, terminological choices must be made.

A number of stakeholder submissions disclosed a preference for a new protected attribute of sex characteristics to be introduced, as opposed to intersex status.

An example of a definition of intersex status is found in section 4 of the SDA, which defines the term to mean:

the status of having physical, hormonal or genetic features that are:

- neither wholly female nor wholly male; or
- a combination of female and male; or
- neither female nor male.

An example of a definition of sex characteristics is contained in section 4 of the Victorian Act, which defines that term to mean:

a person's physical features relating to sex, including –

- genitalia and other sexual and reproductive parts of the person's anatomy; and
- the person's chromosomes, genes, hormones, and secondary physical features that emerge as a result of puberty.

Some stakeholder submissions identified that the term intersex is often defined based on a deficit model that identifies what people lack or are not, which is reflected in the SDA definition above. In contrast, and as demonstrated by the definition in the Victorian Act, sex characteristics is defined on an inclusive basis, and reflects a broad concept of sex.

#### **4.2.26.2 Issues affecting persons with variations in sex characteristics**

Some of the main issues affecting people with variations in sex characteristics highlighted in relevant literature and submissions received by the Commission include:

- (a) discrimination due to variations in sex characteristics;
- (b) the designation of a legal sex other than male or female in documentation; and
- (c) issues associated with medical interventions, particularly in respect of children without the capacity to consent.

Point (a) is canvassed below. However, points (b) and (c) above are beyond the scope of the Commission's Terms of Reference for this review.

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<sup>227</sup> *AB v The State of Western Australia* [2011] HCA 42; (2011) 244 CLR 390 402 [23]; *NSW Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490, [1].

#### **4.2.26.3 Discrimination due to variations in sex characteristics**

It is clear that persons with variations in sex characteristics have been the subject of discrimination. As the submission from Intersex Human Rights Australia observed:

Because our bodies are perceived as different, we can experience stigmatisation, discrimination and harmful practices, including medical interventions intended to make our bodies more typically female or male.<sup>228</sup>

This is also consistent with a recent report by the Australian Human Rights Commission (AHRC) in which it was observed that although variations in sex characteristics are not uncommon in the general population, ‘many individuals reported widespread stigma, discrimination, ill-treatment and misunderstanding’.<sup>229</sup> The Commission acknowledges the AHRC’s report and the sentiment reported to the AHRC that many people with variations in sex characteristics have felt isolated by virtue of feeling like their bodies were ‘abnormal’, shameful and to be hidden.<sup>230</sup>

Stakeholder submissions identified that the types of discrimination experienced by persons with variations in sex characteristics include access to education, sporting activity, employment and services, and genetic discrimination.

#### **4.2.26.4 Current protection**

As noted in the Discussion Paper, the Act is silent on its protection of people with variations in sex characteristics.<sup>231</sup> Protection on the ground of gender history or gender identity are inapposite to protect persons with variations in sex characteristics because sex and gender are not the same thing. Indeed, it was submitted that these grounds provide insufficient legal protection.

Protection on the ground of sex, as currently reflected in the Act,<sup>232</sup> is also unsuitable because the Act contains a number of references to the opposite sex,<sup>233</sup> thus implying that protection is afforded based on sex being restricted to males and females. This does not allow room for variations in sex characteristics and the fact that a person’s sex might not be capable of classification as either male or female.

#### **4.2.26.5 Proposal for a new protected attribute: sex characteristics**

The Commission received submissions that the Act should be amended to adopt sex characteristics as a protected attribute.

The Commission also received submissions opposing the expansion of protection under the Act on the ground of sex characteristics. Some stakeholders have cautioned that such changes should be considered carefully so as not to encroach on spaces and initiatives set up for the protection and general benefit of women. These stakeholders submit that the expansion of protections beyond the currently defined gender reassigned persons would create problems for safe space access, by enabling biological males without male sex characteristics to access safe spaces such as women’s refuges and making it impossible to have safe spaces exclusively for biological females. The submissions further note that potential implications arise in the areas of student accommodation,

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<sup>228</sup> Submission from Intersex Human Rights Australia, October 2021, 4.

<sup>229</sup> Australian Human Rights Commission, ‘Ensuring health and bodily integrity: towards a human rights approach for people born with variations in sex characteristics’, October 2021, 39.

<sup>230</sup> Ibid 44.

<sup>231</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 107 – 108.

<sup>232</sup> *Equal Opportunity Act 1984* (WA) s 8.

<sup>233</sup> See, for example, *Equal Opportunity Act 1984* (WA) s 8(2).

student safety, sporting team participation, bathroom facility usage, and doctrinal teaching around male and female.

The Commission acknowledges the submissions received opposing an amendment to the Act to accommodate variations in sex characteristics and has considered the concerns expressed in those submissions. However, the focus on biological males and females in those submissions does not reflect the fact that intersex people are born with sex characteristics that do not fit typical definitions of male or female sex. That reality, and the fact they are discriminated against because of their sex characteristics, should not be ignored.

The Commission considers that it is appropriate to ensure that persons with variations in sex characteristics are not discriminated against for having sex characteristics that do not align with male or female characteristics. The purpose of the Act is to promote equality in Western Australia and provide remedies in respect of discrimination on certain grounds. Expanding the protections under the Act to protect persons with variations in sex characteristics would plainly further that purpose.

The Commission therefore recommends that a new ground be incorporated into the Act in respect of sex characteristics. The inclusion of sex characteristics as a separate protected attribute (in addition to sex and gender identity) would properly distinguish issues of sex and gender.

The Commission supports the use of sex characteristics rather than intersex status, in light of the support for the former term expressed in the stakeholder submissions. The term sex characteristics is also employed in the ACT Act,<sup>234</sup> and the Tasmanian Act,<sup>235</sup> which each adopt a definition similar to section 4 of the Victorian Act.

### **Recommendation 52**

A new protected attribute of sex characteristics should be included in the Act.

### **Recommendation 53**

Sex characteristics should be defined as a person's physical features relating to sex, including:

- genitalia and other sexual and reproductive parts of the person's anatomy; and
- the person's chromosomes, genes, hormones, and secondary physical features that emerge as a result of puberty.

#### **4.2.27 Sexual orientation**

Currently, the definition of sexual orientation in the Act is limited to people who are straight, gay, lesbian or bisexual (or assumed to be). In the submissions received by the Commission this restrictive drafting was described as 'outdated and narrow', as it fails to reflect that sexuality is more diverse than these four orientations. For instance, no protection is given to people who identify as pansexual (people who experience sexual attraction towards other persons regardless of their gender identity), asexual (people who feel little to no sexual attraction to any persons), or a more fluid sexuality. It was

<sup>234</sup> *Discrimination Act 1991* (ACT), Dictionary.

<sup>235</sup> *Anti-Discrimination Act 1998* (Tas) s 3.

submitted that a substantial proportion of the LGBTIQ+ community are thereby left without protection from discrimination.

The current drafting in the Act is more limited than the Tasmanian Act, which defines sexual orientation as including heterosexuality, homosexuality and bisexuality, and the ACT Act, which adopts the same non-exhaustive definition but uses the term sexuality instead of sexual orientation. Some stakeholders submitted that this approach should be adopted as it achieves simplicity whilst also retaining the ability to be inclusive.

The Victorian Act defines sexual orientation as ‘a person’s emotional, affectional and sexual attraction to, or intimate or sexual relations with, persons of a different gender or the same gender or more than one gender’.<sup>236</sup> Other stakeholders submitted that this definition represented best practice and should be adopted in the Act.

The Victorian Act definition is based on the *Yogyakarta Principles* on the application of international human rights law in relation to sexual orientation.<sup>237</sup> Relevantly, a guide to the *Yogyakarta Principles* discusses the rationale behind its approach to sexual orientation (as well as gender identity) as follows:

In the wording of the Principles themselves, the drafters sought to uphold the universal nature of human rights by avoiding wording that would limit rights to particular groups. Thus, instead of speaking about the rights of heterosexuals, homosexuals, lesbians, gay men, bisexuals, or transgender people, each Principle is said to apply to all people regardless of the characteristic of actual or perceived sexual orientation or gender identity. By expressing the rights in this way, the drafters have also sought to avoid the necessity of requiring individuals to absolutely categorise themselves by identity labels that may not be appropriate for all cultural contexts. The notions of sexual orientation and gender identity are fluid.<sup>238</sup>

The Commission acknowledges that the definition of sexual orientation in the Act should be expanded in recognition of the diversity of sexual orientations that exist in our community. The Commission is of the view that the expansive approach to defining sexual orientation taken in the Victorian Act (and based on the *Yogyakarta Principles*) is desirable, as such a definition would encompass a broader range of sexualities and thereby further the objects of the Act in promoting equality for all.

Accordingly, the Commission recommends that the definition of sexual orientation in the Act should be amended in line with the definition in the Victorian Act. However, in order to ensure that asexuality and pansexuality are covered by this definition, the Commission recommends that it be further expanded to include ‘a person who feels attraction towards all persons irrespective of their gender identity (pansexual), or a person who experiences no sexual attraction to any person (some asexual people)’.

#### **Recommendation 54**

Sexual orientation should be defined as a person’s emotional, affectional and sexual attraction to, or intimate or sexual relations with, persons of a different gender or the same gender or more than one gender. It should be made clear that this includes people who feel attraction towards all persons irrespective of their gender and people who experience no sexual attraction to any persons.

<sup>236</sup> See *Equal Opportunity Act 2010* (Vic) s 4(1).

<sup>237</sup> Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. International Commission of Jurists, 2007, ‘Introduction’, 6.

<sup>238</sup> ‘An Activist’s Guide to The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity’: [http://yogyakartaprinciples.org/wp-content/uploads/2016/10/Activists\\_Guide\\_English\\_nov\\_14\\_2010.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2016/10/Activists_Guide_English_nov_14_2010.pdf).

#### 4.2.28 Social origin, profession, trade, occupation or calling

At present, the Act does not provide protection for people based on their social origin, profession, trade, occupation or calling. In the Discussion Paper, the Commission asked whether any of these attributes should be protected.<sup>239</sup>

##### 4.2.28.1 Social origin

Most stakeholders supported the inclusion of social origin as a protected attribute. It was noted that Australia has ratified a number of UN treaties, including the ICCPR and the ICESCR, as well as the International Labor Organisation *Discrimination (Employment and Occupation) Convention 111*, all of which include the ground of social origin. Social origin has been said to comprise those matters which are 'formulative of a person's acculturation', with the determinants of social origin being 'not merely self-defined but dependent on the way in which a person is assigned by the dominant or majority group in the society in which they socialise, live or work'.<sup>240</sup> The potential scope of precisely what types of conduct may amount to discrimination on the basis of social origin is well articulated by academic commentator Capuano.<sup>241</sup> Capuano notes that social origin discrimination has been expressly defined by the ILO Committee of Experts on the Application of Conventions and Recommendations ('Committee of Experts') to include instances where a person faces discrimination because of his or her class, caste or socio-occupational category.<sup>242</sup>

Capuano goes on to give a number of examples where discrimination on the basis of social origin might arise in Australia, including in the employment context. In doing so, Capuano makes reference to a study undertaken in relation to employment practices, which demonstrated that in considering the question of fit, employers will often consider the extent to which parallels can be drawn between the hobbies, interests, biographies and demographics of prospective employees and those of the employer, factors which are strongly influenced by social origin.

There is currently only limited protection for social origin in anti-discrimination statutes around Australia. The AHRCA includes social origin as a ground for the lodgement of complaints but does not define the term.<sup>243</sup> The annual reports of the AHRC reveal that very few complaints are in fact lodged in respect of social origin. The *Human Rights Act 2004* (ACT), in section 8 titled 'Recognition and Equality Before the Law', also includes social origin within the list of grounds given as examples of discrimination. Other Australian jurisdictions do not include social origin as a protected attribute in anti-discrimination legislation.

By contrast, as one stakeholder noted, social origin, social status, poverty and socio-economic status are gaining recognition as grounds of discrimination elsewhere in the world.<sup>244</sup> In its submission, ADLEG provides as an example a recent decision of the South African equality court, which found that poverty should be recognised as a ground of discrimination (and therefore be a protected attribute).

In supporting the inclusion of social origin as a protected attribute in the Act, some stakeholders argued that the inclusion of social origin as an operable ground would mean that its intersection with race, sex, age and disability would enhance the efficacy of the Act.

<sup>239</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 123.

<sup>240</sup> *Merlin Gerin (Australia) Pty Ltd v Wojcik* [1994] Vic SC 209.

<sup>241</sup> Angelo Capuano, 'Giving Meaning to "Social Origin" in International Labour Organization ("ILO") Conventions, the *Fair Work Act 2009* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth): "Class" Discrimination and its Relevance to the Australian Context' (2016) 39(1) *UNSW Law Journal* 84.

<sup>242</sup> *Ibid* 85.

<sup>243</sup> *Australian Human Rights Commission Act 1986* (Cth), ss 3(1), 46P.

<sup>244</sup> Submission from ADLEG, 30 November 2021, 32-33.

One stakeholder raised the issue of whether the nature of socioeconomic discrimination means that an asymmetrical approach is necessary such that this attribute is only relevant to the more impoverished members of a society.<sup>245</sup> However, it was noted by the same stakeholder that ‘the asymmetrical model is too restrictive and could confuse distributive justice initiatives with the non-discrimination principle’ and the Commission concurs with that view.

Stakeholders raised a range of settings where this attribute could apply such as from postcode discrimination, class discrimination as well as discrimination based on where someone went to school or grew up.

#### **4.2.28.2 Profession, trade, occupation or calling**

There was greater diversity of opinion amongst stakeholders about whether profession, trade, occupation or calling should be added as protected attributes. Some submissions argued that social origin is inherently related to profession, trade, occupation or calling, as it concerns stereotypes and stigma attaching to someone’s place in society based on their class position, which may correspond to the types of work they do. It was thus suggested that these matters should be protected. Various suggestions were made about the best way to implement this suggestion. For example, it was submitted that:

- Social origin should be defined to include profession, occupation, trade or calling;
- Social origin should be defined to include a reference to class or class discrimination, and class should be defined to include trade, occupation and calling;
- The Act should include a new protected attribute of social origin and social status, which would cover discrimination based on one’s profession, trade, occupation or calling, employment status and accommodation status;
- The Act should include a new protected attribute of social origin, profession, trade, occupation or calling, which should cover part-time, casual or occasional workers; the business activity (for example, law) and the job descriptor (for example, lawyer); and the wider industry (for example, legal industry); or
- The Act should include three separate protected attributes of employment status, accommodation status and profession, trade, occupation or calling, as is the case under section 7(1) of the ACT Act.

By contrast, some submissions supported the inclusion of social origin as a ground, but did not support its extension to profession, trade, occupation or calling. This was due to a concern that these factors are often important considerations when making employment decisions.

The Commission is of the view that there is insufficient community support, at least at this point in time, for including social origin as a protected attribute. The inclusion of a ground of social origin in international treaties may be justified because in some other societies, a person’s status is determined by the social status of their parents and ancestors or because they come from a certain social class or caste. In the Commission’s view, and based on the submissions received, Western Australia’s social structure does not justify the inclusion of social origin in the Act. This, of course, does not foreclose an individual making a discrimination complaint in relation to a protected attribute such as sex, race, age or disability should this be relevant on the facts.

Similarly, the Commission is of the view the need to include profession, trade, occupation or calling as a protected attribute in the Act has not been sufficiently demonstrated. Western Australia is a diverse society where people occupy a wide range of jobs. There are wide ranging views as to the merits and

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<sup>245</sup> Ibid.



social status of many of these occupations, but generally speaking, people appear to accept that different people suit and occupy different jobs. It also appears accepted that people may occupy numerous and varied professions, trades, occupations or callings over their working lives, depending on their circumstances and individual choices. The Commission is not satisfied that discrimination occurs based on a person's profession, trade, occupation or calling to the extent that it requires protection under the Act. If such discrimination occurs and its true cause is a protected attribute, then a complaint can be made on that ground.

#### 4.2.29 Spouse or domestic partner identity

In the Discussion Paper, the Commission asked whether the Act should include the protected attribute of spouse or domestic partner identity.<sup>246</sup> A number of submissions supported introducing a new ground to protect against discrimination on this basis. One stakeholder identified the following case example of discrimination of this nature:

##### **Case example**

*A married couple worked for the same employer. One of the couple was injured at work and resigned from their position as a part of a workers' compensation settlement. Shortly after their resignation, their partner was made redundant and believed that one of the reasons for their redundancy was the identity of their partner. This left the couple unemployed.*

It was submitted that the protection of spouse or domestic partner identity was necessary in light of documented discrimination against people based on their partner's sexual orientation. It was also submitted that the Act does not currently cover discrimination against children on the ground that they have LGBTIQ+ parents or guardians.

Three broad approaches were taken to this issue. Some stakeholders suggested that protection could be achieved by more broadly defining the protected attribute of marital status. Such an approach has been taken in the Northern Territory Act, where section 4 defines marital status to mean whether a person is:

- a) single; or
- b) married; or
- c) married but living separately and apart from the person's spouse; or
- d) married, or has been married, to a particular person; or
- e) divorced; or
- f) widowed; or
- g) a de facto partner; or
- h) the de facto partner, or was the de facto partner, of a particular person.<sup>247</sup>

However, it was noted that there is a risk that de facto partner in that definition may not be interpreted to include people in same-sex relationships. Consequently, some stakeholders instead suggested that a new protected attribute of relationship status be added. This is the approach that has been taken in Tasmania, where the grounds of marital status and relationship status are separately protected, with the latter defined by reference to the definition found in the *Relationships Act 2003* (Tas). One

<sup>246</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 124.

<sup>247</sup> Submission from ADLEG, 30 November 2021, 35 quoting *Anti-Discrimination Act 1992* (NT) s 4.



stakeholder suggested that consideration should be given to including a ground of marital or relationship status, then incorporating an inclusive definition of marital status similar to the Northern Territory Act, and a separate definition of relationship status that includes the concept of being or having been in a personal relationship with a particular person.<sup>248</sup>

The third suggested approach was to explicitly protect against discrimination based on the identity of a spouse or domestic partner. This is the approach that has been taken in the South Australian Act.

Some stakeholders submitted that, if spouse or domestic partner identity is added as a protected attribute, exceptions should apply in relation to preserving confidentiality, avoiding conflicts of interest and nepotism, and protecting health and safety, for example, where an applicant to an executive management position is the spouse or domestic partner of the recruiter.

Some stakeholders submitted that no amendment was necessary as the Act offers sufficient protection already. In particular, it was submitted that the existing ground of family status already covers discrimination against a person on the ground of the identity of the person's spouse or domestic partner.

Very few submissions were received on the question of whether this kind of discrimination occurs in Western Australia and therefore whether it requires protection under the Act. One stakeholder submitted that it was not aware that this issue has been identified as a matter of significant concern, and that it is unlikely that it would be relevant to a substantial proportion of the population.<sup>249</sup>

The current ground of family status includes the status of being a particular relative or being a relative of a particular person. Relative is defined in the Act in the following terms:

**relative**, in relation to a person, means a person who is related to the first-mentioned person by blood, marriage, affinity or adoption and includes a person who is wholly or mainly dependent on, or is a member of the household of, the first-mentioned person.<sup>250</sup>

Having considered these submissions, the Commission is of the view that the ground of family status, sufficiently covers discrimination based on a spouse's or domestic partner's identity. It adequately addresses the issues raised by stakeholders in support of introducing the new ground to protect people from discrimination based on their spouse's or domestic partner's identity. The Commission does not consider that the addition of this new protected attribute is required.

This recommendation is strengthened by the Commission's recommendation that the ground of family status be extended to all areas of public life to which the Act applies, and its recommendation that a new protected attribute of 'personal association (whether as a relative or otherwise) with a person who is identified by reference to another protected attribute' should be included in the Act. This latter recommendation will ensure that children are protected from discrimination based on a personal attribute held by their parent's partner, where the child does not reside in the same household as the partner.

#### 4.2.30 Subjection to domestic or family violence

In the Discussion Paper, the Commission asked whether subjection to domestic or family violence should be included as a protected attribute.<sup>251</sup> Many submissions in support of including this ground were received. It was submitted that current protections are not clear or targeted enough, and that including this specific ground would provide stronger protections for people who have experienced

<sup>248</sup> Ibid.

<sup>249</sup> Submission from Chamber of Commerce and Industry WA, 29 October 2021, 13.

<sup>250</sup> *Equal Opportunity Act 1984* (WA) s 4.

<sup>251</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 127 – 128.

domestic or family violence. One stakeholder emphasised that a person who is or might be exposed or subjected to domestic or family violence is not currently protected from discrimination under the Act, including by their employer, landlord, property owner or educational institute.<sup>252</sup>

Many submissions focused on the impact of discrimination based on subjection to domestic or family violence in the area of employment. It was submitted that financial security is a key enabler for victims of family violence to leave violent relationships. Accordingly, it was noted that victims engaging in paid work are typically reluctant to disclose that they are experiencing family violence to employers and colleagues, even when the violence is impacting on their performance, productivity or safety at work, or they desperately need workplace flexibility in order to navigate the criminal justice system or access to family violence support services.<sup>253</sup>

Submissions highlighted that when employees are subjected to domestic and family violence, that violence impacts their mental and physical health which, in many instances, affects their capacity to work. However, they may be discriminated against by the inflexible application of rules in relation to performance or leave without consideration of their experience. Moreover, it was noted that discrimination against victims of domestic and family violence can include being stereotyped, having assumptions being made about them, or having apparently neutral rules disadvantage them in a way that is not reasonable. It was also submitted that such discrimination based on experience of family or domestic violence can re-traumatise victims and compound the harms caused by the original violence.

One stakeholder provided the following example of discrimination based on subjection to domestic or family violence in the employment context.

#### **Case example**

*An Aboriginal person who is a single parent experienced family violence and had a family violence restraining order (FVRO) against the perpetrator. The person worked at a small store and the FVRO prevented the perpetrator from entering the store. The person told their employer about the FVRO and explained that the police would need to be called if the perpetrator entered the store. The employer told them that they would not prevent the perpetrator from entering the store, regardless of the FVRO. The employer dismissed the person because the FVRO made their working at the store too difficult for the employer. This left the person without an income, and at risk of homelessness, with a young child under their care. The person was not protected against unfair dismissal under employment laws.*<sup>254</sup>

Stakeholders in support of introducing a new ground submitted that it would, (1) constitute legislative recognition that those who are or have experienced domestic and family violence should not be subjected to discrimination as a result of that experience, and (2) offer victims protections which are currently not available. Further, it was submitted that women experiencing domestic and family violence are in a particularly vulnerable position and the failure of the current Act to explicitly protect them against discrimination on these grounds is a 'dangerous oversight' which should be rectified.

<sup>252</sup> Submission from Aboriginal Family Law Centre, 6 October 2021, 5.

<sup>253</sup> See Tashina Orchiston and Belinda Smith, 'Empowering victims of family violence: Could anti-discrimination laws play a role?', *Australian Review of Public Affairs* (Web Page, March 2012).

<sup>254</sup> Submission from Circle Green Community Legal, 30 November 2021, 38.

Some submissions recommended that the definition include family violence involving all types of physical, sexual, emotional, verbal, financial, social, cultural and spiritual abuse. Cultural and spiritual abuse have been described in the following terms:

As with many forms of domestic and family violence, spiritual and cultural abuse are means by which a perpetrator can exercise dominance, control or coercion over a victim (sometimes identified as coercive control) who is especially vulnerable due to their spirituality or cultural identity. Behaviours may include any form of domestic and family violence and may involve the perpetrator:

- belittling the victim's spiritual or cultural worth, beliefs or practices
- violating or preventing the victim's spiritual or cultural practices
- denying the victim access to their spiritual or cultural community
- causing the victim to transgress spiritual or cultural obligations or prohibitions
- forcing on the victim spiritual or cultural beliefs and practices that are in conflict with their own
- manipulating spiritual readings and practices to justify abuse
- misusing the traditions, practices and expectations of the spiritual or cultural community to which the victim belongs as a means of normalising or suppressing the abusive behaviours, silencing the victim, or preventing the victim from seeking support and help.

Some specific examples of these behaviours include the perpetrator:

- denouncing the victim's prayers as having no purpose or value
- insisting that the victim honour the perpetrator rather than the victim's cultural or spiritual beliefs
- asserting his entitlement to a dowry from the victim's family, or punishing the victim or her family for what he claims to be an insufficient dowry
- forcing the victim to undergo partial or total removal of her external genitalia, or be subjected to any other injury to her genital organs for reasons that are not medically warranted (sometimes referred to as female genital mutilation or FGM)
- publicly humiliating the victim during spiritual or cultural ceremonies
- preventing the victim from wearing clothing prescribed by spiritual or cultural practices
- preventing the victim from attending their chosen place of worship
- causing the victim to transgress spiritual or cultural belief systems by forcing the victim to drink alcohol or to have intercourse during menstruation
- citing biblical readings in claiming the eternal sanctity of marriage and God's disapproval of divorce
- compelling the victim to keep the abuse secret by threatening that disclosure will result in the victim being disbelieved, shunned and shamed by their spiritual or cultural community.<sup>255</sup>

Cultural abuse may be one aspect of a complex pattern of behaviours engaged in by perpetrators in order to control another person, sometimes referred to as coercive control.

It was also recommended that the Act specifically define the scope of protection offered by the meaning of domestic or family violence to include extended family and Aboriginal kinship relationships.

By contrast, some stakeholders did not support the introduction of a new ground of subjection to domestic or family violence, as they were of the view that protections already exist, including through

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<sup>255</sup> Australian Institute of Judicial Administration, *National Domestic and Family Violence Benchbook* (2021) 3.1.5.

services offered by Western Australian employers, entitlements provided under the FW Act and protections from unfair dismissal in both the FW Act and IR Act.

The Commission recognises the impact that domestic and family violence can have on the physical and mental health of victims, and in turn, on various areas of their lives. It is also satisfied that the risk of discrimination against victims, is one of the reasons why victims often choose not to reveal that they are the victims of domestic and family violence. The law should provide protection for victims from such discrimination as part of the community's effort to expose perpetrators, support victims and stop the offending. The Commission considers that the proposed objects of the Act will be furthered by introducing a new ground to protect victims of domestic and family violence from discrimination. The Commission concurs with submissions recommending that the Act adopt the same approach as the ACT Act, which introduced subsection to domestic or family violence as a new protected attribute,<sup>256</sup> and makes that recommendation.

The Commission notes that consideration could be given by the government to the further expansion of this protected attribute to include all victims of crime or violence.

### **Recommendation 55**

A new protected attribute of subsection to domestic or family violence should be included in the Act.

## **4.3 Protected areas of public life**

It is generally accepted that anti-discrimination laws should only apply to areas of public life. That is, they should not regulate what happens in domestic and other private situations. The Commission does not make any recommendation to change this position.

There has been little change since 1984 to the areas of life to which the Act applies. The Act applies to work, education, access to places and vehicles, goods, services and facilities, accommodation, land, clubs, provision of certain information, sporting activity, superannuation schemes and provident funds and insurance.

In October 2021, the ACT Government released a discussion paper as part of a review of the ACT Act.<sup>257</sup> The ACT Government's discussion paper considered options for responding to recommendations made by the ACT Law Reform Advisory Council (LRAC) in its 2015 review of the ACT Act. The LRAC made the following recommendations:

#### **Recommendation 6.1**

The *Discrimination Act* should be amended to prohibit discrimination generally (in all areas of life) with an exception for private conduct.

#### **Recommendation 6.2**

If, contrary to Recommendation 6.1, the current specified areas of coverage are retained, then the *Discrimination Act* should be amended to cover conduct in the areas of organised sport, government functions, and the conduct of competitions.<sup>258</sup>

<sup>256</sup> Submission from Aboriginal Family Law Centre, 6 October 2021, 6.

<sup>257</sup> ACT Justice and Community Safety Directorate, *Inclusive, Progressive, Equal: Discrimination Law Reform: Discussion Paper 1: Extending the Protections of Discrimination Law* (October 2021).

<sup>258</sup> ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)* (Final Report, March 2015) 55.

The basis for the LRAC's recommendation was that expanding the application of the ACT Act to all areas of public life would make it simpler and offer the broadest possible coverage for the ACT Act. The ACT Government intends to implement LRAC's recommendation, although it acknowledges that this approach requires the ACT Act to make it clear what is included as public life and excluded as private life.<sup>259</sup>

The Commission did not ask for or receive submissions based on LRAC's recommendation. However, the ACT HRC in its submission on the ACT Government's discussion paper did not support the proposal and prefers the addition of particular areas of public life. Their submission states:

The Commission [Act HRC] currently prefers this approach over the alternative recommendation of prohibiting discrimination in public life with an exception for private conduct, for the following reasons:

- there would be considerable difficulty in drafting a workable and appropriate definition of 'public life' and 'private conduct'
- even with a well-drafted definition there is likely to be significant litigation about whether acts or decisions fall within those definitions, making the law less user friendly
- a sharp distinction between what is public and what is private risks the ability of the law to respond to novel and emerging areas of life that do not sit neatly in either public or private spheres and which would likely require specific legislation to clarify whether they fall within or outside the definitions in order to provide certainty or respond to case law – these novel areas should be grappled with primarily as policy issues by the Assembly, not as legal disputes in the courts
- new concepts of public life or private conduct may minimise the value of existing case law principles and guidance about the coverage of specific areas of life, and lead to additional uncertainty for organisations, and re-litigation
- such a reform would be outside the current scope of comparable anti-discrimination frameworks across Australia meaning that organisations operating in the ACT and other jurisdictions may need to comply with conceptually differing regulatory frameworks. (footnotes omitted).<sup>260</sup>

The Commission considers that LRAC's recommendation is problematic for the reasons identified by the ACT HRC. Importantly, by identifying areas of public life to which the Act applies, the Act maintains the important premise that it should not encroach on private activity. The Commission does not recommend implementing LRAC's recommendation in Western Australia. Further consideration and consultation would have to occur before it could be considered for implementation in Western Australia.

This section discusses the areas of public life which, in the Commission's view, require amendment or inclusion in the Act. The Commission notes that there are some areas of public life to which the Act currently applies and in respect of which the Commission received no or very minimal stakeholder feedback. The Commission makes no recommendations in relation to these areas.

#### 4.3.1 General approach

As canvassed in the Discussion Paper,<sup>261</sup> currently the Act differentiates between the scope of the protection offered to people with a protected attribute. For some protected attributes, discrimination is

<sup>259</sup> ACT Justice and Community Safety Directorate, *Inclusive, Progressive, Equal: Discrimination Law Reform Discussion Paper 1: Extending the Protections of Discrimination Law* (October 2021), 9.

<sup>260</sup> ACT Human Rights Commission, Submission to the ACT Justice and Community Safety Directorate, *Inclusive, Progressive, Equal: Discrimination Law Reform, Discussion Paper 1: Extending the Protections of Discrimination Law* (31 January 2022) 4.

<sup>261</sup> Review of the *Equal Opportunity Act 1984* (WA): *Project 111 Discussion Paper*, 21-23.

unlawful in all of the areas of public life covered by the Act; while for other protected attributes it is only unlawful to discriminate in some areas.

ADLEG submitted that there was no justification for this approach and submitted that the protections for all attributes should extend to all areas of public life covered by the Act.<sup>262</sup> It reasoned that this approach would:

- recognise the variety of settings in which discrimination based on protected attributes may occur;
- ensure consistent protection across all attributes (thus avoiding giving the impression that discrimination based on certain attributes is less serious or harmful than others); and
- be consistent with modern approaches to the framework of anti-discrimination legislation.<sup>263</sup>

The Commission concurs with this submission and considers that there is no principled reason for the current piecemeal approach. The Commission is of the view that, historically, discrimination on the basis of many protected attributes occurs in all the areas of public life identified by the Act, and in further areas of public life that the Commission recommends be included in the Act. Consistency in coverage for all protected attributes, in all areas of public life, aligns with the object of the Act in promoting recognition and acceptance within the community of equality for all. The Commission notes that such an approach may also serve to enhance community understanding of anti-discrimination practices by promoting consistency of approach.

The Commission notes that such an approach, whereby protection is afforded across all areas of public life unless an express exception in the Act provides otherwise, is broadly consistent with the approach taken in the ACT, Queensland, Northern Territory and Tasmanian Acts.

Accordingly, the Commission recommends that all of the attributes listed in the Act should be protected in relation to all of the areas of public life covered by the Act. General exceptions and exceptions specific to certain protected attributes are considered in sections 4.5 and 4.6 below.

### ***Recommendation 56***

Subject to any exceptions, all the attributes protected by the Act should be protected in relation to all the areas of public life covered by the Act.

#### **4.3.2 Education**

The Act currently provides that it is unlawful for an educational authority to discriminate:

1. by refusing or failing to accept a person's application for admission as a student;
2. in the terms and conditions on which it is prepared to admit the person as a student;
3. by denying the student access, or limiting the student's access, to any benefit provided by the educational authority;
4. by expelling the student; or

<sup>262</sup> Submission from ADLEG, 30 November 2021, 40.

<sup>263</sup> Ibid.

5. by subjecting the student to any other detriment.<sup>264</sup>

In the Discussion Paper, the Committee sought stakeholders' views on whether this area of protection should be extended to:

- include the evaluation and selection of student applications;<sup>265</sup> or
- prohibit educational institutions from preventing students from carrying out their religious practices during school hours.<sup>266</sup>

The Discussion Paper also sought stakeholders' views on the issue of exceptions in the Act. Exceptions in the area of public life of education are discussed at section 4.6.

Some submissions raised a further issue which was not considered in the Discussion Paper; whether the protections should be extended to cover educational providers. This issue is addressed in the following section of this Report.

#### **4.3.2.1 Educational providers**

Currently, the Act only prevents discrimination by an educational authority. The Act defines an educational authority as 'a body or person administering an educational institution'.<sup>267</sup> An educational institution is defined as 'a school, college, university or other institution at which education or training is provided'.<sup>268</sup> These definitions do not capture other providers of education, such as bodies that set curricula or developers of training courses.

It has been submitted that the term educational authority should be replaced with the term education provider as defined in the DDA. Education provider is defined in the DDA to mean:

- (a) an educational authority; or
- (b) an educational institution; or
- (c) an organisation whose purpose is to develop or accredit curricula or training courses used by other education providers referred to in paragraph (a) or (b).<sup>269</sup>

The EOC noted in its submission that complaints have been received from students who have alleged that a curriculum body has discriminated against them on the grounds of impairment, race, and breastfeeding.<sup>270</sup> The discrimination alleged was in relation to the rules set by the relevant curriculum body for various forms of assessment, including examinations. Notwithstanding that complaints of this nature have been accepted on the basis that such bodies provide services to students, it was submitted that the powers and functions of curriculum bodies are in fact regulatory in nature. The adoption of the definition of educational provider in the DDA would provide greater certainty that the area of education extends to education providers.

#### **Recommendation 57**

The definition of educational authority should include an organisation whose purpose is to develop or accredit curricula or training courses used by educational institutions.

<sup>264</sup> *Equal Opportunity Act 1984* (WA) ss 18, 35AJ, 35I, 35W, 44, 61 AND 66ZD.

<sup>265</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 129 – 130.

<sup>266</sup> *Ibid.*

<sup>267</sup> *Equal Opportunity Act 1984* (WA) s 4(1).

<sup>268</sup> *Ibid* s 4(1).

<sup>269</sup> *Disability Discrimination Act 1992* (Cth) s 4(1).

<sup>270</sup> Submission from the EOC, 1 November 2021, 5.



#### 4.3.2.2 *Evaluation and Selection of Student Applications*

Several stakeholders supported extending the area of education to include the evaluation and selection of student applications. In the context of disability, it was noted that a student's disability can be directly linked to decisions about whether to grant a student admission to primary and secondary schools. There have also been instances where students have been denied access to tertiary studies on the grounds of their disability, with the educational institution claiming the disability of the student will prevent them from being able to meet course requirements. The Commission was also informed that schools have declined to enrol students with disabilities if the school already has a certain number of students with disabilities.

The Commission also received submissions which argued that the area of education should not be extended to include the evaluation and selection of student applications as this is already adequately covered by the Act. Some submissions which opposed the extension of the area of education in this manner relied upon Article 18(4) of the ICCPR which states:

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.<sup>271</sup>

These stakeholders raised concerns that an extension would impact on religious freedom and the ability of schools to uphold their religious ethos and culture. Some stakeholders submitted that, while they remained opposed to the extension, if the area of education were to extend to the evaluation and selection of student applications, there should be an exception for religious institutions, similar to the exception currently contained in section 73(3) of the Act.

The Commission has taken into account the different views of stakeholders and respectfully agrees that the area of education should be extended to include the evaluation and selection of student applications. Although the Commission is of the view that a reasonable interpretation of the current Act is that the evaluation and selection of student applications is encompassed in refusing or failing to accept a person's application for admission as a student, the Commission is of the view that express protection should be included in the Act. Such an inclusion would provide greater clarity to members of the community and educational providers in highlighting that differential treatment based on a protected attribute in this context is unlawful discrimination. The Commission considers that this aligns with the protection of the human right of all persons to an education, which is enshrined in the UNDHR.<sup>272</sup>

It is noted that most of the opposition to this change came from individuals and organisations offering religious perspectives. The Commission recognises the important issues concerning religious freedoms raised by these stakeholders. It considers that the concerns raised in these submissions are best addressed through the exceptions afforded to religious institutions in the provision of education. These are discussed in section 4.5.

#### **Recommendation 58**

The Act should provide that it is unlawful for an educational provider to discriminate in the evaluation and selection of student applications.

<sup>271</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, GA Res2200A (XXI), 999 UNTS 171; Australian Treaty Series 1980 No 23, UN Doc A6316 (1966) (entered into force 23 March 1976, entered into force for Australia 13 November 1980, except article 41 which entered into force on 28 January 1993) Article 18(4).

<sup>272</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) Article 26.



#### 4.3.2.3 Carrying out religious practices during school hours

Various stakeholders supported extending the educational protections to prohibit educational providers from preventing students carrying out their religious practices during school hours. One stakeholder gave the following example highlighting the need for protection in this context:

##### **Case example**

*In Western Australia in 2019, a Hindu girl had pierced her nose for cultural and religious reasons, which amongst other things, symbolised her transition into womanhood. When the student returned to her school for her first day of Year 10, she was told that she would not be able to attend school unless she removed the nose piercing. The student and her family explained the cultural and religious significance of the piercing to the school, however despite their reasoning, the student was denied the ability to wear it and attend school for several weeks.<sup>273</sup>*

It was submitted that all religions and their practices should be embraced by schools and that anti-discrimination laws would play an important role in achieving that aim.

Some stakeholders submitted that an extension on this basis could be subject to a reasonableness test. This would require educational institutions to make reasonable accommodations to allow students to carry out their religious practices during school hours. For example, students could be allowed to carry out their religious practices outside of class time including before and after school, and during recess and lunch breaks.

The Commission also received submissions arguing that the extension is unnecessary, that it may create challenges for staff when trying to build cohesion, as well as undermine and contradict the ethos and beliefs of religious institutions. Other submissions suggested that such a prohibition would be unworkable in religious schools without exceptions being made similar to those currently found in section 73 of the Act.

Having considered these submissions, the Commission considers that if a school prevents or places restrictions on a student carrying out religious practices at school it is arguably discrimination on the ground of religious conviction in the area of education by subjecting the student to a detriment. Thus, it is already covered by the Act.

The Commission considers that there is danger in being prescriptive about what conduct is covered by the education area of public life. There are many things that an education provider may do that could constitute discrimination against a student. If the legislature attempted to specify all possible discriminatory acts of educational providers, there would be a risk that some would be omitted. The Commission considers the best approach to be that the Act identify the possibly discriminatory acts by the broad description of any other detriment.

Possible exceptions are addressed in sections 4.5 and 4.6 below.

<sup>273</sup> Submission from Dr Renae Barker, 24 November 2021, 3; Bethany Hiatt, 'Aranmore Catholic College Hindu nose pin ban may breach anti-discrimination laws' (15 February 2019) *The West Australian* (online) <https://thewest.com.au/news/wa/aranmore-catholic-college-drama-hindu-student-kicked-out-of-school-for-a-nose-piercing-ng-b881097548z>.

### 4.3.3 Employment

The protected area of public life being work includes a wide range of working situations, including employment. However, the Act does not include unpaid or voluntary work. For the purposes of the Act, employment is defined in section 4(1) as including:

- part-time and temporary employment; and
- work under a contract for services; and
- work as a State employee.

In accordance with this definition, unpaid or voluntary workers do not enjoy protections under the Act from discrimination in the area of public life being work. In the Discussion Paper, the Commission asked whether such workers should be included in the definition of employment.<sup>274</sup>

Stakeholder submissions were overwhelmingly in support of extending the definition of employment to include unpaid and voluntary workers. Stakeholders suggested that the relationship between employers and unpaid workers or volunteers is substantively similar to the relationship between employers and employees. Yet, while paid workers are protected from discrimination or harassment, unpaid or volunteer workers can experience the same discrimination or harassment without any protection or recourse. There is no apparent justification for this distinction.

The Commission received a case study from a stakeholder which highlights that volunteers and unpaid workers experience discrimination but are disadvantaged when compared to paid workers:<sup>275</sup>

#### Case example

*The complainant has a disability and was volunteering at an organisation. They faced disability discrimination by their immediate supervisor while working for the organisation. They reported this to the HR manager and they were placed on an immediate suspension. When they complained again, they were dismissed from their volunteer position.*

Stakeholders observed that unpaid and volunteer workers play an important role in protecting and serving Western Australian communities, providing essential public response services such as local fire brigades and unpaid carers. Unpaid and volunteer workers also play an integral role in the economy, including by assisting people from culturally and linguistically diverse backgrounds to find paid positions, or to meet course requirements to graduate.

Some stakeholders suggested that the Act adopt the approach taken in the *Work Health and Safety Act 2020* (WA). Under this Act, the term worker is defined as follows:

- A person is a *worker* if the person carries out work in any capacity for a person conducting a business or undertaking, including work as —
  - (a) an employee; or
  - (b) a contractor or subcontractor; or
  - (c) an employee of a contractor or subcontractor; or
  - (d) an employee of a labour hire company who has been assigned to work in the person's business or undertaking; or

<sup>274</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 148 – 149.

<sup>275</sup> Submission from Circle Green Community Legal, 30 November 2021, 53-54.

- (e) an outworker; or
- (f) an apprentice or trainee; or
- (g) a student gaining work experience; or
- (h) a volunteer; or
- (i) a person of a prescribed class.<sup>276</sup>

The Commission concurs with stakeholder submissions that a failure to protect unpaid or volunteer workers may adversely impact the communities that rely on, or benefit from, their services, or may otherwise potentially deter unpaid or volunteer workers from finding paid work or joining the workforce in their desired professions. The Commission thus recommends that a broader definition of employment is adopted in the Act, to include unpaid or volunteer workers. In the Commission's view this would better promote the objects of the Act, by reinforcing that discriminatory conduct is not tolerated in any form of workplace.

Adopting a definition of work that includes unpaid or volunteer workers is an important step in furthering equality by protecting a group of persons potentially vulnerable to unequal treatment, and by reinforcing that these workers play a crucial role in the community in which they should be protected from discrimination

The Commission acknowledges that to include unpaid or volunteer workers in the protected area of public life of work may impose costs on workplaces if employers were required to have the same hiring practices and dismissal processes for voluntary and paid workers so as to ensure that these practices were non-discriminatory. There are also issues with respect to whether it should be unlawful discrimination to favour providing better work opportunities to a paid worker as opposed to a work experience or voluntary worker. It would be counterproductive if providing such protection to unpaid and voluntary workers resulted in workplaces not being prepared to take on these types of workers.

The Commission has considered these issues and determined that there is a public interest in protecting volunteers and unpaid workers with protected attributes from discrimination in employment. It may be very difficult for these people to obtain work experience without volunteering or engaging in unpaid work. They require the protections of the Act to ensure they are treated in workplaces equally to volunteers and unpaid workers without protected attributes.

The Commission acknowledges that this recommendation, if implemented, could be counterproductive in that it may deter workplaces from taking on volunteers and unpaid workers. For this reason, the Commission considers that this recommendation should be reviewed after five years to ensure that it is not having this undesirable effect.

Another issue with respect to including volunteers is that such a description may be interpreted as including carer and voluntary work in a domestic or other private capacity. As explained at the beginning of this section, the Act only applies to areas of public life. If volunteers and unpaid workers are included in the definition of work, it will include carers in the public sphere but not in private or domestic situations. The definition of employment should exclude carers in private domestic situations and other private circumstances.

In light of the Commission's recommendations to broaden the definition of employment to include areas of work not usually considered to be employment, the Commission is supportive of the terminology being changed from employment to work, as in the Queensland Act.

There are other categories of work that are closely related to voluntary and unpaid work that the Act should cover. These are identified in the Queensland Act as:

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<sup>276</sup> *Work Health and Safety Act 2020 (WA)* s 7(1).

- work under a work experience arrangement...; and
- work under a vocational placement; and
- work by a person with a disability in sheltered workshop, whether on a paid (including a token remuneration or allowance) or an unpaid basis; and
- work under a guidance program, an apprenticeship training program, or other occupational training or retraining program.<sup>277</sup>

The Queensland Act also includes work under a statutory appointment. This too is an area of work not covered by the Act.

It is apparent that the Act definition of employment falls well short of including all relevant categories of employment or work. The Commission is of the view that the Act should be amended to include all of the above areas of working life.

Lastly, the Commission notes that the Act should not be amended to use the same terminology as the *Work, Health and Safety Act 2020* (WA) as it defines worker whereas the Act defines employment as an area of public life to which the Act applies.

The Commission's recommendation is to amend the definition of employment in the Act, to include:

- part-time and temporary employment;
- work under a contract for services;
- work as a State employee;
- work by a statutory appointee;
- work by a student gaining work experience;
- work by a volunteer or unpaid worker;
- work under a vocational placement;
- work by a person with a disability in an Australian Disability Enterprise, whether on a paid or an unpaid basis; and
- work under a guidance program, an apprenticeship training program, or other occupational training or retraining program.

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<sup>277</sup> *Anti-Discrimination Act 1991* (Qld) s 4.

### **Recommendation 59**

The definition of employment in the Act (which term could be changed to ‘work’) should include:

- part-time and temporary employment;
- work under a contract for services;
- work as a State employee;
- work by a statutory appointee;
- work by a student gaining work experience;
- work by a volunteer or unpaid worker;
- work under a vocational placement;
- work by a person with a disability in an Australian Disability Enterprise, whether on a paid or an unpaid basis; and
- work under a guidance program, an apprenticeship training program, or other occupational training or retraining program.

This recommendation should be reviewed after five years.

The definition should not include carers and should not apply to discrimination in private domestic situations or other private situations.

#### **4.3.4 Goods, services and facilities**

One of the areas of public life to which the Act applies is the provision of goods, services and facilities. The definition of services under the Act is not exhaustive, but includes:

- services relating to banking, insurance, superannuation and the provision of grants, loans, credit or finance; and
- services relating to entertainment, recreation or refreshment; and
- services relating to transport or travel; and
- services of the kind provided by members of any profession or trade; and
- services of the kind provided by a government (other than the assessment of an application for suitability for adoptive parenthood, or the placement of a child for adoption or with a view to the child’s adoption, under the *Adoption Act 1994*), a government or public authority or a local government body[.]<sup>278</sup>

In the Discussion Paper the Commission asked whether the definition of services should be extended to expressly include statutory functions that a State government agency is bound to carry out, or activities of a coercive nature.<sup>279</sup>

A number of submissions supported extending the definition of services. Many stakeholders argued that the definition of services should expressly include statutory functions that a State government agency is bound to carry out. It was submitted that this was necessary to overcome any doubt occasioned by the High Court’s decision in *IW v City of Perth*.<sup>280</sup> In that case, the Court held that when a State government agency is bound to carry out statutory functions, or when the nature of the activity

<sup>278</sup> *Equal Opportunity Act 1984* (WA) s 4(1).

<sup>279</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 148.

<sup>280</sup> *IW v The City of Perth* (1997) HCA 30; 191 CLR 1.

is coercive rather than beneficial, then the activity cannot generally be described as a service for the purposes of the Act.

Some stakeholders who supported this change noted that they had assisted individuals who had raised complaints about State-funded agencies acting in a discriminatory manner, such as the WA Police force. ALSWA pointed to the following case example:<sup>281</sup>

#### **Case example**

*A prisoner was suspected of ingesting a prohibited drug and was being transported to the medical centre within the prison for observation. While the prisoner was being escorted to the clinic by two police officers, one police officer said "What did you swallow, you black dog?" The other police officer said the prisoner "looks like he's off his face" and "doesn't know what he's doing the black dog" and the two officers then laughed. The prisoner submitted a complaint to the EOC.*

*While the complaint was accepted by the EOC, lawyers for the prison maintained that disciplinary practices were not a service being provided to the prisoner and so did not amount to an area of public life for the purposes of the Act.*

In a similar vein, several stakeholders also supported the amendment of the definition of services to expressly include the statutory functions of members of staff in State prisons and detention centres. ALSWA provided another relevant case example as follows:<sup>282</sup>

#### **Case example**

*A prisoner was subjected to a strip search. During the strip search, one of the prison officers said to the prisoner 'you're f\*\*\*ed you black c\*\*t. Another day the same year, the prisoner was in a cell when a group of prison officers came to the cell and one of the prison officers imitated a monkey and made monkey noises. The other prison officers present laughed. One officer said to the prisoner words to the effect that 'you all act the same, you act like eight-year-olds'. The prisoner understood this statement to be referring to the Aboriginal prisoners. The prisoner submitted a complaint to the EOC about these incidents. This complaint was discontinued for unrelated reasons.*

Alternatively, it was submitted that an additional area of public life to which the Act applies could be created to include these statutory functions. It was suggested that the exceptions for acts done under statutory authority would assist to balance these rights with the need for actions to be done to comply with court or tribunal orders. It was argued that these exceptions ensure that the functions of such roles are not significantly impacted or limited by the prohibitions under the Act and could be retained in a newly drafted Act.<sup>283</sup> The Commission notes, however, that the Act does not currently contain a broad exception for acts done under statutory authority.

The Commission agrees that the use of the term service has led to some uncertainty about the scope of the provision as it will not always be clear what is, or is not, a service, particularly where it involves the performance of public functions and duties by government bodies.

<sup>281</sup> Submission from ALSWA, 25 November 2021, 22.

<sup>282</sup> Ibid.

<sup>283</sup> Ibid 21.

In *IW v City of Perth* Brennan CJ and McHugh J said:

The term “services” has a wide meaning. The *Macquarie Dictionary* relevantly defines it to include “an act of helpful activity”; “the providing or a provider of some accommodation required by the public, as messengers, telegraphs, telephones, or conveyance”; “the organised system of apparatus, appliances, employees, etc., for supplying some accommodation required by the public”; “the supplying or the supplier of water, gas, or the like to the public”; and “the duty or work of public servants”. But wide as the definition is, in our opinion it is not capable of including a refusal to exercise the statutory discretion provided for by the *Town Planning and Development Act 1928* (WA) and Clause 40 of the City of Perth City Planning Scheme to approve the use of premises for use other than as a shop.<sup>284</sup>

Ultimately their Honours held that the deliberative and quasi-judicial nature of an application process for a planning approval meant that it could not be described as a service. Their Honours noted that the English Court of Appeal had held that those duties of a police officer that involve assistance to or protection of the public constitute services to the public for the purposes of the *Race Relations Act 1976* (UK). Whilst they said that they disagreed with other dicta in that case, they said that the case was rightly decided.

Dawson and Gaudron JJ held that the argument that the local government’s refusal of planning approval was a refusal to provide a service could not be sustained. Their Honours identified the service in question as the exercise of a discretion to grant or withhold planning approval and said that a refusal to provide that service is not established simply by showing that there was a refusal of planning approval. Rather, it is necessary to show a refusal to consider whether or not approval should be granted.

The other three judges (Toohey, Gummow and Kirby JJ) found that the local government was providing a service under the Act when determining an application for a planning approval.

The result of the conflicting judgments in *IW v The City of Perth* is that it is not entirely clear how the question of whether something is a service for the purposes of the Act is to be determined and the full extent of the activities that might fall within that term.

The meaning of the term services has also been considered in the context of the DDA. The decision in *Rainsford v Victoria*<sup>285</sup> considered the meaning of the term services in the context of prisoner accommodation and transport services, ultimately concluding that those things were not services for the purposes of the DDA. The case concerned a complaint of indirect discrimination under section 24(1)(c) of the DDA, which in effect prohibited discrimination on the grounds of disability in the manner in which goods and services are provided or facilities are made available to a person. The matter was originally heard in the Federal Magistrates Court, where the complaint was dismissed. The matter was appealed to the Full Federal Court, where the appeal was upheld and remitted to the Federal Magistrate’s Court, eventually being transferred to the Federal Court. In finding that transportation and accommodation of prisons was not a service for the purposes of section 24 of the DDA, Sundberg J said as follows:

<sup>284</sup> *IW v The City of Perth* [1997] HCA 30; (1997) 191 CLR 1.

<sup>285</sup> *Rainsford v Victoria* [2007] FCA 1059.



Counsel for the State suggested that the touchstone for service should be whether the act involves helpful or beneficial activity: *IW* 191 CLR at 11 per Brennan CJ and McHugh J. I accept that this is a useful test, but in a qualified way. Most activities are helpful or beneficial to someone. That in itself does not make them services. The question must be whether the act is helpful or beneficial to the relevant class of persons to which the person alleging discrimination belongs... Were it not for the decision of the Court of Appeal in *Farah v Commissioner of Police of the Metropolis* [1998] QB 65, I would have thought that the State, by maintaining a prison system, provides a service to the general public. However, in *Farah*, where the alleged discriminator was the police, it was held that assisting and protecting members of the public is a service but that pursuing, arresting and charging criminals is not. To my mind, the pursuit of criminals is so much a part of protecting the members of the public that a distinction between them is hard to justify, but I need not pursue this. These services for the benefit of the State or the general public are not to the point. The question in this case is whether the respondents provide a service to the relevant class to which Mr Rainsford belongs, namely prisoners....

In his outline of submissions, Mr Rainsford identifies the relevant service as 'prison management and control, including the control of cell accommodation and transport between prisons'. In my view, such a wide identification of service is meaningless; it is, in effect, no more than 'prison management and control'. The two activities complained of by Mr Rainsford are, first, the transportation of prisoners between prisons and between a prison and court and, second, the accommodation of prisoners in cells within the prison system. This is the appropriate level of precision with which to identify the alleged services. So identified, I am of the view that neither constitutes a service for the purpose of the DDA...

It is an artificial use of the word service to apply it to a fundamental integer of a system over which those affected have no or almost no control.

As courts have noted the desirability of giving broad definitions to terms in anti-discrimination legislation, in recognition of the purpose and goals of those statutes, it is likely that the term services would be widely interpreted where possible. However, the Commission notes that this does not resolve the uncertainty. In the Commission's view, amendment is required to address the current uncertainties about what amounts to a service. The question that arises is what that definition should be, or whether the issue might best be managed through the extension of the area of public life to cover specific aspects of government functions that might not otherwise fall squarely within the notion of services.

As noted above, several submissions supported extending the definition of services. Many stakeholders argued that the definition of services should expressly include statutory functions that a State government agency is bound to carry out. The difficulty that arises from these submissions is that many of those functions are not in the nature of services and, as such, extending the definition of services to incorporate them imports an artificial meaning to the term.

In the Commission's view that is a problem given there is an important point of principle that arises, namely whether the Act should bind the government and its agencies in the performance of all of their functions, except where the legislature has made a decision to exempt acts and decisions from the Act. In the Commission's view, that issue of principle is best dealt with through the addition of a requirement similar to that contained in section 29 of the DDA and section 101 of the Queensland Act.

Section 29 of the DDA provides as follows:

Administration of Commonwealth laws and programs

It is unlawful for a person who performs any function or exercises any power under a Commonwealth law or for the purposes of a Commonwealth program or has any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program, to discriminate against another person on the ground of the other person's disability in the performance of that function, the exercise of that power or the fulfilment of that responsibility.

The term Commonwealth program is defined simply to be a program conducted by or on behalf of the Commonwealth government.

Section 101 of the Queensland Act provides as follows:

Discrimination in administration of State laws and programs area

A person who—

- (a) performs any function or exercises any power under State law or for the purposes of a State Government program; or
- (b) has any other responsibility for the administration of State law or the conduct of a State Government program;

must not discriminate in—

- (c) the performance of the function; or
- (d) the exercise of the power; or
- (e) the carrying out of the responsibility.

The Commission considers that there would be benefit to clarifying what is meant by the term program. In addition, the Commission acknowledges that in the event that administration of laws and programs is added to the areas of public life to which the Act applies, it may be necessary to include a transitional provision which exempts certain legislative functions from its scope.

#### **Recommendation 60**

The definition of services should remain unchanged, but an additional area of State laws and State programs should be added to the protected areas of public life to which the Act applies.

#### **4.3.5 Local government**

At present, the Act does not include local government as a standalone protected area of public life. This is in contrast to NSW, Queensland and Victoria, where local government is identified as a specific area of protection.

As discussed above, services of the kind provided by a local government body are included in the definition of services in the Act.<sup>286</sup> Consequently, the Act provides protection for the area of life of comprising services provided by local governments. As indicated by the judgments in *IW v The State of Western Australia*, it is not always easy to determine what is or is not a service provided by a local government. Further the protection relates to services provided by the corporate local government body but not the conduct of individual elected local government councillors.

In the Discussion Paper, the Commission asked whether local government should be included as a protected area in the Act.<sup>287</sup>

Submissions were generally supportive of the inclusion of local government as a protected area, in order to ensure consistency with other jurisdictions that include local government as a protected area of life. It was also submitted that change was required to ensure that local government councillors had a remedy if they were discriminated against by another elected councillor or by a person employed by the relevant local council.

<sup>286</sup> *Equal Opportunity Act 1984* (WA) s 4(1).

<sup>287</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 131.

The Queensland Act provides coverage in respect of discrimination against another member in the performance of official functions, other than on the basis of political activity or belief.<sup>288</sup> The NSW Act provides that it is unlawful for local government councillors to discriminate against another councillor.<sup>289</sup> The Victorian Act is similarly limited, although it also provides protection in respect of a councillor's behaviour towards a member of a committee of that council who is not a councillor of that council.<sup>290</sup>

In addition to the above shortcomings in the Act, the EOC in its submission referred to complaints that it has received from employees of local government bodies who allege they have been discriminated against by a local government councillor. However, it was unable to address these complaints because they fell outside the current scope of the Act. The provisions prohibiting discrimination by an employer do not cover this situation, as the local government is the complainant's employer, not the councillor who is alleged to have discriminated against the complainant. The EOC suggested that the area of employment could be extended to include discrimination by a local government member against an employee of that local government, as well as workplace participants and other local government councillors.<sup>291</sup>

The Commission considers that the deficiency in the Act is that it is not clear that it does not cover allegedly discriminatory acts done by local government councillors to other councillors and local government employees, or allegedly discriminatory acts done by local government employees to councillors. In respect to the latter area there is some coverage for local government councillors from the protected area of public life of services but it is probably not broad enough to cover all the relevant area of local government.

This deficiency is best addressed by providing that local government is an area of public life covered by the Act. The area should include:

- actions by a councillor in their capacity as a local government councillor towards another councillor;
- actions by a councillor in their capacity as a local government councillor towards a local government employee; and
- actions by a local government employee towards a councillor.

There may be other activity between councillors and other persons mentioned in the *Local Government Act 1995* (WA) that ought to be included in the definition of the local government protected area of life. It is beyond the Terms of Reference for the Commission to consider in detail all the bodies referred to in the *Local Government Act 1995* (WA). However, consideration ought to be given to that Act when drawing up the list of activities to be included in the local government protected area of life

The Act should be amended to provide that it is unlawful to discriminate in that area of life on the basis of all protected attributes under the Act.

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<sup>288</sup> *Discrimination Act 1991* (Qld) s 102.

<sup>289</sup> *Anti-Discrimination Act 1977* (NSW) ss 10B, 27B, 38G, 42B, 49H, 49Z, 49ZKA.

<sup>290</sup> *Equal Opportunity Act 2010* (Vic) s 73.

<sup>291</sup> Submission from EOC, 1 November 2021, 6.

### **Recommendation 61**

Local government should be included as a protected area of public life to which the Act applies.

### **Recommendation 62**

The protected area of local government should include:

- actions by a councillor in their capacity as a local government councillor towards another councillor;
- actions by a councillor in their capacity as a local government councillor towards a local government employee;
- actions by a local government employee towards a councillor; and
- other activity between councillors and other persons mentioned in the *Local Government Act 1995* (WA) that ought to be included in the definition of the local government protected area of life.

### **Recommendation 63**

Other than in the case of acts done by one councillor towards another councillor on the grounds of political conviction, the Act should provide that it is unlawful to discriminate in the protected area of local government on the basis of all protected attributes under the Act.

## **4.3.6 Sport**

Sport is currently a protected area of public life. However, it is only unlawful to discriminate in the area of sport on the grounds of a small number of protected attributes. The Act makes it unlawful to discriminate in sport by:

- (a) on gender history grounds, excluding a gender reassigned person from a sporting activity or an administrative, coaching, refereeing or umpiring activity in relation to any sporting activity;<sup>292</sup>
- (b) on the ground of impairment, excluding a person from a sporting activity, including an administrative or coaching activity in relation to any sporting activity;<sup>293</sup> and
- (c) on the ground of age, excluding a person from a sporting activity, including an administrative, coaching, refereeing or umpiring activity in relation to any sporting activity.<sup>294</sup>

If a complainant wishes to make a sporting activity discrimination complaint on that basis of a protected attribute other than gender history impairment and age, they are able to do so if the alleged discrimination falls within another area of public life related to the particular sport, such as membership of a club or access to a place.

The Act does not define sporting activity. A sport is ordinarily understood to be a human activity involving physical exertion. Components of the definition that may be open to inclusion or rejection

<sup>292</sup> *Equal Opportunity Act 1984* (WA) s 35AP(1).

<sup>293</sup> *Ibid* s 66N(1) and (2).

<sup>294</sup> *Ibid* s 66ZJ(1) and (2).

include skill and competition. The ordinary meaning of the term may include organised, casual, social, competitive or non-competitive sporting activity. The fact that section 35(1) refers to competitive sporting activity only suggests that the term sporting activity when used elsewhere in the Act includes competitive and non-competitive sporting activity. Although the Act should not cover private areas of life, the term may include private sporting activity. Consideration ought to be given to defining sporting activity to clarify its meaning and to exclude private sporting activity.

There are also detailed exceptions to each of the sporting activity protections. These exceptions are considered in sections 4.5 and 4.6 of the Report.

In the Discussion Paper the Committee asked whether the protection in the area of sports should be extended to further grounds.<sup>295</sup>

A number of stakeholders were in favour of the area of public life of sport being extended to all grounds under the Act, with exceptions applying where necessary. As discussed in section 4.3.1 above, the Commission recommends that all grounds be extended to apply to all protected areas of public life under the Act. Thus, no recommendation specific to the ground of sport is required in order to achieve this change. Nevertheless, the Commission is satisfied that expanding the protected area of public life of sporting activity to all protected attributes is important to signify the importance of sporting clubs offering sporting activities to all people regardless of their personal attributes. Historically sports have unjustifiably discriminated against people on many grounds including sex, sexual orientation, gender identity, race, impairment and religion. Such discrimination can result in financial detriment, mental health issues, relationship problems and deterioration in physical health. Discrimination in sport is particularly detrimental in Australia where organised sport plays an important part in the broader social life of the community. By extending the public area of sporting activity to all protected attributes a clear message will be given that sport should break down barriers between people; not build them up.

In coming to this view, the Commission has taken into account stakeholder concerns that if sport is a protected area of public life which applies to all protected attributes, including gender identity, it will result in biological males who identify as females having a right to play sport against biological females with the result that they will have a physical advantage. Consequently, there will be a risk of injury to female competitors and they will be at a competitive disadvantage. They may be discouraged from playing sport.

Concerns were also raised that it would give biological males who identify as females the right to occupy places on sporting teams previously reserved for women and to access female only sporting places such as changerooms. It was submitted that, in combination, the effects of broadening the protected attributes to which sport applies will erode women's right to participate in sport equally with men, as identified in international human rights instruments such as the CEDAW.

It is important that modern anti-discrimination laws do not provide protection to people at the expense of the protections of traditionally disadvantaged groups, such as women. Australia, partly through its adoption of sex discrimination laws, has facilitated the participation of women and girls in all levels of sport. The Commission recognises that Australia's and Western Australia's achievements in this area should not be undermined. Further, given the prevalence of violence against women and children anti-discrimination laws should ensure that safe places for women and children, included in relation to sporting activity, can be created and maintained.

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<sup>295</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 130.

The Commission notes that section 35 of the Act currently provides that the prohibitions of discrimination on the basis of the protected attributes of sex, marital status, pregnancy or breastfeeding do not make it unlawful to exclude persons of one sex from participation in any competitive sporting activity for people 12 years of age or older in which the strength, stamina or physique of competitors is relevant. There is also the exception section 35AP(2) of the Act relating to gender reassigned persons and sporting activity for which they would have a significant physical advantage due to their medical history. The Commission is satisfied that appropriate exceptions can resolve concerns about the extension of the protected area of sport to all protected attributes.

The Commission is of the view that the Act should adopt an exception-based approach to discrimination in sport, similar to the DDA and the Northern Territory, Queensland and Victorian Acts, such that protection will be afforded unless an express exception in the Act provides otherwise. These exceptions are considered in sections 4.5 and 4.6 below.

The Commission notes that the prohibition on the grounds of impairment in sport is worded differently from the other two prohibitions. It does not include umpiring or refereeing. Whilst people who have certain impairments would not be suitable umpires or referees, there are many other impairments that should not preclude people with those impairments from participating as umpires or referees. The reason for the absence of protection for all people with an impairment is unclear. When the Act is reformed, consideration ought to be given to removing this difference.

#### **4.3.7 Clubs and incorporated associations**

Clubs are currently a protected area of public life. It is unlawful to discriminate in the area of clubs on the ground of all current protected attributes other than family responsibility or family status and publication on the Fines Enforcement Registrar's website.

As stated in the Discussion Paper, in all jurisdictions except for NSW and South Australia, protection is afforded against discrimination on all grounds regarding activities of clubs.<sup>296</sup> In the Commission's view the Act should be similarly extended to prohibit discrimination on all grounds regarding activities of clubs. The Commission is unaware of a justification for excluding the protected attributes of family responsibility or family status and publication on the Fines Enforcement Registrar's website.

The Commission is of the opinion that given the statutory definition of a club (discussed below), there is insufficient justification for not including the recommended new and protected attributes as grounds for discrimination in the clubs area of public life.

The provisions in the Act prohibiting discrimination in relation to club activities are in similar terms. It should not be difficult to consolidate them into one provision which will improve the readability of the Act.

It is unlawful for a club, the committee of management of a club, or a member of the committee of management of a club to discriminate against a person who is not a member of the club:

- (a) by refusing or failing to accept the person's application for membership; or
- (b) in the terms or conditions on which the club is prepared to admit the person to membership.

It is also unlawful to discriminate against a member of the club:

- (a) in the terms or conditions of membership that are afforded to that member; or
- (b) by refusing or failing to accept the application of that member for a particular class or type of membership; or

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<sup>296</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 49.

- (c) by denying that member access, or limiting the member's access, to any benefit provided by the club or incorporated association; or
- (d) by depriving that member of membership or varying the terms of membership; or
- (e) by subjecting that member to any other detriment.<sup>297</sup>

The Act defines a club as:

[A]n association of not less than 30 persons associated for social, literary, cultural, political sporting, athletic or other lawful purposes that provides or maintains facilities in whole or in part from the funds of the association and sells or supplies liquor for consumption on its premises.<sup>298</sup>

The Commission received few submissions that touched on the Act's definition of a club.

The definition of club, like that in some other jurisdictions,<sup>299</sup> is based on the definition of club which was adopted in the SDA.<sup>300</sup> Its reference to the sale or supply of liquor has been described as irrelevant to contemporary circumstances, with suggestions for its removal.<sup>301</sup> There are numerous kinds of clubs which operate within the community and provide public benefits, but do not provide alcohol for consumption on their premises including, for example, police and community youth centres.<sup>302</sup>

This raises a question as to whether there is another basis, intended or not, for maintaining the requirement for a liquor licence being that it includes clubs for adults or adults and children; rather than children alone, whose clubs will not be hold liquor licences.

The Commission received submissions suggesting that the definition of a club should be improved. For example, ADLEG argued that the Tasmanian approach to defining club should be adopted.<sup>303</sup> Section 3 of the Tasmanian Act defines a club as:<sup>304</sup>

an incorporated or unincorporated association of at least 30 persons associated together for a lawful purpose that provides and maintains its facilities, wholly or partly, from the funds of the association.

There is a competing view that including the requirement for the club to have a liquor licence balances the right to freedom of association with the right to equality because it distinguishes larger associations which operate in the public and commercial sphere (and thus should be subject to anti-discrimination legislation) from smaller clubs, more akin to private groups of people. Clubs with liquor licences are subject to government regulation and this indicates that they are operating in the public sphere.<sup>305</sup>

As the Commission has earlier recognised, the Act only applies to areas of public life: it does not apply to private affairs which might include, for example, a social book club run from a person's private

<sup>297</sup> *Equal Opportunity Act 1984* (WA) s 22, s 35AO, s 35ZB, s 48, 64, 66M and 66ZI.

<sup>298</sup> *Equal Opportunity Act 1984* (WA) s 4(1).

<sup>299</sup> *Equal Opportunity Act 2010* (Vic) s 4; *Anti-Discrimination Act 1992* (NT) s 4(1); *Discrimination Act 1991* (ACT), s 2, Dictionary.

<sup>300</sup> *Sex Discrimination Act 1984* (Cth) s 4(1).

<sup>301</sup> Department of the Attorney-General and Justice (NT), *Discussion Paper – Modernisation of the Anti-Discrimination Act* (September 2017), 18; New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW) (Report 92, 1999), [4.256].

<sup>302</sup> See, for example, *Scarborough Police and Citizens Youth Club* [2006] WASAT 38 [25].

<sup>303</sup> Submission from ADLEG, 30 November 2021, 73.

<sup>304</sup> The Tasmanian Act had previously defined club in the same terms as the Act, until it was amended by s 3 of the *Anti-Discrimination Amendment Act 2013* (Tas).

<sup>305</sup> Parliament of Victoria, *Parliamentary Debates* (Legislative Assembly, 10 March 2010), 781.



home.<sup>306</sup> The Commission is of the view that the definition of clubs must maintain the distinction between areas of private life to which the Act does not apply and public life to which it does apply.

The Commission agrees with ADLEG's submission that there is no imperative to define a club in the Act by whether it sells or supply liquor for consumption on their premises in order to maintain this distinction.<sup>307</sup> Another qualifier could be found. In fact, the Act itself contains another qualifier. In respect to discrimination based on impairment and age the description of discrimination in the clubs area of public life includes clubs or *incorporated associations*.<sup>308</sup> This is contrasted with the statutory descriptions of discrimination on other grounds in clubs area of public life which only refer to clubs.

The term incorporated association is defined in the Act to mean an association incorporated under the *Associations Incorporation Act 2015 (WA)*.<sup>309</sup>

The addition of incorporated associations within these provisions widens the types of clubs and associations covered by the Act. An incorporated association must have at least six members as opposed to the 30 members required by the definition of a club. An association is eligible for incorporation if it is formed for and carries on one or more of the purposes specified in the *Incorporated Associations Act 2015 (WA)*. These purposes are very wide and include those referred to in the definition of a club in the Act.<sup>310</sup>

However, section 5(1) of the *Associations Incorporation Act 2015 (WA)* excludes an association formed or carried on for the purpose of securing pecuniary profit for its members, from incorporation under the Act. On the other hand, profit is not referred to in the definition of a club in the Act.

Incorporation offers an association benefits such as a legal status in its own right and it limits the liability of members for any debts of the association. Incorporation may render an association eligible to receive public funding. As a consequence of incorporation an incorporated association becomes subject to regulation under the *Associations Incorporation Act 2015 (WA)* and it must be formally constituted. An incorporated association does not have to sell or supply liquor for consumption on its premises. An incorporated association is by its nature incorporated; whereas a club may be incorporated or unincorporated.

Whilst incorporation, the privileges and obligations which accompany it and the role that incorporated associations play in public life may be a justification for including incorporated associations with the purview of areas of public life covered by the Act, it is unclear to the Commission why they have been included only in relation to discrimination on the grounds of impairment and age.

The Commission is of the view that the Act's definition of a club and its inclusion of incorporated associations in the clubs provisions, but only in relation to the protected areas of life of impairment, is not a consistent approach to which associations and clubs should be protected areas of public life.

The Commission is of the view that that there should be consistency in the descriptions of the areas of public life to which the Act applies. The Act should be amended to add incorporated associations to the protected area of public life that is club activity.

However, it is not possible to replace the definition of a club with an incorporated association because that would exclude clubs that operated to secure pecuniary profit for its members. Thus, it remains necessary to consider whether the current definition of a club is appropriate. The regulation of clubs that operate in the public sphere could be achieved by using a control other than a liquor licence. The

<sup>306</sup> Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act: Discussion Paper* (November 2021), 127.

<sup>307</sup> Submission from ADLEG, 30 November 2021, 73.

<sup>308</sup> *Equal Opportunity Act 1984 (WA)* s 66M and s 66ZL.

<sup>309</sup> *Associations Incorporation Act 2015 (WA)* s 3.

<sup>310</sup> *Ibid* s 4.

requirement that a club sells or supplies liquor from its own premises is a useful bright line which identifies for everyone which clubs are and which clubs are not subject to the Act. On the other hand, the Tasmanian definition lacks clarity because it does not explain what facilities a club requires before it can be included as a club. The definition in the Act by implication at least requires that those facilities include club premises.

The definition of a club should be reviewed and a consistent approach adopted to the types of clubs and associations that are to be protected under the Act. The Commission is of the view that further consultation is required with affected clubs about this definition.

#### **Recommendation 64**

The definition of club should be reviewed. It should include incorporated associations.

### **4.3.8 Requirement to provide information**

Stakeholder submissions suggested introducing a new protected area of public life: requests for information. While the Act currently contains several provisions which deal with requests for information,<sup>311</sup> they are difficult to decipher and are scattered throughout various Divisions of the Act. The net effect of these provisions is to make it unlawful to request or require the provision of information in connection with an act which would, itself, constitute unlawful discrimination. By way of example, section 23 of the Act provides as follows:

- (1) Where, by virtue of a provision of Division 2 or this Division, it would be unlawful, in particular circumstances, for a person to discriminate against another person, on the ground of the other person's sex, marital status, pregnancy or breast feeding, in doing a particular act, it is unlawful for the first-mentioned person to request or require the other person to provide, in connection with or for the purposes of the doing of the act, information (whether by way of completing a form or otherwise) that persons of the opposite sex or of a different marital status, or persons who are not pregnant, or persons who are not breast feeding or bottle feeding, as the case requires, would not, in circumstances that are the same or not materially different, be requested or required to provide.
- (2) Nothing in subsection (1) renders it unlawful for a person to request or require —
  - (a) a person of a particular sex to provide information concerning such part of the last-mentioned person's medical history as relates to medical conditions that affect persons of that sex only; or on ground of sex, marital status, pregnancy or breast feeding Division 4 Discrimination involving sexual harassment
  - (b) a person who is pregnant to provide medical information concerning the pregnancy.

Essentially, these provisions aim to ensure that a person is not discriminated against on the basis of a protected attribute where information is requested from them in connection with doing an act which is itself discriminatory.

Requests for information are an area of public life to which anti-discrimination legislation applies in a number of other jurisdictions, but certainly not all. Provisions of this nature can be found in the DDA, the ADA and the SDA at a Commonwealth level, and in the anti-discrimination statutes of a number of States. The provisions in both the Northern Territory and Queensland are broader in their operation than those at the Commonwealth level, as they apply to requests for information on which unlawful discriminatory conduct 'might' be based, not 'is' based. In the case of the Commonwealth provisions,

<sup>311</sup> See, for example, ss 23, 35AQ.

the focus is on the use that is made of the information, and not the uses which might be made of the information, even if the person requesting it does not then engage in conduct which is discriminatory.

The EOC submitted that it was appropriate for the Act to include a provision of the kind currently incorporated in section 124 of the Queensland Act. That provision provides as follows:

**124 Unnecessary information**

- (1) A person must not ask another person, either orally or in writing, to supply information on which unlawful discrimination might be based.
- (2) Subsection (1) does not apply to a request that is necessary to comply with, or is specifically authorised by—
  - (a) an existing provision of another Act; or
  - (b) an order of a court; or
  - (c) an existing provision of an order or award of a court or tribunal having power to fix minimum wages and other terms of employment; or
  - (d) an existing provision of an industrial agreement under the repealed Industrial Relations Act 1999; or
  - (e) an order of QCAT or the industrial relations commission.
- (3) It is a defence to a proceeding for a contravention of subsection (1) if the respondent proves, on the balance of probabilities, that the information was reasonably required for a purpose that did not involve discrimination.
- (4) In this section—

**existing provision** means a provision in existence at the commencement of this section.

*Example—*

An employer would contravene the Act by asking applicants for all jobs whether they have any impairments but may ask applicants for a job involving heavy lifting whether they have any physical condition that indicates they should not do that work.

The Commission notes that a provision of this nature has the advantage of consolidating the many and varied provisions which are already contained in the Act in relation to this issue, whilst still enabling information to be requested where the purpose of that request is a legitimate and non-discriminatory one. The Commission considers that it is appropriate to incorporate a similar provision in the Act, which applies in respect of all protected attributes. The Commission considers that the exceptions and the defence set out in sections 124(2) and 124(3) respectively are appropriate to be included.

The Commission notes that although this is an area of public life to which the Act would apply, the structure of the exceptions and defences is not entirely consistent with the way in which other provisions of the Act are structured. Whilst the Commission supports consistency in the structure and drafting of the Act wherever possible, it is ultimately a matter for the legislative drafter as to how the intent of this provision can be best incorporated in the Act.

### **Recommendation 65**

The Act should contain a single provision relating to unlawful requests for information. The provision should be drafted in similar terms to section 124 of the *Anti-Discrimination Act 1991* (Qld), which provides:

- (1) A person must not ask another person, either orally or in writing, to supply information on which unlawful discrimination might be based.
- (2) Subsection (1) does not apply to a request that is necessary to comply with, or is specifically authorised by—
  - (a) an existing provision of another Act; or
  - (b) an order of a court; or
  - (c) an existing provision of an order or award of a court or tribunal having power to fix minimum wages and other terms of employment; or
  - (d) an existing provision of an industrial agreement under the repealed *Industrial Relations Act 1999*; or
  - (e) an order of QCAT or the industrial relations commission.
- (3) It is a defence to a proceeding for a contravention of subsection (1) if the respondent proves, on the balance of probabilities, that the information was reasonably required for a purpose that did not involve discrimination.
- (4) In this section—

**existing provision** means a provision in existence at the commencement of this section.

*Example—*

An employer would contravene the Act by asking applicants for all jobs whether they have any impairments but may ask applicants for a job involving heavy lifting whether they have any physical condition that indicates they should not do that work.

## **4.4 Responsibility to make reasonable adjustments**

This section considers whether there should be a responsibility to make reasonable adjustments for people with protected attributes, and if so what the scope of that duty should be. It starts by considering the two areas where this issue most commonly arises. The first area is in relation to people with an impairment and the second area is in relation to carers. It then considers whether the duty should be expanded to cover all protected attributes, the way in which the duty should be framed, and the factors that should be considered in determining whether a proposed adjustment is reasonable.

This concept is different to that considered later in the Report as to whether the Act should impose a positive duty to eliminate discrimination, harassment, victimisation and vilification. The responsibility to make reasonable adjustments is directed towards meeting an individual's needs due to their protected attribute or attributes; rather than to addressing systemic discrimination. Systemic discrimination is best addressed by the imposition of a positive duty not to discriminate, harass, victimise and vilify. The Commission acknowledges that they overlap to an extent.

In order to avoid confusion between the two concepts, in this section the Commission has used the term responsibility rather than duty.

#### 4.4.1 Accommodating impairments<sup>312</sup>

Certain sections of the Act currently provide that there is no discrimination on the grounds of impairment if the alleged discriminator does not provide a person with an impairment with relevant services, facilities or benefits because this would impose an unjustifiable hardship on the provider of the services, facilities or benefits.<sup>313</sup> Section 66I of the Act is an example of such a provision. Section 66I(1) and (2) provide that it is unlawful for an educational authority to discriminate against a person on the grounds of a person's impairment:

- by refusing or failing to accept the person's application for admission as a student<sup>314</sup>; or
- in the terms or conditions on which it is prepared to admit the person as a student<sup>315</sup>; or
- by denying the student access, or limiting the student's access, to any benefit provided by the educational authority<sup>316</sup>; or
- by expelling the student<sup>317</sup>; or
- by subjecting the student to any other detriment<sup>318</sup>.

Section 66I(4) of the Act provides:

Nothing in this section applies to or in respect of a refusal or failure to accept a person's application for admission as a student at an educational institution where the person, if admitted as a student by the educational authority, would require services or facilities that are not required by students who do not have an impairment and the provision of which would impose unjustifiable hardship on the educational authority.

Similar provisions provide exceptions to discrimination on the basis of impairment in the provision of goods and services, accommodation, membership services of clubs and incorporated associations and work.<sup>319</sup>

Section 4(4) of the Act provides that in determining what constitutes unjustifiable hardship:

all relevant circumstances of the particular case shall be taken into account including the nature of the benefit or detriment likely to accrue or be suffered by all persons concerned, the nature of the impairment of the person concerned and the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship.

The Discussion Paper noted that, as a practical matter, these provisions may impose an implicit obligation to make reasonable adjustments for people with an impairment, in order to avoid contravening the Act. This is on the basis that the exceptions to discrimination only exist if acting in a non-discriminatory way would impose unjustifiable hardship on the alleged discriminator. However, it was suggested that reading the Act in this way may be somewhat strained. The Commission thus asked whether the Act offers sufficient protection for people with an impairment. Should a provider of services and benefits be obliged to make reasonable adjustments for a person with an impairment and

<sup>312</sup> The Commission recommends that wherever the word 'impairment' is used in the Act that it be replaced with the word 'disability'. For consistency with the terms of the questions asked in the Discussion Paper, and used in the submissions, this section continues to use the term impairment.

<sup>313</sup> See *Equal Opportunity Act 1984* (WA) ss 66K(2) (goods, services and facilities), 66L(3)(c) (accommodation), 66M(5) (clubs and incorporated associations), 66Q(1)(b) (work).

<sup>314</sup> See *Equal Opportunity Act 1984* (WA) s 66I(1)(a).

<sup>315</sup> Ibid s 66I(1)(b).

<sup>316</sup> Ibid s 66I(2)(a).

<sup>317</sup> Ibid s 66I(2)(b).

<sup>318</sup> Ibid s 66I(2)(c).

<sup>319</sup> A similar provision exists in s 66J(2) for discrimination against a person on the ground of impairment in relation to the provision of a service or facility. Section 66L has a similar exception for discrimination on the grounds of impairment in the area of accommodation. Section 66M has a similar provision in relation to membership benefits of a club or incorporated association. Section 66Q(1) has a similar exception for discrimination on the grounds of impairment in the area of work.

should the Act be amended to include a responsibility to make reasonable adjustments for persons with an impairment.<sup>320</sup>

Many stakeholders submitted that the Act does not offer sufficient protection to persons with an impairment. These submissions were primarily made on the basis that, as currently drafted, the Act does not proactively promote or otherwise require that reasonable adjustments be made but instead responds to incidents of discrimination once they have already occurred. There was broad support for instead introducing a responsibility to make reasonable adjustments for individuals with an impairment into the Act.

Various benefits for including such a positive responsibility were raised by stakeholders. These included better achieving substantive equality for persons with an impairment and, to the extent that the Act may currently impose a positive duty in this regard, clarifying the existing protections (thus providing greater certainty to duty holders and people with a disability about their respective obligations and rights). Imposing a responsibility to make adjustments was also seen to have the potential to drive behavioural change in duty holders, in turn reducing the number of discrimination claims. For instance, it was submitted that, in the case of employees who are at risk of otherwise being unable to perform their jobs, a statutory responsibility may increase the probability of employers making the appropriate adjustments; thus, averting acts of discrimination before they occur. It was also seen to be desirable to bring the Act in line with the obligations to provide reasonable adjustments imposed on relevant duty holders in the Victorian, Northern Territory and South Australian Acts, as well as sections 5(2) and 6(2) of the DDA.

A recurring theme in these submissions was that there is generally a significant power differential between respondents and complainants with an impairment. Respondents have the power to prevent discrimination from occurring, whereas individuals who are discriminated against are often those who, due to their protected attribute, have fewer resources, face greater difficulties with access to different areas of life and, as such, may struggle with accessing their rights under anti-discrimination law. Introducing a positive responsibility to make reasonable adjustments was said to contribute towards addressing this imbalance of power.

A limited number of stakeholders were opposed to including a positive responsibility to make reasonable adjustments. It was suggested that this would create unrealistic expectations for respondents, and particularly employers, to foresee and mitigate discrimination for those with unusual or hard to ascertain impairments. It was submitted that a preferable approach would be to provide that an obligation to make accommodations for individuals with impairments should only arise where, for instance, an employer is notified of an individual's needs, either from the individual or their physician.

#### **4.4.2 Accommodating carer responsibilities**

At present, the protected attribute of having a carer responsibility falls under the broad heading of family responsibility or family status. However, the Commission has recommended above that the Act be amended to create a protected attribute of family status and another protected attribute of carer responsibility.

In its submission, the EOC suggested that the Act should include a requirement that a person must not unreasonably refuse to accommodate carer responsibilities, in all areas of public life to which the

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<sup>320</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 144 – 146.

Act applies, with all relevant facts and circumstances considered.<sup>321</sup> It was submitted that the Act should adopt an approach similar to that taken in section 19(1) of the Victorian Act, which provides:

An employer must not, in relation to the work arrangements of an employee, unreasonably refuse to accommodate the responsibilities that the employee has as a parent or carer.

*Example*

An employer may be able to accommodate an employee's responsibilities as a parent or carer by allowing the employee to work from home on a Wednesday morning or have a later start time on a Wednesday or, if the employee works on a part-time basis, by rescheduling a regular staff meeting so that the employee can attend.

Section 19(2) of the Victorian Act goes on to set out various factors which must be considered when determining whether an employer has unreasonably refused to accommodate an employee's carer responsibilities.

The obligation in the Victorian Act not to unreasonably refuse to accommodate the responsibilities that a person has as a parent or carer, only applies to discrimination by employers, principals of contract workers and firms in relation to work arrangements.

#### 4.4.3 Creation and scope of a responsibility

The concept of discrimination including a failure to make reasonable adjustment and accommodation for people with protected attributes is part of the CRPD. It defines 'discrimination on the basis of disability' as including denial of reasonable accommodation.<sup>322</sup> The CRPD defines reasonable accommodation as meaning:

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.<sup>323</sup>

Article 5 of the CPRD requires States Parties (which include Australia; but not Western Australia) to prohibit all forms of discrimination on the basis of discrimination and to take all appropriate steps to ensure reasonable accommodation is provided.

Some stakeholders submitted that the responsibility to make reasonable adjustments should extend to all of the protected attributes under the Act. It was said that this would assist with best meeting the objective of achieving substantive equality in Western Australia. Additionally, by encouraging organisations to change their processes and practices across the board (and not just in relation to persons with impairments), it was submitted that this would help address the causes or barriers relating to systemic discrimination.

Around Australia, various approaches have been taken to formulating the responsibility to make adjustments.

The Victorian Act creates a number of positive duties for employers, firms, education providers and service providers to make reasonable adjustments for persons with a disability in the protected areas of employment, education and services.<sup>324</sup> The Victorian Act has exceptions to the obligation where the adjustments are not reasonable or the employer, firm, education provider or service provider has met their obligation but the person could not perform the genuine and reasonable requirements of the

<sup>321</sup> Submission of EOC, 1 November 2021, 4.

<sup>322</sup> Article 2.

<sup>323</sup> Ibid.

<sup>324</sup> See *Equal Opportunity Act 2010* (Vic) ss 20(2), 33, 40, 45.



employment or participate in the educational programme or access the service even after the adjustments are made.<sup>325</sup>

The Northern Territory Act prescribes that a person must not discriminate against another person by failing or refusing 'to accommodate a special need that another person has because of an attribute'.<sup>326</sup> Such a failure or refusal to accommodate arises where:

- a person makes 'inadequate or inappropriate provision to accommodate the special need'<sup>327</sup>; and
- a person acts in a way which 'unreasonably fails to provide for the special need of another person if that other person has the special need because of an attribute'.<sup>328</sup>

The Northern Territory Act does not draw a distinction between the attributes from which the special needs arise. Thus, the Northern Territory Act provision is wider than the Victorian Act provisions. The Northern Territory Act provision states that a failure to accommodate a special need takes place when a person acts in a way which unreasonably fails to provide for the special need of another person when that special need is because of a protected attribute.<sup>329</sup> The Northern Territory Act provides that this prohibited conduct is distinct to the prohibitions on discrimination. Like the statutory prohibitions on discrimination, a breach of this provision can be the grounds for a complaint to the Northern Territory Anti-Discrimination Commissioner.<sup>330</sup>

The South Australian Act and the DDA integrate the prohibition against the denial of reasonable adjustments into their definitions of discrimination.<sup>331</sup> For example, under section 5(2) of the DDA, the discriminator will be deemed to have directly discriminated against the aggrieved person on the grounds of the aggrieved person's disability, if:

- (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and
- (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.

Under section 6(2) of the DDA, the discriminator will be deemed to have indirectly discriminated against the aggrieved person on the grounds of the aggrieved person's disability, if:

- (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
- (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and
- (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.

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<sup>325</sup> Ibid.

<sup>326</sup> *Anti-Discrimination Act 1992* (NT) s 24.

<sup>327</sup> Ibid.

<sup>328</sup> Ibid.

<sup>329</sup> *Anti-Discrimination Act 1992* (NT) s 24(2)(b).

<sup>330</sup> Ibid s 60.

<sup>331</sup> *Equal Opportunity Act 1984* (SA) s 66; *Disability Discrimination Act 1992* (Cth) s 5(2).

South Australia has a different model. It defines discrimination on the grounds of disability to include:

- (i) to fail to provide, to the extent that they are able to do so, a safe and proper means of access to or use of a place or facilities for a person who requires special means of access as a consequence of the person's disability<sup>332</sup>;
- (ii) to unreasonably fail to provide special assistance or equipment required by a person in consequence of their disability.<sup>333</sup>

If the broad Northern Territory approach is not taken, it was suggested that, at a minimum, a responsibility to make reasonable adjustments should be provided in relation to individuals who have an impairment, are pregnant, have family or carer responsibilities,<sup>334</sup> or who have been subjected to family and domestic violence.

Although the responsibility to make reasonable adjustments is usually discussed in the context of impairment or in respect of carers, the Commission acknowledges that a broad duty would benefit a much wider range of people. Imposing a responsibility to make reasonable adjustments in relation to all protected attributes would work towards enabling greater participation of all members of the community in public life, thereby enhancing substantive equality within the Western Australian community. It is consistent with the CPRD and other international human rights instruments.

The Commission is of the view that a responsibility to make reasonable adjustments should be created. It is a matter of policy as to the breadth of the responsibility. At a minimum it should prohibit a failure to accommodate a special need that another person has because of an impairment, pregnancy, breastfeeding, family responsibilities or carer obligations. Consideration should be given to creating a responsibility that extends to all protected attributes and all areas of life.

#### **Recommendation 66**

A legislative responsibility to make reasonable adjustments should be enacted. At a minimum it should prohibit a failure to accommodate a special need that another person has because of an impairment (or disability if the Commission's recommendation is adopted), pregnancy, breastfeeding, family responsibilities or carer obligations. Consideration should be given to creating a responsibility that extends to all protected attributes and all areas of life.

#### **4.4.4 Framing of the duty**

In the Discussion Paper, the Commission sought submissions on the best way to frame any positive responsibility to make reasonable adjustments.<sup>335</sup> Many stakeholders supported creating a stand-alone requirement to make reasonable adjustments, as is the case in Victoria and the Northern Territory. It was argued that a stand-alone duty would provide the clearest way of imposing a positive duty and would have the greatest potential to encourage the taking of preventative steps, in advance of discrimination occurring, to reduce or eliminate discrimination. By contrast, it was suggested that prescribing the duty within the definition of discrimination in the Act may make the definition overly

<sup>332</sup> *Equal Opportunity Act 1984* (SA) s 66(ca)(i).

<sup>333</sup> *Ibid* s 66(ca)(ii).

<sup>334</sup> *Equal Opportunity Act 2010* (Vic) s 19, which requires employers to reasonably accommodate an employee's family or caring responsibilities, was provided as an example of a provision of this nature.

<sup>335</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 144 – 146.

complex and possibly result in the requirement being viewed as a defence rather than as a positive obligation which has to be met.

The AHRC's *Free & Equal: Discrimination Law Reform Position Paper*<sup>336</sup> highlighted that there are a number of difficulties with having a duty to make reasonable adjustments contained within the definitions of discrimination. The position paper recommended that the duty to make reasonable adjustments in the DDA be amended to contain a standalone section dealing with the duty to make reasonable adjustments.<sup>337</sup> It also noted that one consequence of having a standalone duty is that failing to make reasonable adjustments would become a separate type of discrimination to direct and indirect discrimination, and a complainant would not have to prove the other elements of those tests.<sup>338</sup>

One stakeholder submitted that introducing a stand-alone positive obligation to make reasonable adjustments would allow the Act to prescribe different penalties for direct discrimination, indirect discrimination and failing to take positive steps to provide reasonable adjustments.<sup>339</sup> It was also suggested that such a measure would be more desirable where a stand-alone positive obligation to make reasonable adjustments is expressed broadly and exists in relation to all grounds.

The Commission considers that the approaches taken in the other Australian jurisdictions all have advantages and disadvantages and acknowledges the benefit of adopting an approach that is consistent with another jurisdiction. In light of the submissions, the Commission is of the view that a responsibility to make reasonable adjustments and accommodations should be a stand-alone duty as it will provide the most clear and simple approach. This is most similar to the Victorian Act provisions.

The Commission recognises that this is an added responsibility and that it may be a basis for a complaint to the Equal Opportunity Commissioner without proof of direct or indirect discrimination. If the breach of the responsibility was not accompanied by direct or indirect discrimination then that fact could be taken into account during conciliation of the complaint by SAT when determining the remedy for the breach.

### **Recommendation 67**

The responsibility to make reasonable adjustments should be a positive, stand-alone responsibility.

#### **4.4.5 Determining which adjustments are reasonable**

As noted above, under the Act the requirement to make adjustments for persons with an impairment does not apply where it would impose an unjustifiable hardship on the discriminator. The Act provides limited guidance about what constitutes an unjustifiable hardship, other than to say that:

In determining what constitutes "unjustifiable hardship" for the purposes of Part IVA, all relevant circumstances of the particular case shall be taken into account including the nature of the benefit or detriment likely to accrue or be suffered by all persons concerned, the nature of the impairment of the person concerned and the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship.<sup>340</sup>

<sup>336</sup> Australian Human Rights Commission, *Free & Equal: A reform agenda for federal discrimination laws* (December 2021).

<sup>337</sup> Ibid 286.

<sup>338</sup> Ibid 292; Submission from AHRC, 3 December 2021, 292.

<sup>339</sup> Submission from Circle Green Community Legal, 30 November 2021, 52.

<sup>340</sup> *Equal Opportunity Act 1984* (WA) s 4(4).

By contrast, more prescriptive approaches are taken in other jurisdictions. For example:

- Section 11(1) of the DDA provides that in determining whether a hardship would be an unjustifiable hardship, all relevant circumstances of the particular case must be taken into account, including:
  - the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;
  - the effect of the disability of any person concerned;
  - the financial circumstances, and the estimated amount of expenditure required to be made, by the first person;
  - the availability of financial and other assistance to the first person;
  - any relevant action plans given to the Commission under section 64.
- Section 24(3) of the Northern Territory Act provides that determining whether a person has unreasonably failed to provide for the special need of another person depends on all the relevant circumstances of the case including:
  - the nature of the special need; and
  - the cost of accommodating the special need and the number of people who would benefit or be disadvantaged; and
  - the financial circumstances of the person; and
  - the disruption that accommodating the special need may cause; and
  - the nature of any benefit or detriment to all persons concerned.
- The Victorian Act prescribes different matters for areas of public life in which the positive duty to make reasonable adjustments applies.<sup>341</sup> For example, in the context of employment, section 20(3) provides that in determining whether an adjustment is reasonable, all relevant facts and circumstances must be considered, including:
  - the person's or employee's circumstances, including the nature of his or her disability; and
  - the nature of the employee's role or the role that is being offered; and
  - the nature of the adjustment required to accommodate the person's or employee's disability; and
  - the financial circumstances of the employer; and
  - the size and nature of the workplace and the employer's business; and
  - the effect on the workplace and the employer's business of making the adjustment including—
    - the financial impact of doing so;
    - the number of persons who would benefit from or be disadvantaged by doing so;
    - the impact on efficiency and productivity and, if applicable, on customer service of doing so; and
  - the consequences for the employer of making the adjustment; and
  - the consequences for the person or employee of not making the adjustment; and
  - any relevant action plan made under Part 3 of the Disability Discrimination Act 1992 of the Commonwealth; and
  - if the employer is a public sector body within the meaning of section 38 of the Disability Act 2006, any relevant Disability Action Plan made under that section.

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<sup>341</sup> *Equal Opportunity Act 2010* (Vic) ss 20(3), 33(3), 40(3), 45(3).

In the Discussion Paper the Commission sought views about the appropriate definition of the responsibility to make reasonable adjustments, including any matters that should be included in the Act to determine whether adjustments impose unjustifiable hardship or are reasonable.<sup>342</sup>

Stakeholders did not provide a uniform answer to this question. Some supported adopting the DDA approach, while others recommended incorporating the kinds of factors listed in section 20(3) of the Victorian Act. Yet others submitted that the appropriate factors to be included in the Act will depend on whether the positive obligation to make adjustments extends to all protected attributes, or only to the ground of impairment. It was submitted that if an extensive positive obligation were enacted, any factors that are prescribed would have to be expressed at a sufficient level of generality so as to be applicable to a broad range of circumstances. The non-exhaustive matters listed in section 24(3) of the Northern Territory Act were submitted as one possible example.

There was dispute about the perspective which the relevant provision should adopt. One stakeholder proposed relevant factors which primarily centre around the impact that adjustments may have on respondent organisations.<sup>343</sup> These include:

- the resources of the respondent organisation;
- whether a respondent has any control over the premises concerned and their corresponding ability to make adjustments;
- financial hardship of the respondent; and
- the impact of any adjustment on the operation of the relevant respondent organisation or corporation.

By contrast, others argued that the process must place the person with the protected attribute at its centre, giving significant weight to their views about the impact the adjustments, or their lack, would have on them. It was suggested that employers and other respondents naturally tend to view this issue through the lens of the personal impact that it would have on them (for example, the financial impact of making an adjustment), rather than properly viewing the situation from the perspective of the individual with the relevant protected attribute. It was submitted that the Act should differentiate between primary considerations (the needs of an employee or other individual with a protected attribute) and secondary considerations (the impact on an employer or other person seeking to be exempt from making adjustments), with the primary considerations being accorded more weight than the secondary considerations.

Some stakeholders suggested that the respondent should bear the onus of proof in this regard. For example, one stakeholder submitted that the Act should expressly provide that an individual with a relevant protected attribute has a right to request reasonable accommodations, and that a request must be granted unless the respondent can provide reasons relating to its operational requirements for why the accommodations would cause unjustifiable hardship. Another stakeholder submitted that the onus of proof should be on respondents to show that they have actively considered alternative options to achieve an adjustment, as well as to prove that any adjustments amount to unjustifiable hardship.<sup>344</sup>

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<sup>342</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 146 – 147.

<sup>343</sup> Submission from Anglican Social Responsibilities Commission, 29 October 2021, 5.

<sup>344</sup> Submission from People With Disabilities Western Australia, 29 October 2021, 4 - 5.

Other general suggestions included:

- ensuring that the obligations imposed on respondents are not too onerous, whilst also minimising complexity to ensure that prospective complainants are more easily able to understand the Act's requirements; and
- specifying that not all hardship or impact to a respondent will be considered unjustifiable, and that some hardship or impact to a respondent may be necessary in order for them to provide reasonable adjustments.

The Commission acknowledges that everyone's circumstances are different, and that what may be considered a reasonable adjustment or unjustifiable hardship in one scenario may not be the case in another. Therefore, in prescribing relevant factors in this context, it is necessary to formulate them in such a way that they have general application, but also provide sufficient guidance to all parties in relation to their respective rights and obligations under the Act.

In the Commission's view, in order to effectively regulate the various different types of conduct that may be called into question under the Act, a sufficient degree of flexibility must be built into the Act, including in relation to any terms that the Act defines, without necessarily compromising its clarity. In addition, the Commission considers there is benefit in adopting an approach that is consistent with another jurisdiction.

Taking these factors into account, the Commission recommends that the Act adopt an approach similar to the DDA, where the responsibility is framed as one to make reasonable adjustments where they will not impose an unjustifiable hardship. The use of the term reasonable adjustments means that the responsibility is to do what is objectively reasonable in the circumstances. Determining what constitutes unjustifiable hardship will involve consideration of all the relevant circumstances of the particular case, including matters similar to those set out in section 11(1) of the DDA.

The Commission acknowledges stakeholder suggestions that the list of factors in the DDA should be modified in three ways:

- The person claiming unjustifiable hardship should be required to provide evidence of efforts taken to identify and secure funding to assist with any financial costs of making adjustments.
- The person claiming unjustifiable hardship should also be required to show evidence of having considered alternative adjustments, short of unjustifiable hardship, that would reduce the discriminatory effect of current arrangements.
- It must be shown that the question of unjustifiable hardship was considered at the time of the discriminatory conduct, not at a later time.

The Commission is not opposed to incorporating these matters into the Act. However, it is of the view that this should be left to government to determine. The issue of onus of proof in discrimination claims is considered at the end of chapter 4 of the Report.

#### **4.4.6 Terminology: Reasonableness and unjustifiable hardship**

The Commission observes that many other Australian jurisdictions define the reasonableness of proposed adjustments by reference to the justifiability of the hardship it will impose. For example, in section 4(1) of the DDA the term reasonable adjustment is defined to mean the following:

[A]n adjustment to be made by a person is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the person.

This concept of reasonable adjustment was drawn from the definition of reasonable accommodation in the CRPD, which is quoted above in section 4.4.3 of this Report.

Acknowledging these definitions, some stakeholders expressed the view that the term 'reasonable' may be misleading or redundant, as any and all adjustments which do not impose unjustifiable hardship, and are implemented to ensure that a person does not experience discrimination, should be considered reasonable. It was thus suggested that the term 'reasonable' should be eliminated from the Act.

The word reasonable adds meaning when it is placed in front of the word adjustments as it signifies that the statutory responsibility is to make objectively reasonable adjustments. When the qualifying phrase of 'unless it would impose unjustifiable hardship' is added, there is considerable overlap between reasonable adjustments on the one hand and adjustments which do not impose unjustifiable hardship on the other. This is to the extent that the word 'reasonable' could be said to be redundant. It would be possible to remove reference to 'reasonable', and to simply impose an obligation that adjustments must be made unless they result in an unjustifiable hardship on the holder of the responsibility. However, in the Commission's view there is benefit in using the term reasonable adjustments, because it signifies the objective nature of the responsibility. The Commission therefore recommends continuing to use the term reasonable adjustments.

#### **Recommendation 68**

The responsibility to make reasonable adjustments should be framed as a responsibility to make reasonable adjustments unless it would impose unjustifiable hardship on the holder of the responsibility.

The Act should provide that in determining whether a hardship would be an unjustifiable hardship, all relevant circumstances of the particular case must be taken into account, including the following:

- the nature of the adjustment sought;
- the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned if the adjustment were or were not made;
- the effect of the disability (or other protected attribute) of any person concerned;
- the financial circumstances of the alleged discriminator, the estimated amount of expenditure required to be made by them and the financial impact on them if the adjustment was made;
- the availability of financial and other assistance to the alleged discriminator; and
- any relevant equal opportunity management plan made under Part IX of the Act.

## **4.5 General exceptions to discriminatory conduct**

As discussed in section 4.3.1 above, the Commission recommends that, subject to any exceptions, all of the attributes listed in the Act should be protected in relation to all of the areas of public life covered by the Act. This section considers the scope of possible general exceptions that are currently found in Part VI of the Act; those exceptions which currently apply to all forms of discrimination. The following section of this Report (section 4.6) considers specific exceptions, which only have limited application. Exemptions from provisions of the Act that may be granted on a case by case basis by the SAT are discussed in section 4.7.

At the outset, however, the Commission wishes to acknowledge the submissions it received which emphasised the importance of language in the context of exceptions. In particular, some stakeholders



urged the Commission to consider adopting the language of defences rather than exceptions and exemptions. It was submitted that the terminology of exceptions and exemptions in Australian discrimination law creates confusion as to what is permissible and what is a valid defence to an allegation of discrimination.

The Commission is not in favour of using the term defences as it could mislead readers because of its connection to criminal offences; rather than regulatory breaches. It is usually used to signify actions that defend someone from attack. The Commission does not see this as a helpful or accurate concept in anti-discrimination law. The exceptions mean that the conduct in question was never unlawful, not that it was unlawful but that there is a valid defence to excuse it.

The ACT Government's *Inclusive, Progressive, Equal: Discrimination Law Reform Discussion Paper* raised for consideration whether a single justification defence should replace all the ACT Act's exceptions and exemptions.<sup>345</sup> The justification defence, which was recommended by the LRAC in 2015, would allow a person who had engaged in unlawful conduct under the ACT Act to show that their conduct was a justifiable limitation on the right to non-discrimination having regard to factors set out in section 28(2) of the *Human Rights Act 2004* (ACT) which states:

In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:

- (a) the nature of the right affected;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relationship between the limitation and its purpose;
- (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

The Commission acknowledges that the plethora of exceptions in the Act is confusing and that they need to be rationalised and refined. Whilst the Commission received a number of submissions regarding the operation of the existing exceptions, the Commission did not specifically seek, nor receive, submissions that advocated for the introduction of a single justification defence like that in section 28(2) of the *Human Rights Act 2004* (ACT) as set out above.

The Commission does not consider that it is desirable to replace the Act's exceptions with a single justification defence. Having such a broad defence would introduce uncertainty as potential respondents would not know whether the relevant circumstances met the test for a justification defence or not. Any respondent could argue that their actions or failure to act fell within the justification defence, thus potentially decreasing protections for people with protected attributes and increasing the complexity of conciliation and SAT proceedings under the Act.

The Commission acknowledges that the Act's use of the terms exceptions and exemptions to describe different ways in which people can be excused from complying with provisions of the Act can mislead people unfamiliar with the structure of anti-discrimination laws. The words have slightly different ordinary dictionary meanings but in the Commission's view the statutory distinction between the two words is likely to be understood only upon a thorough reading of the Act and a clear understanding of its operation.

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<sup>345</sup> ACT Justice and Community Safety Directorate, *Inclusive, Progressive, Equal: Discrimination Law Reform Discussion Paper 1 Extending the Protections of Discrimination Law* (October 2021) 13.

Either the word exceptions or the word exemptions could be as a single term to describe what are currently statutory exceptions and exemptions. The South Australian and Northern Territory Acts use the word exemptions to refer to what the Act describes as statutory exceptions and exemptions granted by the SAT.

The Commission's preference is to adopt the Northern Territory and South Australian approach and to use the word exemptions to refer to what are currently exceptions and exemptions. Doing this will avoid one area of potential confusion. The Commission is also of the view that what are currently exceptions and exemptions should be placed in one part of the Act as in the Tasmanian and ACT Acts. In the Commission's view this structure aids a reader's understanding of the Act.

#### **Recommendation 69**

The term exemptions should be used to refer to what the Act currently terms exceptions and exemptions. All the exemptions should be placed in one part of the Act.

#### **4.5.1 Acts done under statutory authority**

Section 69 of the Act provides a general exception for acts that are necessary to comply with a requirement of a Court or Tribunal Order. In the Discussion Paper, the Commission sought views on whether this exception should be amended in any way.<sup>346</sup>

There was general agreement that it is appropriate to comply with a Court or Tribunal Order rather than the Act, and so section 69 should be retained as an exception.

The current exception is narrower than other Australian jurisdictions, which mostly provide an exception for compliance with the written laws of other States or Territories. It was suggested that section 69 be expanded in a similar fashion.

In this regard, it is relevant to note that when passed, section 69 did in fact include a broader range of exceptions, including an exception for 'any other Act which is in force when this section comes into operation'. That section has been amended over time, and the reference to 'any other Act' was removed in 2017. Law Reform bodies in the ACT, Victoria and NSW have recommended the repeal or amendment of similar provisions that provide an exception for acts done to comply with the requirements of another law.<sup>347</sup>

The Commission is of the view that given the length of time that the Act has been in effect, there is no reason why there should be a general rule that the provisions of the Act should be subject to the requirements of any other Western Australian Acts which have been made or amended subsequent to the Equal Opportunity Act. That is, it can be assumed that the legislature has knowledge of the requirements of the Act when it passes new legislation and that the provisions of newer Acts should not prevail over the provisions in the Act unless Parliament makes a specific exception in the newer Act.<sup>348</sup>

<sup>346</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 159.

<sup>347</sup> ACT Justice and Community Safety Directorate *Inclusive, Progressive, Equal: Discrimination Law Reform Discussion Paper 1 Extending the Protections of Discrimination Law* (October 2021), 17, n 37.

<sup>348</sup> *Saraswati v the Queen* [1991] HCA 21; (1991) 172 CLR 1, 17; *Butler v. Attorney-General (Viet.)* [1961] HCA 32; (1961) 106 CLR 268, 290.

The Commission acknowledges, however, that the adoption of certain of the recommendations that have been made by the Commission (such as the adoption of a new protected attribute) may necessitate changes to existing practices and processes, and that to the extent that those recommendations conflict with any existing laws, temporary transitional provision may be required if certain recommendations are implemented.

#### 4.5.2 Charities

Section 70(1)(a) of the Act provides that nothing in the Act affects a provision in a deed, will or other document that confers charitable benefits on or enables charitable benefits to be conferred on persons of a class identified by reference to any one or more of the grounds of discrimination referred to in the Act. Section 70(1)(b) of the Act states that nothing in the Act affects an act that is done to give effect to such a provision.

Charitable benefits are defined to mean ‘benefits for purposes that are exclusively charitable according to the law in force in Western Australia’.<sup>349</sup>

The Act does not define what it means by the phrase ‘purposes that are exclusively charitable according to the law in force in Western Australia’. However, submissions pointed out that the Act is referencing the common law’s heads of charity, identified by Lord Macnaghten.<sup>350</sup> These are:

1. the relief of poverty;
2. the advancement of education;
3. the advancement of religion; and
4. other purposes beneficial to the community.

Section 70(1) gives effect to the common law that subject to a public policy limitation, a testator is free to dispose of their property as they see fit, even if it is in a discriminatory manner.<sup>351</sup> The Act does not seek to regulate private behaviour and testamentary disposition of property is generally a private matter. However, section 70(1)(b) of the Act also excepts from the Act any act of a charitable trust done to give effect to a discriminatory provision of a will.

In the Discussion Paper, the Commission asked whether this section should be amended in any way.<sup>352</sup>

Stakeholders generally supported retaining this exception to the extent that it is necessary for charities to be able to perform their charitable functions. Such submissions considered that section 70 of the Act is appropriately adapted to promote the core objectives of charity law and that it plays an important role in protecting against beneficiary discrimination. That is, the exception allows charitable bodies to promote public benefit and facilitates positive discrimination for charitable purposes, which in turn promotes public trust and confidence in the charity sector. It allows charities to direct benefits to groups of people who have potentially been subject to historical and structural discrimination and disadvantage.

However, some stakeholders submitted that the scope of the exception is exceptionally broad and that it does not adequately achieve a balance between protecting charities from liability and protecting individuals from discrimination. Currently, the only substantive limit on the exception is that it applies to

<sup>349</sup> *Equal Opportunity Act 1984* (WA) s 70(2).

<sup>350</sup> *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] 1 AC 531.

<sup>351</sup> *Re Lysaght* [1966] CH 191; *Perpetual Trustee Company Ltd v Attorney General for the State of New South Wales (The Will of the Hon George Nesbitt)* [2018] NSWSC 1456, [49].

<sup>352</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 160.

benefits conferred for purposes that are exclusively charitable according to the law in force in Western Australia.

Due to its broad scope, a similar section has been construed as having the potential to effectively permit any discriminatory activity which will confer a benefit for an exclusively charitable purpose. The following case example illustrates this point.<sup>353</sup>

### Case example

*In 2014, the New South Wales Supreme Court found that bequeathing funds to a hospital for the medical treatment of exclusively 'white babies' was permitted as the purpose of the bequest was to treat sick children in hospital. The bequest was held to be exclusively charitable even though it achieved its charitable benefit in a racially discriminatory manner.*

In *Kay's* case (described in the above case example) the judge said that a pragmatic approach would be for the hospital to use its general funds to even up the bequest for the benefit of babies who were not white.<sup>354</sup> This appears to have been an acknowledgment by the judge of the discriminatory effect of the bequest.

Whilst the facts of *Kay's* case are extreme, it must be remembered that the charities exception also permits more traditional discriminatory testamentary acts such as giving money to a single sex school or a women's hospital.

In order to address the potential for the exception to ultimately permit forms of discriminatory activity under the guise of charity, submissions were made that the scope of the existing exception should be narrowed.

On the other hand, the EOC submitted that it is not necessary to amend section 70, as the charities exception has not been raised by way of a defence to a complaint of unlawful discrimination.<sup>355</sup>

In considering the proposals for change the Commission acknowledges that section 70 of the Act has advantages. In his submission to the Commission, Associate Professor Ian Murray listed these as being:

- (a) it enables charities to assist disadvantaged groups without threat of action under the Act;
- (b) it covers all grounds under the Act, whereas other positive discrimination provisions in the Act do not cover all grounds;
- (c) its clarity and simplicity reduces administration costs for charities; and
- (d) it recognises other rights of people, such as the freedom of disposition of property, freedom of expression and freedom of religion.<sup>356</sup>

The Commission also notes that amending section 70 to restrict the freedom of testamentary disposition would change the common law in Western Australia and potentially require amendment of the *Charitable Trusts Act 1962* (WA). It would also be contrary to certain other provisions in the Act that create an exception for discrimination based on the protected attributes of sex, marital status,

<sup>353</sup> *Kay v South Eastern Sydney Area Health Service* [2003] NSWSC 292.

<sup>354</sup> *Ibid* [19].

<sup>355</sup> Submission from the EOC, 1 November 2021, 10.

<sup>356</sup> Submission from Ian Murray, 2 November 2021, 2-3.

pregnancy or breastfeeding, gender history, sexual orientation, race and age in the protected public area of life of the disposal of estate or interest in land for the disposal of an estate or interest in land by of will or by gift.<sup>357</sup>

#### **4.5.2.1 Threshold proportionality test**

As a way of dealing with the concerns about the width of the exception, some stakeholders suggested that the Act could incorporate a proportionality test. The test would operate to ensure that charities could engage in beneficial discrimination only in circumstances where it is proportionate and justifiable to do so. That is, discrimination would not be permitted in circumstances where the harm caused outweighs the benefits provided. It was suggested that a proportionality test would better promote the Act's objects of eliminating discrimination and promoting equality within the community, together with charity law objectives of achieving public benefits and ensuring public trust in the charity sector.

One submission suggested that in order to eliminate or reduce risks associated with unacceptable forms of discrimination, the section should carve-out discriminatory actions which directly conflict with the core objectives of charity law.<sup>358</sup> This would exclude activities which undermine:

- the net public benefit associated with their charitable purpose; or
- public trust and confidence in the charitable sector.

However, in the case of a testamentary disposition, this test may create timing problems. At what point would the test apply? This could be at the time the will was made, at the time probate was granted or at the time a complaint was determined.

Further, who would be a proper complainant for an application to the Equal Opportunity Commissioner and what remedy would they seek? Would the applicant be a person without a protected attribute who may otherwise have benefitted from the will? If not, who would it be? In *Kay's* case the executor of the will brought the action in the NSW's Supreme Court's equity division on a question of the construction of the will. It is arguable that that is the appropriate jurisdiction to determine the validity of a provision of a will.

#### **4.5.2.2 Statutory definition of charity**

The Act does not currently define charity. Instead, it defines charitable benefits as 'purposes that are exclusively charitable according to the law in force in Western Australia'.<sup>359</sup> In the Discussion Paper, the Commission sought views on whether a statutory definition of charity should be inserted into the Act, and if so, how should the term charity be defined.<sup>360</sup> There is an antecedent question as to whether the Act should continue to use the term charitable benefits, and if not, whether it should instead refer to the acts of a charity and (or) use the phrase charitable purposes.

The Commission received several submissions in support of defining charitable purposes in the Act. It was submitted that it would assist people in better understanding the Act. This was said to be particularly necessary given that the legal meaning of charitable purposes is different from the ordinary dictionary meaning of the term. In Western Australia there are different meanings of the term under the common law and in statutes and there are currently multiple inconsistent definitions between states and territories as to the meaning of charity.

<sup>357</sup> *Equal Opportunity Act 1984* (WA) ss 21A, 35N, 35ZA, 47A and 66ZH.

<sup>358</sup> Submission from Western Australia Justice Association, 14 November 2021, 10.

<sup>359</sup> *Equal Opportunity Act 1984* (WA) s 70(2).

<sup>360</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 160.

Some stakeholders recommended that the definition of charitable benefits in the Act be amended so as to be consistent with the following definitions contained in section 5 of the *Charities Act 2013* (Cth):

**charitable:** an entity is *charitable* if the entity is a charity.

**Example:** A reference in an Act to a charitable trust is a reference to a trust that is a charity.

**charity** means an entity:

- a. that is a not-for-profit entity; and
- b. all of the purposes of which are:
  - i. charitable purposes (see Part 3) that are for the public benefit (see Division 2 of this Part); or
  - ii. purposes that are incidental or ancillary to, and in furtherance or in aid of, purposes of the entity covered by subparagraph (i); and
  - iii. Note 1: In determining the purposes of the entity, have regard to the entity's governing rules, its activities and any other relevant matter.
  - iv. Note 2: The requirement in subparagraph (b)(i) that a purpose be for the public benefit does not apply to certain entities (see section 10).
- c. none of the purposes of which are disqualifying purposes (see Division 3); and
- d. that is not an individual, a political party or a government entity.

Even though section 70 has not been raised as a defence to a complaint under the Act, and whilst there are benefits in providing exceptions to charities to permit them to discriminate in favour of groups and for the public benefit, the Commission is of the opinion that section 70 is too broad. This is because it allows an exception under the Act for discriminatory conduct even where that conduct is not to the benefit of the community.

The Act should be amended so as to exempt from the provisions of the Act a provision in a document or an act done to give effect to such a provision only in relation to provisions and acts that confer charitable benefits that are consistent with the stated purpose of the relevant charity, and which are reasonable and proportionate to the public benefit that the charity is trying to achieve.

The Commission is not in favour of amending section 70(1)(a) of the Act as it is consistent with the freedom of testamentary disposition. The Commission is also of the view that it would not be possible for the Equal Opportunity Commissioner or the SAT to resolve issues regarding the validity of a will as only the Supreme Court has the jurisdiction to do so.

However, the issue relating to deeds, wills and other documents can be distinguished from the acts done to give effect to any provision in such a document that confers charitable benefits or enables charitable benefits to be conferred on persons of a class identified by one or more of the protected attributes. The charitable benefits exemption should only exempt an act done to give effect to such a provision, if the provision or act is consistent with the stated purpose of the relevant charity and is reasonable and proportionate to the public benefit that the charity is trying to achieve.

The public's understanding of the Act and the purpose of the charities exception would be clarified if a definition of charitable benefits was amended to specify the nature of such benefits. Currently, the definition only has meaning to those who understand what charitable benefits are under the common law.

### **Recommendation 70**

The Act should define charitable benefits by specifying the nature of such benefits.

### **Recommendation 71**

The Act should continue to provide an exemption for a provision of a deed, will or other document that confers charitable benefits on, or entitles charitable benefits to be conferred on, persons of a class identified by one or more of the protected attributes. However, the Act should only exempt an act done to give effect to such a provision if the act is:

- consistent with the stated purpose of the relevant charity; and
- reasonable and proportionate to the public benefit that the charity is trying to achieve.

#### **4.5.3 Voluntary bodies**

Section 71 of the Act provides that nothing in the Act renders it unlawful for a voluntary body to discriminate against a person on the basis of any protected attribute in connection with the admission of a person as a member of the body or the provision of benefits, facilities or services to members of the body. The exception does not apply to discrimination on the basis of impairment or age by a voluntary body that is an incorporated association.

The Act defines a voluntary body as:

an association or other body (whether incorporated or unincorporated) the activities of which are not engaged in for the purpose of making a profit, but does not include-

- (a) a club; or
- (b) a body established by a law of the Commonwealth, or of a State or Territory of the Commonwealth; or
- (c) an association that provides grants, loans, credit or finance to its members.<sup>361</sup>

The Act defines a club as:

an association (whether incorporated or unincorporated) of not less than 30 persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that —

- (a) provides and maintains its facilities, in whole or in part, from the funds of the association; and
- (b) sells or supplies liquor for consumption on its premises.<sup>362</sup>

Only NSW and the ACT have equivalent provisions. In the Commonwealth jurisdiction, only the SDA has a similar exception.

In the Discussion Paper, the Commission sought views on whether the voluntary bodies exception should be amended.<sup>363</sup>

The Commission received a submission that described various membership rules and practices of private golf clubs, such as the reservation of Saturdays for male competition. The stakeholder did not support these practices on the basis that they provided fewer benefits to female, as compared to male, members and thus were inconsistent with the objectives of the Act.<sup>364</sup>

<sup>361</sup> *Equal Opportunity Act 1984* (WA) s 4(1).

<sup>362</sup> *Equal Opportunity Act 1984* (WA) s 4(1).

<sup>363</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 161.

<sup>364</sup> Submission from Nancy Boswell, undated.



The Jewish Community Council of Western Australia supported the retention of the exception for voluntary bodies because it said that incorporated associations that provide religious and cultural services and foster social cohesion and identity of the Jewish community require the ability to give preference to members of the Jewish community.<sup>365</sup>

It was submitted by ADLEG that the voluntary bodies exception should be removed from the Act. Instead, it submitted the Act should contain a general provision which permits any organisation to adopt special measures in favour of disadvantaged groups.<sup>366</sup> This would allow, for example, any organisation (including voluntary bodies) to discriminate in the provision of accommodation, by solely providing accommodation to people with impairments.

By contrast, the EOC's submissions supported retaining the exception and adopting the amendment proposed by the Ministerial Youth Advisory Council referred to in the Discussion Paper.<sup>367</sup> Under this approach, when admitting people as members, voluntary bodies would only be permitted to discriminate on the basis of a ground which is a core purpose of the voluntary body.<sup>368</sup> For example, an ethnic community organisation would be permitted to discriminate on the basis of ethnicity, but not on any other protected attribute. The Ministerial Youth Advisory Council suggested that the current voluntary bodies exception should be amended so that a voluntary body is required to demonstrate to the Equal Opportunity Commissioner the body's need to discriminate and why it is relevant to the body's core purpose.<sup>369</sup> This would equate to repealing the exception and instead require a voluntary body to apply to the SAT for an exemption from the Act.

In 1999 when the NSW Law Reform Commission reviewed the NSW Act it said:

The exception in relation to voluntary bodies was retained for a number of reasons which were summarised ... in 1981 as:

principally because they have no legal status and there are legal difficulties associated with instituting and enforcing any form of legal action against an association or its members. Also, many unincorporated associations are small, local organisations and their activities are such as not to be the concern of anti-discrimination legislation, which is quite properly principally concerned with the major areas of public life.

Unlike registered clubs, which were considered to be in the mainstream of community life, voluntary bodies were considered to fall within the private arena, and thus not within an area in which it was appropriate for the law to apply. To attempt to regulate such bodies may have been considered an encroachment on a person's right to associate freely for a lawful purpose. Another reason for retaining the exception for voluntary bodies was to exclude those non-profit associations, such as Lions and Rotary, which are perceived as worthy, concerned and altruistic organisations.

Casting the exemption broadly in order to spare these organisations, however, meant that other non-profit bodies, such as sporting clubs, also benefit from the exception from the ADA.

It should be noted that the exception covers bodies which may be incorporated under an Act so long as they are not "established by" an Act.<sup>370</sup>

<sup>365</sup> Submission from the Jewish Community Council of Western Australia, 6 May 2019, 2.

<sup>366</sup> Submission from the Australian Discrimination Law Experts Group, 30 November 2021, 73.

<sup>367</sup> Submission from the EOC, 1 November 2021, 11.

<sup>368</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 161.

<sup>369</sup> Preliminary Submission from the Ministerial Youth Advisory Council, 6 May 2019, 2.

<sup>370</sup> NSW Law Reform Commission *Review of the Anti-Discrimination Act 1977* (1999) 6.76 - 6.77.

The NSW Law Reform Commission summarised submissions that it received and concluded:

In the light of these submissions, it was clear that the liability of voluntary bodies under the [NSW Act] requires reassessment. A threshold issue is whether and to what extent these bodies should be allowed to discriminate in deciding who can join, the kind of membership they can have, and the terms and conditions which apply to the benefits, services or facilities it provides.

The Commission has considered this issue in detail in Chapter Four, where it concluded that the area in which the law operates, presently confined to registered clubs, is too narrow and needs to be redefined. The Commission has recommended that the [NSW Act] specifically prohibit discrimination in relation to membership and access to benefits by all incorporated associations whose membership is open to the public or to a section of the public. Any club or association that does not fall within the redefined area would clearly not be liable under the [the NSW Act]. The retention of an exception for voluntary bodies is therefore unnecessary and inappropriate. Accordingly, the Commission recommends its repeal.<sup>371</sup>

The NSW Law Reform Commission's recommendation has not been implemented.

The extent of the voluntary bodies exception depends on the width of the protected area of public life of clubs and incorporated associations and the protected attributes to which it applies. However, in general, the Commission considers that it would strike the appropriate balance between allowing voluntary bodies to discriminate in favour of particular disadvantaged groups, whilst preventing any discrimination against people on grounds not relevant to the voluntary body's core purpose, if voluntary bodies were only granted an exception to discriminate in connection with the admission of persons as members of the body and in the provision of benefits, facilities or services to members of the body, if the otherwise discriminatory act is in conformity with a lawful core purpose of the body and is reasonable and proportionate in the circumstances.

For incorporated associations, a core purpose would be a core object or purpose of the association that was contained in the binding rules of the association.

### **Recommendation 72**

The voluntary bodies exception should be amended to except voluntary bodies from the discrimination provisions in the Act in connection with the admission of persons as members of the body and in the provision of benefits, facilities or services to members of the body, if the otherwise discriminatory act is in conformity with a lawful core purpose of the body and is reasonable and proportionate in the circumstances.

#### **4.5.3.1 Definition of voluntary body and club**

As noted above, voluntary body is currently defined to include bodies which do not have a profit-making purpose, but to exclude clubs, bodies established by a law of a State, Territory or the Commonwealth, and associations that provide grants, loans, credit or finance to its members.<sup>372</sup>

The Commission is of the view that the definition of voluntary body is convoluted and requires simplification. Further, the object of the definition is only to include associations and bodies that are of a sufficiently public nature so as to be included in the Act but that have aspects of their lawful operation for which they warrant the protection of an exception from the discrimination prohibitions of

<sup>371</sup> Ibid 6.87 – 6.88.

<sup>372</sup> *Equal Opportunity Act 1984* (WA) s 4(1).

the Act for membership requirements and services. Neither of these objects appear to be met by the current definition.

The definition will need to be reconsidered in light of any changes made to the definition of a club.

### **Recommendation 73**

The definition of voluntary body should be simplified. It should identify in simple language the types of associations and bodies that are of a sufficiently public nature to be included in the Act, but that have aspects of their lawful operation for which they warrant an exemption from the Act's discrimination prohibitions in relation to their membership requirements or the services they provide.

## **4.5.4 Religious exceptions**

### **4.5.4.1 Overview**

The Act contains the following four general exceptions that relate to religious bodies and educational institutions established for religious purposes:

- (a) Religious personnel exception: The Act does not affect the ordination or appointment of priests, ministers or religion or members of any religious order; the training or education of people seeking such ordination or appointment; or the selection or appointment of people to perform duties or functions for the purposes of or in connection with, or otherwise to participate in any religious observance or practice.<sup>373</sup>
- (b) Religious bodies exception: The Act does not affect any other act or practice of a body established for religious purposes, if it is an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.<sup>374</sup>
- (c) Religious educational institutions employment exception: The Act does not render it unlawful for religious educational institutions to discriminate on any one or more of the grounds of discrimination referred to in the Act in connection with the employment of staff or positions of contract workers working in the religious educational institution, if the otherwise discriminatory act is done in good faith in order to avoid injury to the religious susceptibilities of adherents of the relevant religion or creed.<sup>375</sup>
- (d) Provision of education exception: The Act does not render it unlawful for religious educational institutions to discriminate on any one or more of the grounds of discrimination referred to in the Act, other than the grounds of race, impairment or age, in connection with the provision of education or training by the educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed. The exception covers discrimination in good faith in favour of adherents of that religion or creed generally, but not in a manner that discriminates against a particular class or group of persons who are not adherents of that religion or creed.<sup>376</sup>

<sup>373</sup> *Equal Opportunity Act 1984* (WA) s 72(a)-(c).

<sup>374</sup> *Ibid* s 72(d).

<sup>375</sup> *Ibid* s 73(1)-(2).

<sup>376</sup> *Ibid* s 73(3).

In the Discussion Paper, the Commission sought views on each of these exceptions.<sup>377</sup> It received a large body of submissions which are summarised below.

Each of these exceptions raise discrete issues and each is addressed separately. There are, however, some overarching issues that are relevant to the issue of religious exceptions generally. These are discussed prior to examining the specific exceptions.

These issues have been the subject of recent consideration by the Commonwealth Parliament in the *Religious Discrimination Bill 2022* (Cth). The Bill passed the House of Representatives (with amendments) in February 2022. However, at the time the Commonwealth Parliament was prorogued on 11 April 2022 it had not been debated in the Senate. Consequently, the Bill has lapsed.

The religious exceptions in the Victorian Act were amended and, in effect, narrowed by the recently enacted *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic) (Victorian Religious Exceptions Act). Most of the provisions of the Victorian Religious Exceptions Act that amend the religious exceptions in Victoria are due to come into operation on 14 June 2022. However, the provisions in Division 2 of Part Two relating to the applicability of the religious exceptions to government funded goods and services do not come into operation until 14 December 2022. Given the very recent consideration given to the religious exceptions in Victoria, the Commission has considered carefully the provisions of that Act and considers it useful to set out some of the detail of those provisions here.

The provisions in the Victorian Religious Exceptions Act will create the following religious exceptions:

1. Religious personnel exception: Nothing in Part 4 of the Victorian Act (the discrimination provisions) applies to the ordination or appointment of priests, ministers of religion or members of any religious order; the training or education of people seeking such ordination or appointment; or the selection or appointment of people to perform duties or functions for the purposes of or in connection with, or otherwise to participate in any religious observance or practice.<sup>378</sup>
2. Religious bodies exception: There will be three provisions comprising the religious bodies exception. One creates an exception for the actions of religious bodies other than in relation to employment or the provision of government funded goods and services. The second creates an exception for the actions of religious bodies relating to employment. The third creates an exception for the actions of religious bodies relating to the provision of government funded goods and services. The details of the three religious bodies exceptions are:
  - i. General religious bodies exception (excluding employment and the provision of government funded goods and services): Nothing in Part 4 of the Victorian Act (the discrimination provisions) applies to anything done (except in relation to employment and the provision of government funded goods and services) on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity by a religious body that is reasonable and proportionate in the circumstances, and which:
    - (a) conforms to the doctrines, beliefs or principles of the religious body's religion; or
    - (b) is reasonably necessary to avoid injury to the religious susceptibilities of adherents of the religious body's religion.

<sup>377</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 162-169.

<sup>378</sup> Act s 72(a)-(c).

- ii. Religious bodies employment exception: A person may discriminate against another person in relation to the employment of that person by a religious body if:
  - (a) conformity with the doctrines, beliefs or principles of the religious body's religion is an inherent requirement of the position;
  - (b) the other person cannot meet that inherent requirement because of their religious belief or activity; and
  - (c) the discrimination is reasonable and proportionate in the circumstances.
- iii. Religious bodies provision of government funded goods and services exception: A person may discriminate against another person in relation to a religious body refusing to provide government funded goods and services, determining the terms on which the government funded goods are provided or a religious body subjecting a person to any detriment in connection with the body's provision of government funded goods and services, on the basis of the person's religious belief or activity if:
  - (a) the refusal, the terms or subjecting the person to the detriment, as the case requires, is in conformity with the doctrines, beliefs or principles of the religious body's religion or is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion; and
  - (b) the discrimination is reasonable and proportionate in the circumstances.
- 3. Religious educational institutions employment exception: A person may discriminate against another person in relation to the employment of another person in a position at a religious education institution in the course of establishing, directing controlling or administering the institution if:
  - (a) conformity with the doctrines, beliefs or principles of the religious body's religion is an inherent requirement of the position;
  - (b) the other person cannot meet that inherent requirement because of their religious belief or activity; and
  - (c) the discrimination is reasonable and proportionate in the circumstances.
- 4. Provision of education exception: Nothing in Part 4 of the Victorian Act (the discrimination provisions) applies to anything done (except in relation to employment) on the basis of a person's religious belief or activity by an educational body that is or is to be conducted in accordance with religious doctrines, beliefs or principles in the course of establishing, directing, controlling or administering the educational institution that is reasonable and proportionate in the circumstances and which:
  - (a) conforms with the doctrines, beliefs or principles of the religion of the religion of the educational institution; or
  - (b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion of the educational institution.

The result of these amendments will be that, after the commencement of the Victorian Religious Exceptions Act, all the Victorian religious exceptions other than the religious personnel exception will be substantially narrowed from their current form (meaning that some conduct that would not have been discriminatory previously because of the religious exceptions will now amount to unlawful discrimination). That will be achieved in part by adding to every other religious exception an objective requirement that any excepted discrimination be reasonable and proportionate in the circumstances.

Secondly, it will be achieved by creating more limited exceptions for discrimination by religious bodies in the areas of employment and provision of government funded goods and services. The new religious bodies employment exception will only apply to positions which require conformity with the doctrines, beliefs or principles of the relevant religion and to situations where the person cannot meet that inherent requirement because of their religious belief or activity. The new, religious bodies provision of government funded goods or services exception will only apply to discrimination on the grounds of religious activity or belief and to where the religious body's actions are either in conformity with the doctrines beliefs or principles of the religious body or are reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.

Lastly, in relation to religious educational institutions, it will be achieved by further limiting the excepted discrimination (other than in employment) to the ground of religious activity or belief. In relation to employment, it will be achieved by providing the same limitations as will apply to the religious bodies employment exception. The effect of this change is to limit the exception to positions where conformity with the doctrines, beliefs or principles of the relevant religion is a requirement, and to situations where the person cannot meet that inherent requirement because of their religious belief or activity.

#### **4.5.4.2 Overarching principles**

##### **4.5.4.2.1 Protection of the freedom of religion and thought under international human rights law**

Various international human rights covenants and declarations address the freedom of religion and thought. Most notably, Article 18 of the ICCPR, to which Australia is a party, states:

- (1) Everyone shall have the right to freedom of thought, conscience and religion.<sup>379</sup> This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
- (2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
- (3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.
- (4) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.<sup>380</sup>

The freedom of religion and thought is one of seven non-derogable rights in the ICCPR; rights which cannot be suspended, even in a state of emergency.

Freedom of religion and thought is not absolute. Article 18(3) of the ICCPR, provides that the right to manifest one's religion may be subject to certain limitations, including for the protection of others' fundamental rights and freedoms. Article 5(1) also provides some limitation on rights and freedoms identified in the ICCPR. It provides:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

<sup>379</sup> Throughout this Report this freedom is referred to as the freedom of religion and thought.

<sup>380</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, entered into force for Australia 13 November 1980, except article 41 which entered into force on 28 January 1993).

Those rights and freedom include the right to life and the principle in Article 26 of the ICCPR that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief<sup>381</sup> (Declaration on Religion) is also relevant. The Declaration on Religion prohibits unintentional and intentional acts of discrimination. Article 2(2) defines discrimination as:

Any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

Article 6 of the Declaration on Religion stipulates that a religious community's joint or shared expression of its beliefs is protected equally with the individual's rights and protects manifestation of religion or belief including, but not limited to:

- worshipping and assembling, and maintaining places for this purpose;
- practising religious rites and customs;
- writing and disseminating religious publications;
- teaching of religion and belief;
- training and appointment of religious leaders in accordance with the requirements and standards of the religion or belief;
- observing religious holidays and ceremonies; and
- communicating with individuals and communities on matters of religion and belief.

A number of submissions also referred to the UNDHR, ICESCR and CRC. It was suggested that in light of these international protections, Western Australia should not amend the Act in a manner that imposes an unreasonable burden on the right to freedom of religion and thought. It was argued that removing or narrowing the right for religious bodies to discriminate would be a violation of international human rights law.

Conversely, some stakeholders submitted that the current drafting of the religious exceptions is not compliant with international human rights law, as it improperly prioritises freedom of religion and thought over other protected rights. The Commission received a large body of submissions which suggested a need to amend or remove the existing exceptions in order to properly balance an individual's right to religious freedom and thought against the right not to be discriminated against on the basis of protected attributes, other than religion. The current exceptions were seen to inappropriately provide faith-based institutions with an easy and legal way to discriminate against those who do not share the same religious ethos or tenets or against those who have protected attributes that a particular religion does not value.

The Commission acknowledges the importance of protecting the freedom of religion and thought. The freedom includes freedom to have or to adopt a religion or belief of choice, and freedom to practice the religion or belief through worship, observance, ritual, practice and teaching. Western Australia

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<sup>381</sup> *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UN Doc A/36/684 (1981).



protects the right through the provisions of the Act that render it unlawful to discriminate against a person on the ground of their religion or belief or on the grounds of actions associated with their religion or belief. The Commission has recommended that those provisions remain in place and be clarified.

However, as acknowledged in the ICCPR, the Declaration on Religion and other international human rights instruments, and as with other freedoms, the freedom of religion and thought does not include a right to exercise the freedom in a manner that destroys other people's rights not to be discriminated against on other recognised grounds.

The Act attempts to protect the rights of all people, but it is inevitable that in some situations if the Act protects one person's right it will impair the exercise of another person's right. The Commission has approached the determination of the appropriate scope of the religious exceptions by endeavouring to strike a balance between different rights and freedoms. Part of that balance is to provide exceptions for religious bodies and religious educational institutions to some parts of the Act. It is the scope of those exceptions that is often in dispute. It is essential that resolution of the differing viewpoints on these matters be dealt with in a fair and reasonable manner and with an acknowledgement that other people who do not share the religion or beliefs of a religious body, its adherents or the religion or beliefs of a religious educational institution have an equal right to protection of their personal attributes in areas of public life to which the Act applies. Further, in some circumstances the rights of the disadvantaged and marginalised sections in our society require particular protection if Western Australia is to be a fair and cohesive society.

#### **4.5.4.2.2 Impact on the LGBTIQ+ community**

Many submissions submitted that the current religious exceptions can be, and are, used to justify discrimination against LGBTIQ+ people and their associates. It was submitted that as a result, many LGBTIQ+ people simply hide who they are, or avoid jobs, educational opportunities or services that would otherwise be available to them, because of the fear of discrimination or the indignity of being turned away. It was suggested that the exceptions are outdated and should be removed to ensure a person's sexual orientation or gender identity does not limit where they can work, study or access services.

#### **4.5.4.2.3 Reasonable and proportionate discrimination**

Many submissions highlighted the importance of balancing freedom of religion and thought against the fundamental rights and freedoms of others. As a way of maintaining an appropriate balance between competing rights, numerous submissions supported introducing a requirement that in order to be excepted from the provisions of the Act, the otherwise discriminatory conduct of the religious body ought to be reasonable and proportionate. It was suggested that adding this requirement would appropriately narrow the scope of the religious exceptions, by providing an objective standard by which to assess whether an action is connected to the freedom of religion and thought to the extent that it should be excepted from the provisions of the Act, even though it may affect adversely the exercise of others' rights and freedoms. It would require consideration to be given to both the person who is being discriminated against and the rights of the religious body.

#### **4.5.4.2.4 Limiting the grounds of discrimination**

The religious personnel, religious bodies and religious educational institutions employment exceptions all provide protection against discrimination on any ground. By contrast, the provision of education exception does not permit discrimination on the grounds of race, impairment or age, nor in a manner that discriminates against a particular class or group of persons who are not adherents of that religion or creed.

Different Australian jurisdictions have taken different approaches to the grounds on which it is permissible to discriminate for religious reasons.<sup>382</sup> Stakeholder's views on the appropriate scope of the exceptions differed. While some favoured retaining the current scheme, others suggested it should be narrowed. In the following section the Report considers separately the appropriate scope of each religious exception.

#### **4.5.4.3 Religious personnel exceptions**

The religious personnel exception in section 72(a) to (c) of the Act provides that the Act does not apply to:

- (1) the ordination or appointment of priests, ministers of religion or members of any religious order; or
- (2) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order; or
- (3) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in any religious observance or practice.

Most submissions received by the Commission opposed amending the religious personnel exception. It was seen to be appropriately targeted to core religious practices for religious institutions and considered unlikely to cause any detriment to individuals outside of the religion.

Submissions emphasised the importance of religious bodies having the freedom to train, ordain and appoint their own priests, ministers of religion or officiating religious members in accordance with the doctrines, tenets and beliefs of their religion. These submissions noted that decisions made by churches for the appointment of key ministry members lie at the very heart of the religious freedom of churches, and such decisions should not need to be justified.

Submissions also argued that narrowing the exceptions would violate Articles 18(1) and 18(3) of the ICCPR. It was contended that doing so would constitute an interference in the freedom of religion and thought, and that any change in this area should come from within religions themselves. Stakeholders also suggested that the SAT should not be permitted to adjudicate issues of theology and religious practice as its members are not trained and equipped to do so.

There was some limited support for replacing the religious personnel exceptions with a positive declaration that religious communities have the right to train, ordain and appoint ministers of religion, and that these activities do not constitute unlawful discrimination. However, if this recommendation were not implemented, these stakeholders supported retaining the current exceptions.

The submission that the exceptions should be replaced with a declaration of religious rights was made in relation to each religious exception. The Commission does not support positive statements as to religious rights being inserted into the Act as to do so would be contrary to the structure of the Act. The Act identifies prohibited behaviour and exceptions to it. The Act is not a declaration of rights and the Commission has not been asked to opine on whether Western Australia should have such an instrument. Consequently, it does not provide such advice. If any change was made to the terminology used for the religious exceptions, it would have to be made to every exception (not just those related to religious freedom) as the terminology should be consistent.

The Commission is of the view that changing the current terminology to state that the religious personnel exception does not constitute unlawful discrimination is a narrower exception than the existing blanket religious personnel exception. The existing religious personnel exception provides an exception from every aspect of the Act; not just those that relate to discrimination. A narrower

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<sup>382</sup> These are summarised in Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 62-67.

exception may be justified<sup>383</sup> as there is no reason why religious bodies should be able to use the religious personnel exception to, for example, engage in conduct that would otherwise constitute victimisation. However as there is no evidence that it is being used to do this and the current exception is well understood, the Commission does not see a need to recommend this change.

The religious personnel exception is broad and may result in conduct that would otherwise be regarded as discriminatory being excepted from the provisions of the Act. The Commission accepts that this result is justified where the exercise of religious freedoms requires that religious bodies be able to decide who is ordained or appointed as priests, who is ordained or appointed as ministers of religion or members of any religious order and who is appointed to other key position connected with religious practice. The Commission accepts that the religious personnel exception is appropriately targeted to core religious practices of religious institutions. The Commission also notes that the religious personnel exception is consistent with the approach taken in all other Australian jurisdictions, which incorporate exceptions expressed in similar terms.<sup>384</sup>

However, the Commission is of the view that the application of the religious personnel exception to every protected attribute in the Act, whether or not discrimination on the basis of a protected attribute conforms to the doctrines, tenets or beliefs of the religion, permits religious bodies to discriminate without good reason.

The protections required for the selection, ordination and appointment of priests, ministers of religion, members of any religious order or other key position connected with religious practice, should not permit religious bodies to discriminate beyond the extent necessary to give effect to the doctrines, tenets or beliefs of the religion. The current provision goes well beyond that protection in permitting discrimination in the area of public life of work even where the otherwise discriminatory act has no connection to religion or belief. Consequently, the Commission is of the view that the religious personnel exception should be amended so that the exception applies only where the otherwise discriminatory conduct conforms to the doctrines, tenets or beliefs of the relevant religion.

The Commission is of the view that because the religious personnel exception is in relation to conduct that is integral to the exercise of the freedom of religion and thought, it is not justifiable to further limit the religious personnel exception by adding a reasonable and proportionate test or by adding a requirement to prove that the relevant action is necessary to avoid injury to the religious susceptibilities of adherents to the religion.

#### **Recommendation 74**

The religious personnel exemption should only apply where the otherwise discriminatory conduct conforms to the doctrines, tenets or beliefs of the relevant religion.

#### **4.5.4.4 Religious bodies exception**

Section 72(d) of the Act allows a body established for religious purposes to discriminate in its acts or practices, as long as those acts or practices:

- conform to the doctrines, tenets or beliefs of that religion; or
- are necessary to avoid injury to the religious susceptibilities of adherents of that religion.

<sup>383</sup> For example, Victoria's religious personnel exception applies to discrimination only.

<sup>384</sup> *Equal Opportunity Act 2010* (Vic) s 82(1); *Anti-Discrimination Act 1998* (Tas) s 52; *Anti-Discrimination Act 1997* (NSW) s 56; *Anti-Discrimination Act 1991* (Qld) s 109; *Anti-Discrimination Act 1992* (NT) s 51; *Equal Opportunity Act 1984* (SA) ss 50, 85ZM.

All Australian jurisdictions have a similar religious bodies exception but there is no uniformity between them.

In the Discussion Paper, the Commission sought views on whether this exception should be retained, removed or amended.<sup>385</sup> It received widely divergent responses from stakeholders, which can be broadly categorised into four groups.

One group of submissions argued that the religious bodies doctrine exception should be retained in its current form. The exception was seen to offer important protections for religious freedom, and it was contended that narrowing or removing the exception would be a violation of the ICCPR.

Another group of submissions suggested expanding the scope of the exception, which was considered to be very narrowly drawn and in need of strengthening to provide greater protection for religious freedom. In particular, it was argued that under the current approach, anti-discrimination tribunals are required to determine what constitutes a 'religious purpose', religious 'doctrines and tenets', and the 'religious susceptibilities' of adherents. It was contended that tribunals are ill-equipped to determine such matters, which are more theological than judicial.

A third group of submissions recommended removal of the exception. These submissions asserted that the exception unacceptably privileges religious interests over the rights and interests of other people in the community. One stakeholder expressed concern that it can result in people being refused services or employment by faith-based institutions for inappropriate reasons, including on the basis of religion, race, gender identity or sexual orientation.<sup>386</sup>

A fourth group of submissions suggested limiting the scope of the exception. Various suggestions were made in this regard, including restricting the religious bodies exception:

- to the ground of religious conviction;
- to acts or practices that are reasonable and proportionate in the circumstances;
- to acts or practices that are 'required' in order to conform with the tenets or beliefs of that religion;
- to exclude from the exception acts or practices that relate to the provision of government funded goods and services; and
- to further restrict the ability of religious bodies to discriminate in the area of employment.

The above suggestions for further restrictions mirror the effect of the new Victorian provisions.<sup>387</sup>

The Commission has considered these submissions and is of the view that the religious bodies doctrine exception should be retained in the Act. This exception is an important mechanism for protecting religious freedom and ensuring that Western Australian anti-discrimination laws comply with the freedom of religion and thought. For example, it allows religious bodies to discriminate in relation to the employment of people who work within their place of worship but who would not fall within the religious personnel exception because their work is not connected to religious observance or practice. However, after considering the stakeholder submissions, the Commission considers the exception should be amended as discussed below.

The Commission is not in favour of expanding the religious bodies exception. It provides an important exception to the prohibitions in the Act but the exception must be limited. The limitations on it are necessary to ensure that religious bodies are not able to discriminate against others unless it is in

<sup>385</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 164 – 166.

<sup>386</sup> Submission of Western Australia Council of Social Service, 19 October 2021, page 7.

<sup>387</sup> See section 4.5.4.1 of this Report for a summary of the Victorian provisions.

conformity with their religion's doctrines, tenets or beliefs. There is no principled reason for giving religious bodies the ability to discriminate more broadly. Neither is it consistent with the international human rights treaties to do so as they recognise the need to respect all rights and freedoms; not just freedom of religion and thought.

The SAT may be required under section 72(d) to determine matters such as what constitutes religious purposes, religious doctrines, tenets or beliefs of a religion and the religious susceptibilities of adherents of a religion. These are matters about which the parties may need to call evidence from theological experts. The consideration of expert evidence by lay decision makers is not an unusual situation and there are legal rules to ensure that expert evidence is given appropriate weight and decision makers do not substitute their views for those of the experts. Whatever difficulties arise, can be managed fairly. The Commission does not consider that those difficulties are of such a nature as to provide a justification for permitting religious bodies to use freedom of religion and thought to discriminate against any person, for any reason.

The Commission is not in favour of limiting the religious bodies exception to employment only. The provision provides protection for elements of worship, rites and religious customs that would otherwise be discriminatory, and which may not be excepted under the religious personnel exception. This is justifiable in order to give effect to the freedom of religion and thought when the acts or practices of the religious body are in pursuance of the religious body's religious purpose and are unlikely to affect the exercise of the rights of non-adherents to the religious body's religion.

However, the Commission is of the view that it is appropriate for there to be a different religious bodies exception for each of the following situations:

- provision of government funded goods and services and provision of goods and service on a commercial (for profit basis); and
- general religious bodies exception covering other acts or practices of a religious body not falling within the religious personnel exception or the above exception.

#### **4.5.4.4.1 Religious bodies work exception**

In relation to work situations the current religious bodies exception is, on one view, too broad as it permits religious bodies to do any act relating to the employment of a person (not being work to which the religious personnel exception applies) on the broad basis that the act conforms to the doctrines, tenets or beliefs of the religion. Thus, it may enable a religious body to refuse to employ a person because they do not hold the same religious belief as members of the religious body's religion, even in circumstances where the religious beliefs and other protected attributes of the candidate for a position are irrelevant to the discharge of the duties of the position. This is in relation to an area of public, as opposed to private life.

On the other hand, there may be reasons intrinsically connected to the doctrines, tenets or beliefs of a religion and the protected personal attributes of a candidate for a position, other than the religious belief or activities of the candidate for the position, that in the eyes of the religious body and its adherents renders them unsuitable for appointment to a position within a religious body.

Thus, the Commission is of the view that in the area of public life of work (not being work to which the religious personnel exception applies), the general religious bodies exception should apply. It is described in section 4.5.4.3.

#### **4.5.4.4.2 Religious bodies provision of government funded and commercial goods and services exception**

In so far as it applies to the provision by religious bodies of goods and services funded by the government, in the view of the Commission the current religious bodies exception is too broad

because it permits religious bodies to engage in what would otherwise be discriminatory behaviour when they are, in effect, acting on behalf of the government pursuant to a commercial agreement and performing acts that are to benefit all of the community or a sector of it identified in the agreement; rather than acting as a religious body ministering to the adherents of the religion.

In relation to commercial activities the Act should not permit religious bodies to engage in what would otherwise be discriminatory behaviour when they are acting pursuant to a commercial agreement (for profit) with a third party for the provision by the religious body of goods and services to non-adherents to the religion; rather than as a religious body ministering to the adherents of the religion.

The Commission is of the opinion that Victorian Religious Exceptions Act provision relating to situations in which the religious body is providing government funded goods and services is appropriate in both these circumstances. Thus, the Commission is of the view that in the areas of public life of the provision of goods and services, the religious bodies provision of government funded and commercial goods and services exception should only apply where:

- a religious body is funded by a government to provide goods or services or enters into a commercial (for profit) agreement to provide goods and services;
- the religious body refuses to supply the goods and services, or provides the goods and services on terms or subjects a person to a detriment in connection with the provision of goods and services, on the basis of the person's religious conviction;
- the act of the religious body conforms to the doctrines, tenets or beliefs of the religion of the religious body or is reasonably necessary to avoid injury to the religious susceptibilities of adherents of the religion; and
- the otherwise discriminatory act is reasonable and proportionate in the circumstances.

In these two situations the religious bodies exception should be limited in their effect to excepting the acts and practices of religious bodies on the basis of another person's religious belief or activities and not on the basis of any other personal attribute.

#### **4.5.4.4.3 General religious bodies exception**

As a consequence of the above recommendations, the general religious bodies exception currently contained in s 72(d) of the Act will apply to acts or practices of religious bodies including work, but excluding the provision of government funded goods and services and commercial activities.

The Commission is of the view that the general religious bodies exception is, in any case, too broad. Currently, there are two limbs of the limitation on the exception. The first is that the otherwise discriminatory act or practice conform to the doctrines, tenets or beliefs of the religion. The second is that the act or practice is necessary to avoid injury to the religious susceptibilities of adherents of that religion. Only one of the two limbs need be met.

If the doctrines, tenets or beliefs of the relevant religion, do not justify the discriminatory behaviour, the Commission is of the view that the Act should not except the otherwise discriminatory act or practice on the grounds of religious susceptibilities of adherents to the religion. This is because if those religious susceptibilities are not based on the doctrines, tenets or beliefs of the relevant religion the susceptibilities should not be the justification for a discriminatory act. This view is reflected in similar provisions in some other jurisdictions that require both limbs of the limitation to be met before the exception applies.<sup>388</sup>

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<sup>388</sup> *Anti-Discrimination Act 1998* (Tas) s 52; *Anti-Discrimination Act 1991* (Qld) s 109; *Anti-Discrimination Act 1991* (ACT) s 32.



On the other hand, there may be situations where a doctrine of the relevant religion justifies discriminatory conduct, but the same conduct does not offend the religious susceptibilities of most of the adherents of the religion because that doctrine is not complied with or adhered to in the practice of the religion. If a doctrine is not complied with or adhered to by the relevant group of adherents to the religion, freedom of religion and thought does not justify otherwise discriminatory acts or practices based on that doctrine being excepted from the provisions of the Act.

The Commission is of the view that the two limbs of section 72(d) should be amended by deleting 'or' and inserting 'and' before the phrase 'is necessary', so as to require both limbs to be satisfied before the religious bodies exception applies.

The Commission considers that restricting the general religious bodies exception to discrimination on the ground of religious conviction alone would be too restrictive and give insufficient recognition of a religious community's right to express itself through worship, assembly, the practise of religious rites and customs and the observing religious ceremonies consistently with that religion's doctrines, tenets or beliefs.

The Commission considers that the proposal to restrict the religious bodies exception to those acts or practices which are required in order to conform with the tenets or beliefs of a religion has some merit but after consideration it has formed the view that it raises the bar too high. Adherents to a religion of any size will have a wide range of views as to which acts or practices are required in order to conform with the doctrines, tenets or beliefs of the religion, as opposed to which acts or practices are in conformity with the doctrines, tenets or beliefs of the religion. The latter may be seen as a slightly lower standard than the former, but it is appropriate in order to recognise the differences in beliefs of adherents to the same religion. The additional requirement of the second limb of the limitation will ensure that the otherwise discriminatory act or practice is considered important to adherents to the religion.

Finally, the Commission is of the view that the general religious bodies exception should require that any act or practice excepted under it should be reasonable and proportionate to the circumstances. The application of this test will require the seriousness of the breach of the religious doctrines and its impact on the religious susceptibilities of adherents to be balanced against the seriousness of the impact of the discriminatory action on the affected person before the conduct is excepted under the provision.

Thus, the Commission is of the view that in the areas of public life other than those covered by the religious personnel exception, and the provision by religious bodies of goods and services funded by the government and pursuant to a commercial (for profit) arrangement, the general religious bodies exception should only apply where:

- (a) the act of the religious body conforms to the doctrines, tenets or beliefs of the religion of the religious body;
- (b) the act of the religious body is reasonably necessary to avoid injury to the religious susceptibilities of adherents of the religion; and
- (c) the otherwise discriminatory act is reasonable and proportionate in the circumstances.

### ***Recommendation 75***

The Act should contain a religious bodies provision of government funded or commercial (for profit) goods and services exemption, and a religious bodies general exemption, rather than the single religious bodies exception currently contained in section 72(d) of the Act.



### **Recommendation 76**

The religious bodies provision of government funded or commercial (for profit) goods and services exemption should apply where:

- a religious body is funded by a government to provide goods or services or enters into a commercial (for profit) arrangement to provide goods and services;
- the religious body refuses to supply the goods and services, or provides the goods and services on terms or subjects a person to a detriment in connection with the provision of goods and services, on the basis of the person's religious conviction;
- the act of the religious body conforms to the doctrines, tenets or beliefs of the religion of the religious body or is reasonably necessary to avoid injury to the religious susceptibilities of adherents of the religion; and
- the otherwise discriminatory act is reasonable and proportionate in the circumstances.

### **Recommendation 77**

The general religious bodies exemption should apply where:

- the act of the religious body does not relate to the provision of government funded goods and services or the provision of goods and services pursuant to commercial (for profit) arrangements;
- the act of the religious body conforms to the doctrines, tenets or beliefs of the religion of the religious body;
- the act of the religious body is reasonably necessary to avoid injury to the religious susceptibilities of adherents of the religion; and
- the otherwise discriminatory act is reasonable and proportionate in the circumstances.

#### **4.5.4.5 Religious educational institutions employment exception**

The religious educational institutions employment exception allows educational institutions established for religious purposes to discriminate on any ground in the employment of staff or in the engagement of contract workers, where this is done in accordance with the doctrines, tenets, beliefs or teachings of the religion, and is done in good faith.<sup>389</sup>

In the Discussion Paper, the Commission sought the community's views on whether this exception should be retained or removed.<sup>390</sup> In response, it received strong support for both the retention and removal of the exception.

In support of its retention, stakeholders submitted that choosing how one's children are educated is a parental right and responsibility. Stakeholders said that if the religious educational institutions employment exception was removed, the ability for religious schools to maintain their religious character would be eroded or taken away, limiting parent's rights to choose how their children are educated.

<sup>389</sup> *Equal Opportunity Act 1984* (WA) s 73(1)-(2).

<sup>390</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 166 – 169.

A significant number of submissions in support of retaining the exception were received from religious schools, which stated that they rely on this exception to maintain their religious standards and distinctiveness in employment policies. Submissions from several churches supported this, noting that they encourage parents to send their children to a religious school, so that what is taught at home is reinforced by the teaching and modelling of staff at the school.

A submission that was representative of this view stated:

Parents must be able to send their children to schools that will provide the educational environment that will educate their children in accordance with their religious convictions.<sup>391</sup>

Some religious schools submitted that they prioritise an 'entire community' approach to religious education, which considers every member of staff to be a vital pillar of a community that seeks to maintain the best educational environment for all their students consistent with parental religious beliefs and practices. These submissions stated that it is an inherent requirement of this approach that all staff have a genuine faith in the religion underpinning the school. Submissions noted that this approach to education provides consistency between home, church and school, and is an important reason why parents choose to send their children to religious schools. It was argued that the removal of the exception would threaten the holistic community-approach to their delivery of education.

For example, one stakeholder submitted:

For a Christian school, with a cultural focus on a Christian environment and associated support system, the vital importance of every employee being aligned with the educational and religious objects and values of the organisation is paramount.<sup>392</sup>

Another stakeholder submitted that:

...these protections are necessary for religious educational institutions to be able to continue to provide an education that reflects the religious mission and identity that parents have specifically chosen for their children.<sup>393</sup>

Some religious schools expressed concern that if section 73 were removed, they may cease to exist. It was submitted that the effect of requiring religious schools to employ a member of staff whose private life contradicts fundamental religious moral teaching is to ban religious schools from operating at all.

Submissions from religious organisations also emphasised the impressionable nature of children, contending that in order for religious schools to model that a religious life is equally important to formal instruction, it is essential for religious schools to ensure that all their staff, from the principal to the gardener, speak and act in keeping with that faith. These stakeholders argued that any changes to section 73 should strengthen, not weaken, protections for religious educational institutions.

A common argument raised by submissions in favour of the retention of the religious educational institutions employment exception was to draw a parallel with political parties, noting that they have the right to exclusively employ staff that promote and adhere to their values and policies and that religious organisations should be afforded the same right.

In regards to the protection for political parties, section 66(2) of the Act provides that sections 54 to 56 of the Act, which make it unlawful for an employer or principal to discriminate against an employee, commission agent or commission worker on the grounds of political conviction and related political activity, do not apply to the offering of employment or work to a person under the *Electoral Act 1907*

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<sup>391</sup> Submission from Human Rights Law Alliance, 29 October 2021, 7.

<sup>392</sup> Submission from Hillside Christian College, 28 October 2021, 7.

<sup>393</sup> Submission from the Human Rights Law Alliance, 29 October 2021, 6.

(WA), or as a ministerial adviser or officer, employee or worker for a political party, member of the electoral staff of another person, or in similar employment or work.

Thus, the exception granted to political parties permits them to discriminate on the basis of political conviction only and in the area of public life of engagement of people to work for politicians and political parties.

Relevantly, section 66(1) of the Act provides that religious schools, as 'private educational authorities', are exempted from sections 54 to 56 of the Act in relation to the employment or appointment of workers at the religious school if the duties of the employee or worker relate to the participation of the person in any religious observance or practice. Thus, religious schools, separate to the religious educational institutions exception, may discriminate against employees and workers on the basis of their religious convictions, if the duties of the employment or work involve the employee or worker participating in any religious observance or practice. There were also numerous submissions that favoured removing or narrowing the religious educational institutions employment exception, arguing that it was no longer justifiable or appropriate.

These submissions often highlighted cases where faith-based institutions in Western Australia had used the exception to act in ways which have had a harmful and disproportionate impact on the LGBTIQA+ community. For example, the following case example was provided:

#### **Case example**

*In 2017, a Christian teacher lost their job as a relief teacher at a religious college after they told the senior staff that they were in a long-term same-sex relationship.<sup>394</sup> The teacher had worked at the school for about two years and was previously a student at the school. After informing the senior staff about their long-term relationship they were removed from the relief teacher roster at the school. The school principal confirmed that the reason for the removal was an inconsistency between the relief teacher's beliefs on sexuality and the college's beliefs.<sup>395</sup>*

Stakeholders reported instances of LGBTIQA+ staff feeling significant pressure to hide their identity for fear of discrimination or losing their job. It was submitted that this is highly detrimental to someone's ability to thrive in their workplace and contributes to a decline in mental health. One submission also noted that LGBTIQA+ students are often aware that teachers are hiding their identities at school, which sends a strong, harmful message that they should be ashamed of their sexual identity or orientation.

Contrary to suggestions that removal of the exception would result in the closure of religious schools, it was argued that faith-based schools would have the capacity and resilience to continue operating even in the absence of the religious educational institutions employment exceptions. It was submitted that a considerable majority of employers in faith-based schools in Western Australia do not need and never utilise provisions in legislation enabling them to discriminate against their employees. These submissions suggested that existing contractual obligations are sufficient to ensure that faith-based schools have the ability to hire in accordance with their beliefs, practices and customs. For example, it was suggested that:

<sup>394</sup> Claire Moodie, 'Is it really the Christian way? Teacher who lost job after revealing he was gay speaks out' *ABC News* (6 December 2017) <<https://www.abc.net.au/news/2017-12-06/teacher-loses-job-after-telling-school-hes-gay/9231948>>.

<sup>395</sup> Submission from Equality Australia, 24 October 2021, 9.

[t]he current requirement at common law requiring an employee to exhibit fidelity and good faith toward their employer is more than sufficient to address a situation where a staff member is alleged to have acted in a manner contrary to the ethos and fundamental principles of a school.<sup>396</sup>

Recognising freedom of religion and thought includes respecting the liberty of parents and people having the care of children to ensure the religious and moral education of their children in conformity with their own convictions. Consequently, the Commission is of the view that an employment exception for religious educational institutions should be retained, even if it results in legalising what would otherwise be some unlawful discriminatory acts. The scope of the exception is considered in the next section.

### **Recommendation 78**

The Act should contain an employment exemption for religious educational institutions.

#### **4.5.4.5.1 Scope of the exception**

In the Discussion Paper, the Commission asked whether the religious educational institutions employment exception (if retained) should be narrowed in any way. For example, should its operation be limited to specific categories of employees or certain protected attributes.<sup>397</sup>

Some stakeholders advocated implementing an approach such as that recently enacted by the Victorian Religious Exceptions Act. When it commences operation, section 83A of the Victorian Act will provide that religious educational institutions can only discriminate in employment where conformity with religious doctrine, tenets or beliefs is an inherent requirement of the role, and the person discriminated against cannot meet the inherent requirement because of their religious belief or activity. The discrimination will also need to be reasonable and proportionate in the circumstances. A similar approach is taken in Tasmania, where discrimination in employment is only permitted on the basis of religion where it is a genuine occupational requirement of the role.

Under this approach, it seems likely that discrimination would not be permitted when employing a maths teacher or a gardener, as these jobs can be performed without conformity to religious doctrine, tenets or beliefs. It was suggested by some stakeholders that religious affiliation would only be an inherent requirement of a principal and chaplain, who are both religious leaders of the school, or staff who teach religious education. It would not be an inherent requirement of other positions at a school, including teaching or non-teaching staff. There may be some grey areas, such as a maths teacher who was also to be a student mentor.

The justifications for narrowing the scope of the religious educational institutions employment exception are the same as for abolishing it. Stakeholders referred to the discriminatory nature of the employment practices of some religious schools that effectively prevent teachers who are members of the LGBTIQ+ community from obtaining employment in a large and prestigious education sector. Members of the LGBTIQ+ community who live in regional Western Australia are particularly disadvantaged by such discrimination because of the limited availability of alternative employment.

Stakeholders spoke of what they said was the unnecessary breadth of the exception that enables religious schools to discriminate on any ground.

<sup>396</sup> Submission from the Independent Education Union of Australia, 28 October 2021, 4.

<sup>397</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 166 – 169.

Other stakeholders argued against narrowing the scope of the exception. Stakeholders submitted that even where employment positions are not considered to have the characteristic of religious vocation, the conformity of employees' religious convictions with those of the school is still critical in allowing religious schools to achieve their religious objectives. Some stakeholders submitted that all staff, in both teaching and non-teaching roles, are considered to act as role models and examples to students of the religious ethos. It was suggested that the proposed 'inherent requirement' exception would create division within staffing bodies. It would also be difficult for decision makers and tribunals to determine whether religious compatibility is an inherent requirement of an employment position, particularly as the moral and ethical framework of a religious body is arguably an inherent requirement of all positions.

Stakeholders opposed to narrowing the exception also suggested that individuals who decide to interact with an educational institution established for religious purposes should do so knowing and accepting the religious convictions upon which that religious entity operates. They preferred the current 'in good faith' requirement, as it evaluates fairness and consistency without evaluating the authenticity of religious belief.

The Commission has considered these submissions and is of the view that the approach taken in the Victorian Religious Exceptions Act should be adopted. This will only allow religious educational institutions to discriminate in employment and the engagement of contract workers where conformity with religious doctrine, tenets or beliefs is an inherent requirement of the role, and the person discriminated against cannot meet the inherent requirement because of their religious belief or activity. The discrimination should only be permitted where it is reasonable and proportionate in the circumstances.

An inherent requirement of a position is a similar concept to the duties of a position or the genuine occupational qualifications or requirements of a position.

The Commission is of the view that adopting such an approach will contribute to greater equality of opportunity in employment, which will further the proposed amended objects of the Act. It will require individual consideration of the particular role, and whether it is of such a nature that it is necessary for the individual to conform with religious doctrines, beliefs or principles of the educational institution.

The Commission's recommendation strikes a balance between the rights of parents and those with the care of children to ensure the religious and moral education of children in their care in conformity with their religious convictions and the rights of people with different religious beliefs to those of the religious education institution in question and the rights of people with other personal attributes protected by the Act not to be discriminated against because of their protected attribute in employment and work.

Under this approach, religious schools will not be required to employ people who are hostile to their religious doctrine or ethos. Religious education institutions can ensure by contract or common law that teacher and contract workers exhibit fidelity and good faith toward the school so as to prevent a staff member from acting contrary to the ethos and fundamental principles of a school.

Educational institutions established for religious purposes will also be free to adopt employment practices which reflect that there are those who hold roles at the religious institution in which conformity with the religion of the school is significant and inherent to that role. The Commission considers that this will create a greater balance for individuals to remain free from discrimination and the rights of religious educational institutions established for religious purposes to observe practices in conformity with the beliefs of those organisations.

### **Recommendation 79**

The religious educational institutions employment exemption should be similar to section 83A of the *Equal Opportunity Act 2010* (Vic), to be inserted by the *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic). This exception is limited to the employment of staff and the appointment of commission agents and contract workers if:

- conformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the job;
- the person cannot meet that inherent requirement because of their religious conviction; and
- the discrimination is reasonable and proportionate in the circumstances.

#### **4.5.4.5.2 Publicly available policy**

In the Discussion Paper, the Commission asked whether religious educational institutions should be required to maintain a publicly available policy on religious convictions and the employment of staff.<sup>398</sup> In context, this policy would be a document that articulated the school's religious and related beliefs. It would, in summary form, set out the way in which those beliefs applied to the school's criteria for selecting staff and contract workers, the conditions of employment of staff and contract workers and the standard of conduct of staff and contractor workers.

The South Australian Act provides a like provision. Recommendation 5 of the Religious Freedom Review proposed that the SDA be amended to broaden its religious education institutions exception to apply to all grounds as long as the act or practice is founded on the precepts of the religion and the school has such a policy and provides a copy of it to employees and contract workers and prospective employees and contract workers.<sup>399</sup>

The justifications for this proposal are that it would:

- be a code of conduct for the school and its staff, without the risk of its publication or contents being unlawful discrimination;
- clarify the school's policy on employment so that parents could make informed choices as to whether to send their child to the school and potential employees and contract workers could make informed choices as to whether to accept a position at the school; and
- be a balance to the religious educational institutions employment exception.

Another view is that conflicts over employment of staff of religious schools are less likely to occur where the school has such a publicly available policy. The policy would mean that the school had considered its position on the relevant issues in advance of any matter arising that required its implementation. Its subsequent decisions are more likely to be consistent with the policy and less likely to be made on an ad hoc basis. The public availability of the policy would mean that parents and staff would be less likely to be surprised by the application of a policy with which they were not aware when they enrolled their child at the school or accepted employment at it. Thus, such a policy would be part of the evidence to show that any subsequent decision to take the benefit of the religious educational institutions employment exception was taken in good faith.

Some stakeholders, including some religious institutions were supportive of providing prospective staff and students with a policy which sets out the school's position and expectations regarding religious

<sup>398</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 169.

<sup>399</sup> Religious Freedom Review Expert Panel, Parliament of Australia, *Religious Freedom Review* (Report, 18 May 2018) 2.



tenets or beliefs. It would allow students or teachers to clearly know the school's position prior to enrolling their students at the school or applying for employment at the school.

Other stakeholders, including other religious institutions, opposed this suggestion, arguing that the option to maintain a publicly available policy should be discretionary and determined by each religious educational institution. Some submitted that requiring an express statement that individuals with certain attributes would not be offered employment would do nothing to lessen the stigma or alleviate the harms experienced by individuals (for example, the LGBTIQ+ community) who were denied employment because of their attribute. Others were of the view that providing a public policy may result in adverse publicity to the educational institution. This was seen to be a particular risk in light of the widespread use of social media. Concerns were expressed that requiring an institution's policy to be made public would put them at risk of being attacked online. Instead, it was suggested that the policy should only be made available to genuine applicants for a position.

The Commission has formed the view that if the Commission's recommendations to narrow the exceptions for religious schools is accepted, the publication by religious schools of such a policy, as set out above, should not be a requirement. Whilst there may be benefits for the public, prospective teachers and students and their parents having access to such a policy, a publication provision would impose a requirement on religious schools that other organisations that can utilise a statutory exception do not have to meet.

#### **4.5.4.6 Provision of education exception**

The provision of education exception allows religious educational institutions to discriminate against a person in the provision of education or training, if it is done in good faith in favour of adherents of the relevant religion or creed.<sup>400</sup> However, discrimination is not permitted on the grounds of race, impairment or age, nor in a manner that discriminates against a particular class or group of persons who are not adherents of that religion or creed.<sup>401</sup>

The provision of education exception permits religious schools to discriminate in favour of adherents to their religion by taking into account the protected personal attributes of a child, other than race, impairment or age, when deciding, in good faith, who they enrol as students, the conditions of enrolment of students, and the benefits and opportunities that children will have as enrolled students.

In the Discussion Paper, the Commission sought views on whether the exception should be retained in its current form, removed from the Act, or amended in some way.<sup>402</sup>

Stakeholders were divided on this issue. Some contended that the provision of education exception is a vital element in securing and protecting religious freedom for parents and others with the care of children and should be retained in its current form. They were of the view that religious schools should be free to choose which students they will or will not accept, and that the State should not have any involvement in this decision. Further, religious schools should be free to teach the principles of their religion and to live them through the school's approach to education and training of its students, without breaching any law. Stakeholders in support of retaining the exception also asserted that it was critical for religious schools to be able maintain their distinctive character.

Other stakeholders argued that the exception should be removed from the Act. In support of this position, one stakeholder provided the following example.

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<sup>400</sup> *Equal Opportunity Act 1984* (WA) s 73(3).

<sup>401</sup> *Ibid.*

<sup>402</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 169 – 171.



### Case example

*In 2015 a seven-year-old student was told by the principal of a Christian College that they could only stay enrolled at the school if they did not speak about one of their parent's sexuality or of that parent's relationship with their same sex partner. At a meeting with the school, that parent was told by the school that it did not 'promote gay', and that if they had known that the parent was gay at the admission interview, the student 'would never have got in this school.' Worried that their child could be expelled at any time, the parent withdrew the child and enrolled them in a public primary school. The child was very upset by the requirement to change schools.<sup>403</sup>*

Particular concern was expressed about the effects of the exception on LGBTIQ+ students. Submissions referred to the lived experience of LGBTIQ+ students in religious educational institutions who as a result of their sexual identity have experienced:

- expulsion and threats of expulsion;
- feeling compelled to hide their LGBTIQ+ identity;
- being told they would "burn in hell";
- direct discrimination from teaching staff, students and pastoral care staff;
- bullying policies that did not specifically address bullying related to LGBTIQ+ identity;
- being denied the ability to affirm their gender at school; and
- being prevented from bringing same-gender partners to school formals.

It was also submitted that many LGBTIQ+ students are unable to leave a school that discriminates against them. For example, young people at these schools are often from families who do not support their identity or their desire to attend a different school. This means that these young people do not have a safe place to express their identity in either the home or at school. It was also highlighted that LGBTIQ+ young people from regional areas may not have other options, particularly to complete year 11 and 12 or if they were in receipt of an educational scholarship. Additionally, LGBTIQ+ young people who discover their identity while in school may internalise the messages and discrimination they experience, as illustrated by the following quote that was included in a submission:

When you're a teenager, your high school is your world. And the world we lived in sent a very clear message that it preferred us to not exist. Just because they weren't actively expelling queer students doesn't mean they weren't deeply hurting us in ways that we would carry with us for many years to come.<sup>404</sup>

Submissions noted that these experiences have detrimental effects on the mental health and wellbeing of students and that they can result in young people becoming disengaged with school. Stakeholders also referred to the right to education under Article 28 of the CRC which is said to be denied when a student is not supported in a school environment.

Various suggestions were made regarding the reform of the provision of education exception contained in section 73(3) of the Act. One stakeholder suggested that the provision should be replaced by section 5 of the *Equal Opportunity (LGBTIQ Anti-Discrimination) Amendment Bill 2018* (WA), which states:

<sup>403</sup> Submission from Equality Australia, 29 October 2021, 9.

<sup>404</sup> Submission from Youth Pride Network, 29 October 2021, 11.

A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to admission of that other person as a student to an educational institution that is or is to be conducted in accordance with tenets, beliefs, teachings, principles or practices of a particular religion.<sup>405</sup>

This would allow religious-operated schools to prioritise enrolments of students who adhere to their faith but it would not permit religious schools to discriminate against a child on the basis of any other protected attribute. If the exception was limited in this manner it would not deny a religious school the capacity to operate lawfully as a single sex school. Section 18(3) of the Act states that section 18(1) of the Act which prohibits a school from discriminating against a student on the grounds of sex, marital status, pregnancy or breast feeding, does not apply to a single sex school refusing to admit students of the 'opposite sex'.

Another stakeholder suggested that section 73(3) should be retained, but it should be narrowed so that it only applies to sex (in order to permit single sex schools) and religion (in order to permit schools to discriminate in selection of students in favour of co-religionists).<sup>406</sup> A similar approach is taken in the Tasmanian Act, which provides that students at religious schools can only be discriminated against on the basis of religion at the time of admission.<sup>407</sup>

A number of stakeholders supported the approach adopted in the Victorian Religious Exceptions Act. Under this approach (which will be incorporated into section 83(2) of the Victorian Act), educational institutions may discriminate on the basis of a person's religious belief or activity in the course of establishing, directing, controlling or administering the institution, provided that what is done:

- conforms with the doctrines, beliefs or principles of the religion in accordance with which the educational institution is to be conducted; or
- is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion in accordance with which the educational institution is to be conducted and
- is reasonable and proportionate in the circumstances.

According to the Second Reading Speech of the Victorian Religious Exceptions Act, the effect of this provision should be that a religious educational institution that holds specific beliefs about sex before marriage cannot expel a student who becomes pregnant only on the basis that the student is pregnant. Similarly, a religious school that holds specific beliefs about gender identity could not refuse to allow a trans student to be on the student council only on the basis that student is trans. However, the school would retain the ability to ensure students hold religious beliefs consistent with those of the school, and only take discriminatory action because of the student's religious beliefs and activities where it is reasonable and proportionate in all the circumstances.<sup>408</sup> The Commission notes that on a plain reading of the provision it would not permit single sex schools to discriminate against children of a different sex to that for which the school is operated unless the decision only to enrol students of one sex is in conformity with the doctrines, beliefs or principles of the religion; or is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion. It seems to be doubtful that mainstream single sex religious schools would qualify for an exception under these requirements. If single sex schools were to continue to be lawful, a provision similar to that in section 18(3) of the Act needs to be retained.

<sup>405</sup> Submission from WAAC, 27 October 2021, 16.

<sup>406</sup> Submission from Dr Renae Barker, 24 November 2021, 4.

<sup>407</sup> *Anti-Discrimination Act 1998* (Tas) s 51A.

<sup>408</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 28 October 2021, 4376.

Some stakeholders submitted that this approach would strike an appropriate balance between competing rights. One stakeholder provided an example of its operation:

A Christian School would be allowed to discriminate in favour of admitting Christian students. However, if a Year 12 student were to renounce their faith, a school would not be able to expel that student unless it were reasonable and proportionate to do so. It may be reasonable and proportionate to do so if the student seeks to express their new beliefs in a way which undermines the beliefs of the school. But it may not be reasonable and proportionate to do so if the student otherwise supports the rights of others to believe and the student's beliefs can be accommodated in a way respectful to others that would not disrupt their final year of education.<sup>409</sup>

The Commission is of the view that the Act should adopt a similar approach to that taken in Victoria. This will help to protect students from discrimination which has the potential to do great harm to them, while also maintaining the ability of educational institutions established for religious purposes to ensure that they can maintain an environment in which attendees hold religious beliefs that are not in conflict with those promoted by the institution. The Commission considers that taking this approach will appropriately balance the different interests in the community and will contribute to greater overall equality.

The Commission notes that the Victorian Religious Education Act requires only that the discrimination conforms with the doctrines, beliefs or principles of the religion or is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion. In the Commission's view there is insufficient justification to vary from its earlier recommendations that these two requirements ought to be conjunctive. The discrimination ought not be exempted unless both these requirements are met.

#### **Recommendation 80**

The Act should contain a provision of education exemption.

#### **Recommendation 81**

The provision of education exemption should provide that educational institutions established for religious purposes may only discriminate in the provision of education and training on the basis of a person's religious conviction at the time the school decides whether or not to admit a student to the school and where the discrimination:

- conforms with the doctrines, beliefs or principles of the religion;
- is reasonably necessary to avoid injury to the religious susceptibilities of adherents of the religion; and
- the discrimination is reasonable and proportionate in the circumstances.

### **4.5.5 Aged care housing**

Section 74 of the Act allows an institution which provides housing accommodation and ancillary services for aged persons to restrict admission to applicants of any class, type, sex, race, age or religious or political conviction or the provision of benefits, facilities or services to such persons. In the

<sup>409</sup> Submission from Equality Australia, 29 October 2021, 11.

Discussion Paper, the Commission sought submissions on whether this exception should be retained or removed.<sup>410</sup>

Most stakeholders did not support retaining the exception. It was suggested that the application of section 74 can result in serious hardship in rural communities where there are limited facilities for aged care in a diverse population. In addition, it was noted that many government accommodation services are provided by religious organisations, and the government often relies on the capacity of these accommodation services due to the limited availability of beds. Submissions also highlighted that there is no equivalent exception in other states and territories, except NSW, which has a more limited exception allowing discrimination based on sex, marital or domestic status, or race.

By contrast, there was support for the Commission's proposal that providers of housing accommodation for aged persons instead be required to apply for an exemption from the provisions of the Act under section 135 of the Act, as is the case in most other Australian jurisdictions. Exemption applications are addressed in section 4.7 of this Report below.

The Commission agrees with this approach. It sees little justification for allowing institutions which provide housing accommodation to discriminate at their own discretion. This undermines the value of the protections offered by the Act and is likely to significantly disadvantage various vulnerable populations. While there may be circumstances in which it is justifiable for a housing provider to discriminate, this should be determined in accordance with the general principles that govern exemption applications.

Consequently, the Commission recommends that section 74 be removed from the Act. If an institution which provides housing accommodation and ancillary services for aged persons wishes to discriminate, it should be required to seek an exemption under section 135 of the Act.

### **Recommendation 82**

Section 74 of the Act, which allows institutions providing housing accommodation for aged persons to discriminate, should be removed from the Act. If a provider of housing accommodation for aged persons wishes to discriminate, it should be required to apply for an exemption under the Act.

#### **4.5.6 Other exceptions**

In the Discussion Paper, the Commission asked whether any other general exceptions should be added to the Act, such as a special needs exception, a pensions exception or an exception relating to affirmative discrimination.<sup>411</sup>

The benefit of amending the Act to incorporate some broadly applicable exemptions is that it would reduce the number of exemptions in the Act and simplify their application. The Commission has determined that this is the best way to proceed and recommends that the Act have general exemptions for affirmative discrimination and bona fide benefits or concessions, special needs and health and safety. The Commission did not receive sufficient submissions in relation to the inclusion of a general pensions exemption and this may need to be the subject of further consultation with relevant stakeholders.

<sup>410</sup> Ibid 171 – 172.

<sup>411</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 174 - 175.

#### 4.5.6.1 *Special needs, affirmative action and bona fide benefits or concessions*

The Act currently has two forms of special needs provisions. One grants a stand-alone exception for meeting special needs such as:

##### **Section 35K: Measures intended to meet special needs**

Nothing in Division 2 or 3 renders it unlawful to do an act a purpose of which is to afford a person with a particular family responsibility or of a particular family status access to facilities, services or opportunities to meet their special needs in relation to employment, education, training or welfare, or any ancillary benefits.

The other combines the exception for meeting special needs with an affirmative action provision such as:<sup>412</sup>

##### **Section 66R: Measures intended to achieve equality**

Nothing in Division 2 or 3 renders it unlawful to do an act a purpose of which is

- a. to ensure that persons who have an impairment have equal opportunities with other persons in circumstances in relation to which provision is made by this Act; or
- b. to afford persons who have an impairment access to facilities, services or opportunities to meet their special needs in relation to employment, education, training or welfare.

Other jurisdictions adopt a range of legislative formats to address these exemptions. The ACT provides in section 27 that it is not lawful if the affirmative action measure is not reasonable for the achievement of the purpose:

##### **Measures intended to achieve equality**

1. Part 3 does not make it unlawful to do an act if a purpose of the act is—
  - a. to ensure that members of a relevant class of people have equal opportunities with other people; or
  - b. to give members of a relevant class of people access to facilities, services or opportunities to meet the special needs they have as members of the relevant class.
2. However, subsection (1) does not make it lawful to do an act for a purpose mentioned in that subsection if the act discriminates against a member of the relevant class in a way that is not reasonable for the achievement of that purpose.

##### *Example for s (1)(a)*

An employer runs a management skills development course for female employees only. Part 3 does not make this unlawful if a purpose is to ensure that women have equal opportunities (in this case, for career development) with men. Women are 'members of a relevant class of people' (**relevant class of people** is defined in the dict) because they are a class of people whose members are identified by reference to a protected attribute, in this case, sex in s 7(1)(u).

##### *Example for s (1)(b)*

A health clinic provides speech therapy for autistic children only. Part 3 does not make this unlawful if a purpose is to give autistic children access to a service that meets their special needs as autistic children. Autistic children are 'members of a relevant class of people' because they are a class of people whose members are identified by reference to 2 attributes mentioned in s 7, in this case, disability in s 7(1)(e) and age in s 7(1)(b).

<sup>412</sup> See also ss 31, 35ZD, 51 and 66ZP.

The ADA combines special measures, affirmative action and bona fide benefits in one provision in section 33 and also includes statutory examples:

This Part does not make it unlawful for a person to discriminate against another person, on the ground of the other person's age, by an act that is consistent with the purposes of this Act, if:

- (a) the act provides a bona fide benefit to persons of a particular age; or

*Example 1:* This paragraph would cover a hairdresser giving a discount to a person holding a Seniors Card or a similar card, because giving the discount is an act that provides a bona fide benefit to older persons.

*Example 2:* This paragraph would cover the provision to a particular age group of a scholarship program, competition or similar opportunity to win a prize or benefit.

- (b) the act is intended to meet a need that arises out of the age of persons of a particular age; or

*Example:* Young people often have a greater need for welfare services (including information, support and referral) than other people. This paragraph would therefore cover the provision of welfare services to young homeless people, because such services are intended to meet a need arising out of the age of such people.

- (c) the act is intended to reduce a disadvantage experienced by people of a particular age.

*Example:* Older people are often more disadvantaged by retrenchment than are other people. This paragraph would therefore cover the provision of additional notice entitlements for older workers, because such entitlements are intended to reduce a disadvantage experienced by older people.

The Act currently contains separate provisions for bona fide benefits (including concessions), such as section 66ZG(3)(d) which provides an exception from accommodation discrimination in respect of 'the provision of bona fide benefits, including concessions, to a person by reason of his or her age' or section 35B(4) which provides:

Nothing in this section renders it unlawful for a person to do an act a purpose of which is to afford persons with a particular family responsibility or family status rights, benefits or privileges in connection with that family responsibility or family status.

The Commission is of the view that these should have a broader scope and can be combined with an affirmative action focused provision.

For the sake of simplicity and clarity, the Commission recommends the inclusion of a general provision combining exemptions for special needs, affirmative action and the provision of bona fide benefits or concessions in one bifurcated statutory provision, focused on special needs schemes and on affirmative action (through promoting equal opportunity or providing a bona fide benefit or concession). The Commission recommends that the provision be drafted to include statutory examples and that the substantive provision read as follows:

**Measures intended to achieve equality**

Nothing in this Act makes it unlawful for a person to discriminate against another person if it is for the purpose of:

- carrying out a scheme for the benefit of a group which is disadvantaged or has a special need because of a protected attribute; or
- promoting equal opportunity or providing a bona fide benefit or concession for a group of people who are disadvantaged or have a special need because of a protected attribute if it discriminates in a way that is reasonable to achieve that purpose.

### **Recommendation 83**

The Act should include a general provision combining exemptions for special needs, affirmative action and the provision of bona fide benefits or concessions and should include statutory examples to assist in its application. It should provide:

#### **Measures intended to achieve equality**

Nothing in this Act makes it unlawful for a person to discriminate against another person if it is for the purpose of:

- carrying out a scheme for the benefit of a group which is disadvantaged or has a special need because of a protected attribute; or
- promoting equal opportunity or providing a bona fide benefit or concession for a group of people who are disadvantaged or have a special need because of a protected attribute if it discriminates in a way that is reasonable to achieve that purpose.

#### **4.5.6.2 Health and Safety**

The Act currently includes a health and safety exception in relation to age discrimination in section 66ZM:

1. Nothing in Division 2 or 3 renders unlawful discrimination by an employer, principal or person against another person on the ground of the other person's age in the terms and conditions on which —
  - (a) employment is offered or afforded; or
  - (b) engagement is offered or afforded; or
  - (c) contract work is allowed; or
  - (d) access to or the use of places or vehicles is allowed; or
  - (e) goods, services or facilities are provided or made available,as the case requires, if those terms and conditions are imposed in order to comply with health and safety considerations which are reasonable in the circumstances.
2. In determining for the purposes of subsection (1) what health and safety considerations are reasonable in all the circumstances, regard shall be had to all relevant circumstances of the particular case, including the effect of the discrimination in question on the person against whom that discrimination takes place.

The Victorian Act includes a general health and safety provision in section 86 which provides:

1. A person may discriminate against another person on the basis of disability or physical features if the discrimination is reasonably necessary—
  - (a) to protect the health or safety of any person (including the person discriminated against) or of the public generally; or
  - (b) to protect the property of any person (including the person discriminated against) or any public property.
2. A person may discriminate against another person on the basis of pregnancy if the discrimination is reasonably necessary to protect the health or safety of any person (including the person discriminated against).

The Commission is of the view that the Act should include a more expansive exemption than section 66ZM to render discrimination not unlawful if it is done in order to comply with health and safety considerations which are reasonable in the circumstances. At the minimum it should apply in the areas of employment, goods, services and facilities and access to places and vehicles, but consideration



could be given to whether it is appropriate to extend it to all areas of public life protected by the Act. Consideration should also be given to it applying to at least include the protected attributes of pregnancy, age, assistance animals, disability and physical features.

#### **Recommendation 84**

The Act should include an exemption for acts that are done in order to comply with health and safety considerations and which are reasonable in the circumstances. At the minimum, the exemption should apply in the areas of employment, goods, services and facilities and access to places and vehicles, but consideration could be given to whether it is appropriate to extend it to all areas of public life protected by the Act. Consideration should also be given to it applying to at least include the protected attributes of pregnancy, age, assistance animals, disability and physical features.

#### **4.5.6.3 Unjustifiable hardship**

In Recommendations 66-68, the Commission has recommended the creation of a responsibility to make reasonable adjustments, unless it would impose an unjustifiable hardship on the holder of the responsibility. Accordingly, the Commission is of the view that to the extent that consideration is given to extending this to all areas protected attributes and all areas of public life, there is no need for a broad exemption on the basis of unjustifiable hardship when this is built into the responsibility to make reasonable adjustments. To the extent that the responsibility applies, at the very minimum, to disability, pregnancy, breastfeeding, family responsibilities or carer obligations it will subsume exceptions currently in the Act, such as sections 66K(2) and 66L(3)(c) which provides an exception on the grounds of unjustifiable hardship for goods, services and facilities and accommodation, respectively in relation to the ground of impairment. Potentially, it could also extend to encompass exceptions currently set at a lower standard, like section 35L, which allow for employers to discriminate on the grounds of family responsibility or family status in provision of employee accommodation.

#### **4.5.6.4 Superannuation and Insurance**

There are a number of insurance and superannuation exceptions in the Act.<sup>413</sup> These allow discrimination on various grounds based on actuarial/statistical data and where discrimination is reasonable. The Commission is of the view that these various exceptions should be amalgamated (as is the case in sections 28 and 29 of the ACT Act) and be the subject of further consultation with relevant stakeholders. While the Commission does not consider that these exceptions need to be narrowed, they may need to be expanded to encompass new protected attributes recommended by the Commission.

#### **Recommendation 85**

Following further consultation with relevant stakeholders, consideration should be given to amalgamating exemptions relating to insurance and superannuation.

<sup>413</sup> See for example, ss 35AR, 66T, 66ZL and 66ZR.

## 4.6 Specific exceptions

### 4.6.1 Scope of this section

As discussed in section 4.3.1 of this Report above, the Commission recommends that, subject to any exceptions, all of the attributes listed in the Act should be protected in relation to all of the areas of public life covered by the Act. The previous section of this Report considered the scope of possible general exceptions: those exceptions which apply to all forms of discrimination. This section considers specific exceptions, which only have limited application.

This section does not address in detail all specific exemptions. Consistent with the Discussion Paper it considers exemptions in the areas of accommodation status, age, gender identity, lawful sexual activity and pregnancy. This section also includes consideration of exemptions in other areas of public life and/or other protected attributes where the Commission considered them to be matters of importance. The exemptions are considered in alphabetical order.

In respect to other exemptions, the Act contains many individual exceptions applying to particular protected attributes or areas of public life protected by the Act. The Commission recommends that these be consolidated, modernised and simplified. It is apparent that this is required from a consideration of the following table that contains the specific exceptions to discrimination in the protected area of education on the basis of the protected attributes named in the left hand column of the table:

No	Protected attribute	Extent of exception in the area of education
1	Sex, marital status, pregnancy or breastfeeding (section 18(3)).	A refusal or failure to accept a person's application for admission as a student at an educational institution that is conducted solely for students of the opposite sex to the sex of the applicant.
2	Family responsibility or family status (section 35I(3)).	Bona fide benefits, including concessions, provided to a person by reason of his or her family responsibility or family status.
3	Family responsibility or family status (section 35K).	An act a purpose of which is to afford a person with a particular family responsibility or of a particular family status access to education or any ancillary benefits.
4	Sexual orientation (section 35ZD).	An act to afford persons of a particular sexual orientation access to facilities, services or opportunities to meet their special needs in relation to education and training.
5	Race (section 44(3)).	Acts by an educational authority prescribed by regulations in relation to such circumstances, if any, as may be prescribed by regulations.
6	Race (section 51).	An act a purpose of which is: (a) to ensure that persons of a particular race have equal opportunities with other persons in circumstances in relation to which provision is made by this Act; or (b) to afford persons of a particular race access to facilities, services or opportunities to meet their special needs in relation to education or any ancillary benefits.

No	Protected attribute	Extent of exception in the area of education
7	Religious or political conviction (section 61(3)).	Acts by an educational authority prescribed by regulations in relation to such circumstances, if any, as may be prescribed by regulations.
8	Impairment (section 66I(3) and (4)).	<p>A refusal or failure to accept a person's application for admission as a student at an educational institution that is conducted solely for students who have an impairment which the applicant does not have.</p> <p>A refusal or failure to accept a person's application for admission as a student at an educational institution where the person, if admitted as a student by the educational authority, would require services or facilities that are not required by students who do not have an impairment and the provision of which would impose unjustifiable hardship on the educational authority.</p>
9	Impairment (section 66R)	<p>An act a purpose of which is:</p> <p>(a) to ensure that persons who have an impairment have equal opportunities with other persons in circumstances in relation to which provision is made by this Act; or</p> <p>(b) to afford persons who have an impairment access to facilities, services or opportunities to meet their special needs in relation to employment, education, training or welfare.</p>
10	Age (section 66ZD(4)).	A refusal or failure to accept an application for admission as a student at an educational institution under a mature age admission scheme conducted by the educational institution, which application is made by a person whose age is below the minimum age fixed under that scheme for admission.
11	Age (section 66ZP).	<p>An act a purpose of which is:</p> <p>(a) to ensure that persons who are of a particular age have equal opportunities with other persons in circumstances in relation to which provision is made by this Act; or</p> <p>(b) to afford persons who are of a particular age access to facilities, services or opportunities to meet their special needs in relation to education or training.</p>

The table shows how many exceptions relevant to education are included in the Act, as well as how dispersed they are across various sections of the Act. This makes the Act difficult to read and understand. The Commission recommends that all the exceptions to be included in the Act be collected in one part to aid understanding and that they be updated to the extent that the Commission's recommendations are adopted. Different jurisdictions use different classification schemes for exceptions. The Queensland Act groups them by areas of public life. Whereas the Tasmanian Act groups them by protected attributes.

Exceptions numbered 1, 8 and 10 all relate to exceptions to decisions to accept or reject a person for admission to a school, on the grounds of sex, marital status, pregnancy or breastfeeding, impairment and mature age. These exceptions warranted few mentions in stakeholder submissions. There does not seem to be any impetus to change them.

Exceptions numbered 2, 3, 4, 6, 9 and 11 are all exceptions made to help people with protected attributes achieve equality. The Commission recommends in this Report that the Act contain a broad

provision rendering it lawful for a person to discriminate in favour of a person or group of people with a protected attribute for the purpose of granting access to facilities, services or opportunities to meet the special needs they have as members of the relevant class, and the act is reasonable for the achievement of that purpose. If that recommendation is accepted, these exceptions are unnecessary.

This type of reasoning can be applied to many of the specific exceptions in the Act so as refine and reduce the number of specific exceptions.

## 4.6.2 Accommodation status

The Commission recommended in section 4.2.2 of this Report above that accommodation status be included in the Act as a protected attribute. The Commission also sought submissions about what exceptions, if any, should apply if accommodation status is included as a ground in the Act.<sup>414</sup>

As noted in the Discussion Paper, the ACT Act contains an exception to the ground of accommodation status in section 26(2), which provides that it is not unlawful:

for a person to discriminate on the ground of accommodation status in relation to the provision of accommodation if the discrimination is reasonable, having regard to any relevant factors.

Very few stakeholders made submissions on this issue. Where they did, they submitted that any exceptions should be narrow and limited to discrimination that is reasonable and proportionate in the circumstances, similar to the operation of the ACT Act.

The Commission agrees with these submissions and recommends that an approach similar to that taken in the ACT be adopted.

### **Recommendation 86**

The Act should provide that it is not unlawful for a person to discriminate on the ground of accommodation status in relation to the provision of accommodation if the discrimination is reasonable, having regard to any relevant factors.

## 4.6.3 Age

### 4.6.3.1 Discriminatory legislative requirements

Under section 66ZS of the Act, it is not unlawful to discriminate on the ground of age if the relevant act is done by a person in order to comply with certain legislative requirements that were in force when the provision came into operation (on 8 July 1985). In the Discussion Paper, the Commission sought views on whether this provision should be amended.<sup>415</sup>

Some stakeholders submitted that the scope of this exception, which applies to most laws which were in force in 1985, is very broad and is the most far-reaching exception in the Act. It was argued that allowing such a wide-ranging exception for age discrimination acted to deprioritise age equality. Consequently, it was recommended that this blanket exception should be removed from the Act.

<sup>414</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 125 – 126.

<sup>415</sup> Ibid 159.

Other stakeholders recommended retaining the exception but updating it to reflect legislative changes that have occurred since its enactment. For example, it was suggested that the reference to the *Industrial Relations Act 1988* (Cth) in section 66ZS(1)(b) should be updated to the FW Act.

The Commission considers that it is highly unlikely that there is a continuing need to exempt pre-existing discriminatory provisions that existed prior to the commencement of section 66ZS in July 1985. Accordingly, the Commission recommends that section 66ZS should be repealed unless, during the course of further investigation, it is shown that there are some continuing provisions in these pre-existing laws that are required and still rely upon this exception. Such investigation is beyond the scope of this reference.

If section 66ZS is retained, the Commission recommends that subsections 66Z(3) to (6) be repealed. These subsections require reporting of certain matters be carried out within a prescribed period of time, which has passed. They are therefore now redundant.

### **Recommendation 87**

The exception to discrimination on the ground of age contained in section 66ZS of the Act should be repealed unless, during the course of further investigation, it is shown that there are necessary provisions in other legislation that still rely upon this exception.

If section 66ZS is not repealed, sections 66ZS(3) to (6) should be repealed. These provisions are now redundant due to the passage of time.

#### **4.6.4 Assistance animals**

The Commission recommended at 4.2.4 of this Report above that assistance animals be included as a ground. While the Commission did not seek views on specific exceptions to this ground, some submissions were received which raised the need to balance the support needed by those with assistance animals and the health, safety and comfort of users of public spaces.

Employee safety and wellbeing, and the wellbeing of the animal itself, were also raised as relevant considerations in relation to assistance animals which are required in the workplace. One stakeholder made this submission in the context of the resources and energy industry, where the presence of animals on-site may not be appropriate or possible to accommodate.<sup>416</sup> Another stakeholder noted that consideration for health and safety obligations and the practicalities are important as it may not always be safe to have assistance animals in some work environments (for both the animal and the broader workforce).<sup>417</sup>

The Commission notes that section 54A of the DDA contains specific exceptions relating to assistance animals. It states:

- (2) This Part does not render it unlawful for a person to request or to require that the assistance animal remain under the control of:
  - (i) the person with the disability; or
  - (ii) another person on behalf of the person with the disability

....

<sup>416</sup> Submission from the Australian Resources & Energy Group (AMMA), 29 October 2021, 6.

<sup>417</sup> Submission from the Chamber of Commerce and Industry WA, 29 October 2021, 6.

- (4) This Part does not render it unlawful for a person (the discriminator) to discriminate against the person with the disability on the ground of the disability, if:
  - (a) the discriminator reasonably suspects that the assistance animal has an infectious disease; and
  - (b) the discrimination is reasonably necessary to protect public health or the health of other animals.
- (5) This Part does not render it unlawful for a person to request the person with the disability to produce evidence that:
  - (a) the animal is an assistance animal; or
  - (b) the animal is trained to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

The Commission is of the view that a broad exemption in relation to health and safety is sufficient subject to further community consultation in this regard.

#### **4.6.5 Employment status**

The Commission recommended at 4.2.8 of this Report above that employment status be included as a protected attribute. It recommended adopting an approach similar to that taken in the ACT.

Section 57O of the ACT Act provides that it is not unlawful for an employer to discriminate against a person on the basis of the protected attribute of employment status in (1) the arrangements made for deciding who should be offered employment (a protected area of public life) and (2) the terms or conditions of offer, so long as there is a reasonable justification for the discrimination (having regard to any relevant factors).

In introducing this exception into the ACT Act, the Explanatory Statement provided:

The aim of this exception is to recognise that there may be situations where a person's employment status is a relevant consideration in offering a person employment. For example an agent might look to a person's work history as part of an assessment about the suitability of a prospective applicant for a particular offer of employment.<sup>418</sup>

The Commission is tentatively of the view that such an exemption would appropriately achieve the balance between the right to non-discrimination on the basis of employment status and the rights of others, by allowing employers to distinguish between individuals where reasonable. However, as the Commission did not specifically consult on this issue it does not make any recommendation in this regard.

#### **4.6.6 Gender identity**

The Commission recommended at section 4.2.12 of this Report that gender identity be included as a protected attribute in the Act. In the Discussion Paper, the Commission asked whether there should be any specific exceptions to this ground of discrimination.<sup>419</sup>

In light of the discrimination faced by many trans, gender diverse and non-binary people any exemptions need to be carefully appraised, particularly in light of the recommendations identifying the imperative of recognising gender identity as a protected attribute.

Many stakeholders argued that there should not be any specific exemptions to this ground. However, as discussed earlier in the Report in sections dealing with related issues, the Commission received

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<sup>418</sup> Explanatory Statement to the Discrimination Amendment Bill 2016 (ACT), 14.

<sup>419</sup> Ibid 107 – 109.

some submissions cautioning that any changes in this area should be considered carefully, so as not to encroach on spaces and initiatives set up for the protection and general benefit of women. These stakeholders suggested that the expansion of protections to gender identity would create issues for safe space access by enabling biological males to access safe spaces such as women's refuges and create other potential implications in the areas of student accommodation, student safety, sporting team participation and bathroom facility usage.

Some stakeholders were also concerned about the application of this ground to the area of sporting activity. Under the Act, it is generally unlawful to discriminate against a gender reassigned person on gender history grounds by excluding that person from a sporting activity, or an administrative, coaching, refereeing or umpiring activity in relation to any sport. However, discrimination is permitted if the relevant sporting activity is a competitive sporting activity for members of the sex with which the person identifies, and the person would have a significant performance advantage as a result of their medical history.<sup>420</sup> This is addressed by the Commission in the sporting exemption below.

The Commission has made recommendations in relation to a number of the general exemptions and the affirmative discrimination exemption that have taken into account the Commission's recommendation that gender identity be a protected attribute under the Act. Those recommendations cover many of the issues raised by stakeholders. For instance, a women's refuge may be able to rely on the exemptions directed at measures intended to achieve equality, such as carrying out a scheme for the benefit of a group which is disadvantaged or has a special need. Similarly, a group directed at providing counselling to gender diverse youth may be able to discriminate in the services it is able to provide by relying on these general exemptions.

The Commission considers that there may be a limited number of circumstances in which discrimination on the basis of gender identity should be permitted. These include in the protected area of employment, where there is a genuine occupational qualification or requirement in relation to a particular position.

Outside these limited circumstances, people who wish to discriminate on the basis of gender identity should be required to apply for an exemption. Exemption applications are discussed in section 4.7 below.

#### **Recommendation 88**

The Act should only include limited exemptions relevant to discrimination on the basis of gender identity. These could include exemptions in the protected area of employment, where there is a genuine occupational qualification or requirement in relation to a particular position.

#### **4.6.7 Goods, services and facilities**

Other than in the circumstances in which the religious bodies exception applies, the Act does not allow individuals or businesses to discriminate in relation to the provision of goods, services or facilities for any reason. This is consistent with other anti-discrimination legislation in Australia. In the Discussion Paper, the Commission asked whether an exception should be added to the Act, allowing individuals or businesses to discriminate in the provision of goods or services in certain circumstances.<sup>421</sup>

<sup>420</sup> *Equal Opportunity Act 1984* (WA) s 35AP.

<sup>421</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 173 – 174.



Stakeholders submitted that an exception of this kind is neither desirable nor necessary. It was argued that introducing such an exception would lead to an increase in discrimination, particularly for the LGBTIQA+ community. It would also be inconsistent with the views of the Religious Freedom Review Expert Panel, which found that allowing businesses and individuals to discriminate in the provision of goods and services would unnecessarily encroach on other human rights and could cause harm to vulnerable groups.<sup>422</sup>

Having regard to the issues raised in these submissions, the Commission is of the view that an exception allowing individuals or business to discriminate in the provision of goods or services would not contribute to achieving equality within the community and would not further the proposed objects of the Act. Accordingly, no such exception should be included in the Act.

#### 4.6.8 Immigration status

The Commission recommended at 4.2.13 of this Report above that immigration status be included as a protected attribute. Some stakeholders who supported the inclusion of immigration status as a new ground suggested that it would be appropriate to also include a reasonableness exception, similar to that contained in section 57P of the ACT Act, which provides:

Part 3 does not make it unlawful to discriminate against a person on the ground of immigration status if the discrimination is reasonable, having regard to any relevant factors.

**Example—relevant factors**

effect of the discrimination on the person discriminated against

By contrast, other stakeholders suggested that the inclusion of a reasonableness exception should not be adopted, as it would open the scope for potential discrimination and increase ambiguity for individuals and employers in terms of what is considered to be reasonable discrimination. Instead, it was submitted that no exceptions should be provided, other than the general exception for measures intended to achieve equality (special needs, affirmative action and bona fide benefits or concessions) (see 4.5.6.1 above).<sup>423</sup>

The Commission is tentatively of the view that no specific reasonableness exemption of this kind for the protected attribute of immigration status is warranted based on the submissions received, beyond the recommended general exemptions concerning measures intended to achieve equality. As the Commission did not specifically consult on this issue it does not make any recommendation in this regard.

#### 4.6.9 Irrelevant criminal record

The Commission recommended at 4.2.15 of this Report above that a new ground of irrelevant criminal record should be included in the Act. Some stakeholders submitted that, if this ground were introduced, it would be important to have some exemptions. For example, it was suggested that there be an exemption in the employment context, where the role involved the care of vulnerable people, provided that there is proper consideration of the circumstances of the criminal record and its relevance to the role of caring for vulnerable people.<sup>424</sup> Further, it was argued that it should not be discriminatory in some instances to refuse to provide accommodation if such a refusal was necessary in the circumstances.

<sup>422</sup> Religious Freedom Review Expert Panel, Parliament of Australia, *Religious Freedom Review* (Report, 18 May 2018) 49.

<sup>423</sup> Submission from John Curtin Law Clinic, 19 October 2021, 8-10.

<sup>424</sup> Submission from CPSUCSA, 5 November 2021, 23-26.

In relation to employment, the Commission notes that its recommendation in this area states that it should not be discriminatory for an employer to refuse to offer employment to a candidate with a criminal record, if that criminal record provides evidence that the person does not have the attributes that will enable them to fulfil the selection criteria or inherent requirements of the job. The Commission is of the view that this is adequate to address the concerns of stakeholders.

The Commission does believe, however, that an additional exemption is required in relation to the education, training or care of vulnerable people. In this regard, section 50 of the Tasmanian Act provides:

A person may discriminate against another person on the ground of irrelevant criminal record in relation to the education, training or care of children if it is reasonably necessary to do so in order to protect the physical, psychological or emotional wellbeing of children having regard to the relevant circumstances.

If the government accepts the Commission's recommendation in relation to the new protected attribute of irrelevant criminal record, the Commission recommends the inclusion of a targeted exemption based on section 50 of the Tasmanian Act. It should be directed at 'a vulnerable group including children'.

There should also be an exemption to permit a person to discriminate against another person on the ground of irrelevant criminal record in relation to accommodation if it is reasonably necessary to do so in order to protect the physical, psychological or emotional wellbeing of residents or nearby residents.

#### **Recommendation 89**

If a protected attribute of irrelevant criminal record is included in the Act, the Act should also include exemptions which allow a person to discriminate on this basis in relation to:

- the education, training or care of a vulnerable group, including children, if it is reasonably necessary to protect the physical, psychological or emotional wellbeing of that vulnerable group having regard to the relevant circumstances; and
- the provision of accommodation, if it is reasonably necessary to do so in order to protect the physical, psychological or emotional wellbeing of residents or nearby residents.

#### **4.6.10 Lawful sexual activity**

The Commission recommended at section 4.2.17 of this Report that the ground of lawful sexual activity be included in the Act. The Commission sought submissions as to whether there should be any specific exceptions to this ground.<sup>425</sup>

Several submissions which opposed including lawful sexual activity as a protected attribute submitted that, if it were to be included, there should be an exception to allow for religious views as to sexual morals and ethics. The Commission is of the view that the scope of the religious exceptions mean that further exceptions are not required to address these concerns.

In relation to the provision of accommodation, the Commission is of the view that an exemption should be included in the Act based on the Victorian Act, which provides in section 62 that:

<sup>425</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 123 – 124.

A person may refuse to provide accommodation to another person if the other person intends to use the accommodation for, or in connection with, a lawful sexual activity on a commercial basis.

As the Act's protections for accommodation only apply to principals, agents and commercial transactions, the Commission is of the view that no further exemption is required in relation to the provision of accommodation. The Commission is of the view that private homeowners should be able to refuse to provide accommodation within their own home if the other person intends to use the accommodation for lawful sexual activity. The Commission does not understand that the law prevents this.

#### ***Recommendation 90***

The Act should provide that it is not unlawful for a person to refuse to provide accommodation to another person if the other person intends to use the accommodation for, or in connection with, a lawful sexual activity on a commercial basis.

#### **4.6.11 Local government**

The Commission recommended at 4.3.5 of this Report above that local government be included as a new protected area of public life. In making this recommendation, the Commission does not intend to impinge upon the freedom of councillors to give voice to their political views in the local government context. To ensure that this does not occur, the Commission recommends that the Act include an exemption for acts done by one councillor towards another councillor on the basis of political conviction.

#### ***Recommendation 91***

If local government is included in the Act as a protected area of public life, there should be an exemption for acts done by one councillor towards another councillor on the basis of political conviction.

#### **4.6.12 Political conviction**

Section 66(2) of the Act currently renders it not unlawful for an:

employer, principal or person on the ground of the holding or not holding of any political conviction or the engaging in or refusal or failure to engage in any lawful political activities with respect to the offering of employment or work to a person as an officer within the meaning of the *Electoral Act 1907*, or as a ministerial adviser or officer, employee or worker for a political party, member of the electoral staff of another person, or in other similar employment or work.

The Commission is of the view that this exemption needs to be narrowed. It should provide that the offering of employment or work to a person in the specified circumstances is not unlawful provided that:

- holding or not holding of any political conviction or the engaging in or refusal or failure to engage in any lawful political activities is an inherent requirement of the job;
- the person cannot comply with that requirement because of their political conviction; and
- it is otherwise reasonable and proportionate in the circumstances.

### **Recommendation 92**

The political conviction exemption should be narrowed in scope. It should provide that the offering of employment or work to a person as an officer within the meaning of the *Electoral Act 1907* (WA), or as a ministerial adviser or officer, employee or worker for a political party, member of the electoral staff of another person, or in other similar employment or work, is not unlawful provided that:

- holding or not holding of any political conviction or the engaging in or refusal or failure to engage in any lawful political activities is an inherent requirement of the job;
- the person cannot comply with that requirement because of their political conviction; and
- it is otherwise reasonable and proportionate in the circumstances.

#### **4.6.13 Physical features**

The Commission recommended at 4.2.19 of this Report above that a new ground of physical features should be included in the Act. Many stakeholders, including those that proposed the adoption of a very broad definition of physical features, supported also including exceptions to this ground.

The following exceptions, canvassed in the Discussion Paper, received stakeholder support:

- Circumstances where an employee's physical features pose significant risks to the health, safety and wellbeing of others. For example, it was submitted that employers may need to discriminate against some features, such as long hair and piercings, where they pose a potential safety risk, as may be the case in the resources sector. It was also submitted that facial hair can affect the efficacy of respirators, which may be needed during the course of employment.
- Circumstances where certain features are a pre-requisite to a dramatic or artistic performance, photographic or modelling work or similar employment.<sup>426</sup>

In addition, some stakeholders raised the need for an exception where physical appearance may come into conflict with religious beliefs.

Two exceptions to discrimination on the basis of physical features can be found in the Victorian Act:

- Section 26(4), which relates to exceptions for genuine occupational requirements, provides that –  

An employer may discriminate on the basis of physical features in the offering of employment in relation to a dramatic or an artistic performance, photographic or modelling work or any similar employment.
- Section 86(1), which concerns the protection of health, safety and property, provides that:  

A person may discriminate against another person on the basis of disability or physical features if the discrimination is reasonably necessary—

  - (a) to protect the health or safety of any person (including the person discriminated against) or of the public generally; or
  - (b) to protect the property of any person (including the person discriminated against) or any public property.

<sup>426</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 118.

The Commission notes that the general health and safety exemption recommended above is potentially relevant to this protected attribute.

The Commission is of the view that a genuine occupational requirement exemption should apply to this protected attribute similar to section 66S,<sup>427</sup> which currently applies to the area of employment in relation to the attribute of impairment (or, as recommended, disability). It could be re-drafted as follows:

Nothing in this Part applies to or in respect of any work or employment where that work or employment involves any one or more of the following:

- participation in a dramatic performance or other entertainment in a capacity for which a person with a particular physical feature is required for reasons of authenticity;
- participation as an artist's or photographic model in the production of a work of art, visual image or sequence of visual images for which a person with a particular physical feature is required for reasons of authenticity;
- providing persons with a particular physical feature with services for the purpose of promoting their welfare where those services can most effectively be provided by a person with the same physical feature.

### **Recommendation 93**

The Act should include a genuine occupational requirement exemption for discrimination on the basis of a physical feature. That exemption should provide that it is not unlawful to discriminate in respect of any work or employment, where that work or employment involves any one or more of the following:

- participation in a dramatic performance or other entertainment in a capacity for which a person with a particular physical feature is required for reasons of authenticity;
- participation as an artist's or photographic model in the production of a work of art, visual image or sequence of visual images for which a person with a particular physical feature is required for reasons of authenticity;
- providing persons with a particular physical feature with services for the purpose of promoting their welfare where those services can most effectively be provided by a person with the same physical feature.

#### **4.6.14 Pregnancy**

Under the current Act, there are two provisions which allow for discrimination on the basis of pregnancy; sections 28 and 31.

Section 28 provides:

Nothing in Division 2 or 3 renders it unlawful for a person to discriminate against a man on the ground of his sex by reason only of the fact that the first-mentioned person grants to a woman rights or privileges in connection with pregnancy, childbirth, breast feeding or bottle feeding.

Section 31 provides:

Nothing in Division 2 or 3 renders it unlawful to do an act a purpose of which is -

<sup>427</sup> See also ss 50 (race) or 66ZQ (age).

- (a) to ensure that persons of a particular sex or marital status, persons who are pregnant or persons who are breast feeding or bottle feeding have equal opportunities with other persons in circumstances in relation to which provision is made by this Act; or
- (b) to afford persons of a particular sex or marital status, persons who are pregnant or persons who are breast feeding or bottle feeding access to facilities, services or opportunities to meet their special needs in relation to employment, education, training or welfare.

In the Discussion Paper, the Commission sought submissions on whether these exceptions should be retained, or any other pregnancy-related exceptions included.<sup>428</sup>

Stakeholders generally agreed that the existing exceptions in sections 28 and 31 of the Act should be retained. However, it was suggested that section 28 should be redrafted in gender-neutral terms to clarify that no rights or privileges granted to a person on the basis of pregnancy, childbirth, breastfeeding or bottle feeding constitute unlawful discrimination of a person who is not pregnant, breastfeeding or bottle feeding.

Other stakeholders suggested that the Act should include express exceptions similar to those contained in section 85Z(3) of the South Australian Act. That section provides that a workplace does not discriminate against a pregnant woman on the ground of pregnancy if —

- (a) the discrimination is based on the fact that the woman is not, or would not be, able—
    - (i) to perform adequately, and without endangering herself, the unborn child or other persons, the work genuinely and reasonably required of her; or
    - (ii) to respond adequately to situations of emergency that should reasonably be anticipated in connection with her duties; and
  - (b) in the case of discrimination arising out of dismissal from employment—
    - (i) there is no other work that the employer could reasonably be expected to offer the woman; and
    - (ii) the woman has been offered leave for the period that would result in her being unable—
      - (A) to perform adequately, and without endangering herself, the unborn child or other persons, the work genuinely and reasonably required of her; or
      - (B) to respond adequately to situations of emergency that should reasonably be anticipated in connection with her duties,
- and the woman has declined to take the leave.

In contrast, some stakeholders did not agree with the drafting of the South Australian Act and submitted that the Act should not allow pregnancy discrimination in any circumstances.

Some stakeholders suggested that there should be clear and limited express exceptions, coupled with a responsibility to make reasonable adjustments. The issue of reasonable adjustments is addressed in 4.4 above.

In the Commission's view, the health and safety exemption discussed above would be sufficient to address additional instances where pregnancy discrimination may be lawful.

<sup>428</sup> Ibid 114 – 116.

#### **Recommendation 94**

The exemptions relating to pregnancy, childbirth, breast feeding or bottle feeding should be drafted in gender neutral terms.

#### **4.6.15 Sport**

As explained at 4.3.6 above, the Commission recommends that the Act should adopt an exemption-based approach to discrimination in the area of public life of sport, similar to that adopted in the ACT, Northern Territory, Queensland and Victorian Acts, such that protection against discrimination on the basis of all protected attributes will be afforded unless an express exemption in the Act provides otherwise. The question arises whether the current exceptions in the Act which apply in relation to sporting activity should be maintained and/or any other exemptions should be included.

The Act currently permits discrimination in relation to participation in sport on the following bases:

- Discrimination based on sex is permitted by excluding persons of one sex from participating in any competitive sporting activity (excluding participation in coaching, umpiring, refereeing and administering sport activity, prescribed sports and sporting activities for children who are under 12 years of age), if the ‘strength, stamina or physique of competitors is relevant’.<sup>429</sup>
- Discrimination based on the gender history of a gender reassigned person is permitted by excluding a gender reassigned person from a sporting activity (excluding participation in coaching, umpiring, refereeing and administering sport activity) if the relevant sporting activity is a competitive sporting activity for members of the sex with which the person identifies, and the person would have a significant performance advantage as a result of their medical history.<sup>430</sup>
- Discrimination based on impairment is permitted in respect of any sporting activity (including participation in coaching, umpiring, refereeing and administering sport activity in coaching and administering sport activity) in the following circumstances:
  - (a) if the person is not adequately capable of performing the actions required in relation to the sporting activity;
  - (b) where the persons who participate or are to participate in the sporting activity are selected by a method which is reasonable on the basis of their skills and abilities relevant to the sporting activity and relative to each other; or
  - (c) where a sporting activity is conducted only for persons who have a particular impairment, and the person does not have that impairment.<sup>431</sup>
- Discrimination based on age is permitted in respect of competitive sporting activity (excluding participation in coaching, umpiring, refereeing and administering sport activity) if the sporting activity is so conducted that competition is only permitted between persons of a particular age.<sup>432</sup>

The current exception permitting discrimination on the basis of sex is similar to the approach in section 42 of the SDA, subsection (1) of which provides that, subject to certain exceptions, it is not unlawful to ‘discriminate on the ground of sex, gender identity or intersex status by excluding persons from

<sup>429</sup> *Equal Opportunity Act 1984* (WA) s 35(1). The Commission is unaware of any prescribed sporting activity.

<sup>430</sup> *Ibid* s 35AP(2).

<sup>431</sup> *Ibid* s 66N(3).

<sup>432</sup> *Ibid* s 66ZJ(3).



participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant.’ The exceptions are contained in section 42(2) of the SDA, which provides that it is not permissible to discriminate in the exclusion of persons participating in:

- (a) the coaching of persons engaged in any sporting activity;
- (b) the umpiring or refereeing of any sporting activity;
- (c) the administration of any sporting activity;
- (d) any prescribed sporting activity; or
- (e) sporting activities by children who have not yet attained the age of 12 years.

In *Taylor v Moorabbin Saints Junior Football League and Football Victoria Ltd* (Taylor’s case) Morris J considered the difficulty in attributing a meaning to the phrase ‘strength, stamina or physique of competitors is relevant’.<sup>433</sup> His Honour pointed out that the strength, stamina or physique of competitors is almost always relevant to the competitive advantage of participants in sporting activity. Consequently, the phrase must mean something other than that.

Morris J accepted the interpretation of the phrase given to it in *Robertson v Australian Ice Hockey Federation* where the President of the Anti-Discrimination Tribunal of Victoria said:

... the sub-section only permits the exclusion of one sex from a competitive sporting activity where the relative strength, stamina or physique of each sex is relevant. In other words, the sub-section is directed to competitive sporting activities where, if both sexes competed against each other, the competition would be uneven because of the disparity between the strength, stamina or physique of men and women competitors. This interpretation is consistent with the objectives of the Act which include the elimination (as far as possible) of discrimination and the promotion of acceptance and recognition of everyone’s right to equality of opportunity .... Exceptions to the prohibitions of the Act, like other statutory exceptions, should be construed strictly and in the light of the objectives of the Act. It would not be consistent with the objectives of the Act to construe one of these exception provisions to authorise discrimination against one sex or the other in competitive sport, where there is no disparity between the requisite strength, stamina or physique of men and women that would prevent them competing together in the sporting activity.<sup>434</sup>

It has been a long-standing practice in various sports to impose competitor classification schemes, including in relation to age, weight (for example, in combat sports), impairment and sex. In some sports, there has been discussion regarding the introduction of height classifications.<sup>435</sup>

The Commission considers that there is a public interest in ensuring as far as reasonably possible that persons are not discriminated against by way of exclusion from participation in sport. However, the Commission also recognises that there is an objective in the public interest in limiting participation in sporting activity in such a way as to ensure fair competition, including to reduce the risk of injury. To that end, competition in certain sports, by their nature, can be affected by matters such as age, weight, disability and sex.

Further, for substantive equality to be achieved, it is sometimes necessary to permit conduct that is prima facie discriminatory. Examples include women-only sporting activity and sporting activity for people with an impairment.

As has been discussed above, the Commission received submissions opposing the expansion of protection under the Act to include sex characteristics and gender identity. Relevantly, some

<sup>433</sup> *Taylor v Moorabbin Saints Junior Football League and Football Victoria Ltd* [2004] VCAT 158.

<sup>434</sup> *Robertson v Australian Ice Hockey Federation* [1998] VADT 112, 8.

<sup>435</sup> See, for example, British Journal of Sports Medicine, *Protecting the health of athletes: height categories in taekwondo*, available at: <https://blogs.bmj.com/bjbm/2019/11/06/protecting-the-health-of-athletes-height-categories-in-taekwondo/>.

stakeholders cautioned that such changes should be considered carefully because the expansion of protections beyond the currently defined gender reassigned persons may reduce the participation of women in sport.

One stakeholder submitted that section 35AP should be repealed and section 35 of the Act should be amended to expressly protect sporting competition for natal biological females.<sup>436</sup> This submission relied upon the SDA and the CEDAW and submitted that natal biological males should be excluded from female sport, irrespective of the sex marker on their identification documents. It suggested that this is necessary to ensure fair competition, to provide safety and player welfare in sports for women, and to recognise the performance advantage in strength, speed, stamina, size and physique conferred on males by virtue of their biological sex.<sup>437</sup>

The Commission does not favour such an approach and does not support the changes proposed by the Commonwealth private member's bill, the Sex Discrimination and other Legislation (Save Women's Sport) Bill 2022 (Cth). It would be wrong for the Act to say that an intersex person, a trans woman or a gender assigned person should never compete in a woman's sporting activity. This would apply to unnecessarily prohibit the many situations where the participation of an intersex person, a trans woman or a gender assigned person in women's sporting activity will be consistent both with the rights of women and the right for all people, including gender diverse people, to be able to participate in fair, safe and inclusive sporting activity.<sup>438</sup> The Act should encourage such occasions and only permit discrimination based on sex where it may be necessary to do so to ensure the safety of sporting participants, protect the fairness of sporting activity or to promote women's equality.

The capacity for major sporting codes to include trans and gender diverse participants in what have been traditional male or female competitions is evidenced by them developing and publishing gender diversity policies for this to occur. In 2020 Australian sporting associations which published such policies included the AFL, Hockey Australia, Rugby Australia, Tennis Australia, Touch Football Australia, UniSport Australia and Water Polo Australia.<sup>439</sup>

The Commission considers that exemptions to the protected area of public life of sporting activity are required. They must reflect the aims of achieving safety, fairness, equality and inclusiveness in sporting activity. What is safe, fair, equal and inclusive in any particular sport needs to be dealt with on a case-by-case basis, and it is not possible for the Act to cater for the requirements that may be imposed in any particular sport. A more prescriptive approach would also have the effect of limiting the scope for development and change in light of any scientific or medical developments.

The Commission is of the view that subject to the following changes and comments, the current exemptions for sporting activity are appropriate and reflect an appropriate balance between the rights of all people who wish to participate in fair sporting activity and the aim of achieving safety, fairness, equality and inclusiveness. The Commission's changes and comments are:

- The exception for discrimination based on the gender history of a gender reassigned person should be replaced with an exception for discrimination based on gender identity or sex characteristics, to reflect the Commission's recommendations in relation to these protected attributes and, like section 35(1), should not apply to children under 12;

<sup>436</sup> Submission from Save Women's Sport, 27 October 2021, 1.

<sup>437</sup> Ibid.

<sup>438</sup> See, for example, Australian Human Rights Commission, *Guidelines for the Inclusion of Transgender and Gender Diverse People in Sport* (2019), <https://humanrights.gov.au/our-work/lgbti/publications/guidelines-inclusion-transgender-and-gender-diverse-people-sport-2019>.

<sup>439</sup> <https://netball.com.au/news/netball-australia-commits-inclusion-transgender-and-gender-diverse-athletes-elite-competitions>.

- For any exclusion from a competitive sporting activity to be lawful, it must be shown to be reasonable and proportionate in the circumstances;
- Consideration should be given to defining and clarifying phrases such as sporting activity and 'strength, stamina or physique of competitors is relevant'; and
- The exceptions should be consolidated, simplified and modernised.

The Commission notes that while the Act would allow for discrimination on these bases in prescribed circumstances, it will ultimately fall to sporting organisations to determine the steps, if any, that they will take to promote inclusion. For example, in 2015 the International Olympic Committee considered issues relating to the inclusion of trans athletes in sporting competitions, and agreed upon guidelines to be taken into account by sports organisations when determining eligibility to compete in male and female competitions.<sup>440</sup> While the Act will permit discrimination in certain circumstances, sporting codes and organisations are free to advance the public interest in ensuring inclusion in sport to the greatest extent possible, whilst balancing considerations of fairness and achieving substantive equality for groups in the community.

The Commission notes the capacity in the Act for a particular sporting activity to be prescribed so that the prohibition against discrimination does not apply to that sporting activity. The Commission did not receive any specific submissions as to whether the Act should include the ability to prescribe certain sporting activities in that manner. However, the Commission recommends that such a provision be included in order to ensure flexibility, if necessary.

Sporting activity involves many different individuals and organisations participating in the playing, organisation and administration of sport at all levels across Western Australia from the larger cities to the outback areas. The Commission suggests that if there are to be more significant changes than those recommended by it to the exemptions for sporting activity, fuller consultation be conducted in relation to the impact of exceptions in the sporting activity area of life.

### **Recommendation 95**

The exemptions relating to sporting activity should be consolidated and simplified.

For any exclusion from a competitive sporting activity to be lawful, it must be shown to be reasonable and proportionate in the circumstances.

The exemption for discrimination based on the gender history of a gender reassigned person should be replaced with an exemption for discrimination based on gender identity or sex characteristics, to reflect the Commission's recommendations in relation to these protected attributes. It should apply in limited circumstances and should not apply to children under 12 years of age.

Consideration ought to be given to defining and clarifying phrases such as sporting activity and competitive, as well as clarifying when the strength, stamina or physique of competitors will be relevant.

<sup>440</sup> See International Olympic Committee Consensus on Sex Reassignment and Hyperandrogenism (November 2015) [https://stillmed.olympic.org/Documents/Commissions\\_PDFfiles/Medical\\_commission/2015-11\\_ioc\\_consensus\\_meeting\\_on\\_sex\\_reassignment\\_and\\_hyperandrogenism-en.pdf](https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf).

## 4.7 Exemption applications

Section 135 of the Act permits a person to apply to the SAT for an exemption from the operation of a specified provision in the Act. The SAT is given discretionary power to grant such an exemption, which would allow the commission of conduct which would otherwise be unlawful.

As noted in the Discussion Paper,<sup>441</sup> while not expressly stated in section 135 of the Act, case law has established that this exemption is constrained by the objects, scope and purpose of the Act. Consequently, any factors plainly relevant to those constraints must be considered in determining an application for exemption under section 135.<sup>442</sup> In *Bae Systems Australia Ltd v Commissioner for Equal Opportunity*,<sup>443</sup> it was held that the relevant factors to be assessed in determining whether the proposed exemption should be granted may include the following:

- Is the proposed exemption sought necessary?
- Is the proposed exemption appropriate and reasonable in light of the reasons for which it is necessary?
- Is it in the public interest that the proposed exemption be granted?
- Have the applicants taken, and will they continue to take steps to mitigate the potential adverse effects of the proposed exemption?
- Are there any non-discriminatory ways of achieving the objects and purposes for which the proposed exemption is sought?

In the Discussion Paper the Commission sought views on whether section 135 should be amended. It was specifically asked whether the Act should include criteria, such as those specified in *Bae Systems*, that must be satisfied before an exemption may be granted.<sup>444</sup>

In its submission, ADLEG suggested that the absence of specific criteria which must be satisfied for an exemption to be granted is a 'significant gap' in the legislation. It contended that this gap allows for an expansive approach to the exemption power to be taken by the SAT, which is capable of leading to problematic results.<sup>445</sup> The following example was provided.

### Case example

*In ADI Ltd & Ors v Commissioner for Equal Opportunity & Ors*,<sup>446</sup> the SAT granted an exemption that allowed an employer to exclude workers on the basis of their race, even though the employer had conceded in their exemption application that they could not invoke the 'spirit' of the Act, and the SAT had also concluded that 'the grant of the exemption would not fit within the objects' of the Act.

<sup>441</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 175.

<sup>442</sup> *Commission for Equal Opportunity v ADI Ltd* (2007) WASCA 261, [43]-[54] per Martin CJ (Wheeler and Pullin JJA agreeing).

<sup>443</sup> [2019] WASAT 79, [24].

<sup>444</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 174 – 175.

<sup>445</sup> Submission from ADLEG, 30 November 2021, 77 – 78.

<sup>446</sup> [2005] WASAT 259.

Moreover, ADLEG submitted that the lack of clarity in the Act invites applications to be made based on considerations that are alien to the aims of the Act. By way of example, ADLEG referred to *Tassi and Commissioner for Equal Opportunity*,<sup>447</sup> where an exemption was sought by a hostel to allow race and age discrimination, to 'ensure an authentic backpackers experience for young travellers'.<sup>448</sup>

It was submitted that, to ensure that exemption applications and SAT decisions are consistent with the aims of the Act, section 135 of the Act should specify the criteria that must be satisfied before an exemption be granted. It was suggested that the Act should adopt the approach taken in section 109(3) of the ACT Act, which specifies that, in making an exemption decision, regard must be had to the need to promote acceptance of and compliance with the Act, and the desirability of certain discriminatory actions being permitted to redress the effect of past discrimination. It was submitted that these considerations would ensure that an exemption is consistent with the equal opportunity aims of the statute, thereby allowing the SAT to permit, for example, women-only gym sessions, indigenous-only employment programs, and age-appropriate activities.

It was also suggested that, in addition to these criteria, the Act could adopt a similar provision to section 65 of the Tasmanian Act, which gives the Tasmanian Anti-Discrimination Commissioner the power to dismiss a complaint if it relates to conduct which falls within the scope of an exemption. This could be incorporated into section 89 of the Act, which is the current section dealing with the EOC power to dismiss a complaint.

The Commission has considered these submissions and is of the view that, in determining whether an application for an exemption should be granted, the SAT should consider a range of matters which should be set out in the Act.

### **Recommendation 96**

The Act should specify that in determining whether an application for an exemption should be granted, the SAT should consider the following matters:

- Is the exemption sought necessary?
- Is the exemption appropriate and reasonable in light of the reasons for which it is necessary?
- Is it in the public interest that the exemption be granted?
- Have the applicants taken, and will they continue to take steps to mitigate the potential adverse effects of the proposed exemption?
- Are there any non-discriminatory ways of achieving the objects and purposes for which the exemption is sought?

## **4.8 Burden of proof for discrimination complaints**

Discrimination complainants are currently required to prove each element of their case on the balance of probabilities.<sup>449</sup> This applies to both direct and indirect discrimination claims. In effect, this imposes a general requirement on a complainant to adduce probative evidence to support any claim of discrimination in accordance with the principles established in *Briginshaw v Briginshaw*.<sup>450</sup> In the

<sup>447</sup> [2021] WASAT 91.

<sup>448</sup> Submission from ADLEG, 30 November 2021, 78.

<sup>449</sup> *Haines v Leves* (1987) 8 NSWLR 442, 457; *Williams and Commissioner of Police* [2005] WASAT 349, [34].

<sup>450</sup> *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336, cited in *D'Alto and Curtin University* [2019] WASAT 61, [21] - [22].

Discussion Paper, the Commission sought submissions on whether the burden of proof should be changed.<sup>451</sup>

Many stakeholders supported reversing or shifting the burden of proof. They were concerned about the vulnerability of certain complainants and the impact that the burden of proof may have on their ability to successfully gather supporting evidence and bring a claim. For instance, a complainant who has an intellectual or cognitive disability may find it difficult to accurately recall the details of an incident and articulate their claim of discrimination.

The Commission also acknowledges that complainants may experience a range of circumstances which impose additional burdens when finding assistance and support to pursue their claims. This is reflected in the EOC's annual report which identified that in 2019 - 2020, 70% of complainants did not have representation and of those that did, 50% were represented by family or friends.<sup>452</sup> The Commission recognises that the imposition of the burden of proof on the complainant can be unduly burdensome and may deter a complainant from pursuing their complaint.

The difficulties for a complainant acting in person in the SAT in a claim under the Act were explained by the SAT in the following terms:

Acting for oneself in legal proceedings can be a difficult and stressful exercise, particularly for persons who have no legal training. Complaints of direct and indirect discrimination under the EO Act can involve complex legal issues, and often involve conflicting evidence, which can add to the difficulty for self-represented litigants. Although the Tribunal endeavours to ensure that all litigants understand the procedures in the Tribunal, it is not appropriate for the Tribunal to provide a litigant with specific advice about the manner in which his or her case should be run. Subject to the need for the Tribunal to ensure fairness to an opposing party (which is reflected in provisions such as s 32 and s 48 of the SAT Act) it is ultimately for a litigant to determine how to present their case to the Tribunal, and what evidence should be placed before the Tribunal in support of that case.<sup>453</sup>

Another key issue identified by stakeholders who supported reversing or shifting the burden of proof to the respondent was the difficulty that complainants can face in proving their claims due to a respondent often having a monopoly of knowledge in relation to their decision-making. Currently, the Act does not require a respondent to explain their conduct and there may otherwise be little or no evidence available to a complainant to establish their claim.<sup>454</sup> A complainant may need to rely on circumstantial evidence or inferences to prove whether discrimination has occurred.<sup>455</sup> Shifting the persuasive burden to a respondent also has symbolic value by making a respondent aware of their responsibility to 'show a credible non-discriminatory reason for their conduct'.<sup>456</sup>

Other stakeholders opposed the reversal of or shift in the burden of proof. These submissions were primarily concerned with the impact that reversing or shifting the burden of proof may have on respondents. These stakeholders suggested that reversing or shifting the burden of proof would

<sup>451</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 175 – 177.

<sup>452</sup> Western Australian Equal Opportunity Commission, *Annual Report 2019-20*, 25.

<sup>453</sup> *Edoo v Minister for Health* [2010] WASAT 74, [49].

<sup>454</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 176 citing preliminary submission from the EOC, 20 November 2020, 2; Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31 *Sydney Law Review* 579, 583.

<sup>455</sup> *Department of Health v Arumugam* (1988) VR 319, 330 cited in Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31 *Sydney Law Review* 579, 583-584. [As observed by Fullagar J, "... The fact that the occurrence of racial discrimination may often be difficult to prove cannot justify 'convicting' on something less than proof".]

<sup>456</sup> Bob Hepple, Mary Cousey and Tufyal Choudhury, 'Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discriminatory Legislation', cited in Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31 *Sydney Law Review* 579, 597.



require respondents, in order to defend any claims of alleged unlawful discrimination, to maintain detailed records of all recruitment, promotion, wage review, disciplinary and termination decisions.

Other key issues identified by these stakeholders were that the reversal of or shift in the burden of proof would encourage vexatious complaints or complaints with no reasonable prospects of success, and that reversing the burden of proof would undermine the presumption of innocence. Vexatious complaints, or complaints with no reasonable prospects of success, may cause financial loss and reputational damage to a respondent even where it can be successfully defended. Also, even where a claim has no reasonable prospects of success, respondents may be encouraged to settle the claim for commercial reasons rather than based on the merit of the claim, particularly in a low or no cost jurisdiction.

The Commission acknowledges the difficulties for self-represented complainants with protected attributes having to prepare and present a case under the Act. It also acknowledges that it may be unfair to require respondents to bear the burden of proving that they did not act in a discriminatory manner.

The Commission is of the view that the concerns raised on behalf of potential complainants and respondents set out above can be addressed by including in the Act a requirement that in order to prove a claim a complainant establish a *prima facie* case before the onus of proof shifts to the respondent. A *prima facie* case is a case where there is sufficient evidence upon which the tribunal of fact can, but not must, find for the party raising the *prima facie* case.<sup>457</sup> The Commission considers that once the complainant has established a *prima facie* case, it would be appropriate that a persuasive burden be placed onto the respondent to provide an explanation for their decision or treatment of the complainant and, in the absence of such an explanation or in the event that there is no reasonable explanation for the failure by the respondent to call such evidence, an inference of discrimination should be drawn.<sup>458</sup>

This approach extends, but is not inconsistent with the philosophy behind, the rule articulated in *Jones v Dunkel*<sup>459</sup>, which provides that where a party fails to lead evidence about matters peculiarly within their knowledge and that failure is unexplained, an inference may be drawn that such evidence would not have assisted the party in its cause.<sup>460</sup> It is consistent with other international anti-discrimination jurisdictions, such as the United Kingdom, where if a *prima facie* case has been found, the court must hold that the contravention occurred except where that respondent persuades the court otherwise.<sup>461</sup>

In respect of direct discrimination, the Commission considers that imposing an evidentiary burden on a complainant to prove a *prima facie* case and a persuasive burden on a respondent in this way will enhance the accessibility of the protections provided for in the Act and promote the proposed objects of the Act. The instances of vexatious claims or claims with no reasonable prospects of success will be limited by requiring a complainant to prove a *prima facie* case in all claims. It is the Commission's view that this approach strikes a careful balance between the interests of complainants and respondents.

In respect of indirect discrimination, the complainant should be required to prove a *prima facie* case that they have a protected attribute, that the respondent has imposed a requirement or condition on them, and the condition or requirement had, or was likely to have, the effect of disadvantaging the complainant. The evidentiary onus should then shift to the respondent to prove that the requirement

<sup>457</sup> *May v O'Sullivan* (1955) 92 CLR 654.

<sup>458</sup> *Igen* [2005] ICR 931, [31].

<sup>459</sup> *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298.

<sup>460</sup> Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31 *Sydney Law Review* 579, 594.

<sup>461</sup> *Equality Act 2010* (UK), c.15, s 136t.



was not unreasonable. This structure is consistent with the burden of proof provisions in other jurisdictions including the Commonwealth, Victoria, Tasmania and Queensland. Lastly, the Commission notes that section 123 of the Act provides that proof of an exemption lies on a respondent. The Commission does not recommend a change to this provision.

#### ***Recommendation 97***

In respect of direct discrimination, the Act should impose an evidentiary burden on a complainant to establish a prima facie case of discrimination. Once this evidentiary burden has been established, a persuasive burden should be imposed on the respondent to establish that their conduct did not constitute unlawful discrimination.

In respect of indirect discrimination, the complainant should be required to prove a prima facie case that they have a protected attribute, that the respondent has imposed a requirement or condition on them, and that the condition or requirement had, or was likely to have, the effect of disadvantaging the complainant. The evidentiary onus should then shift to the respondent to prove that the requirement was not unreasonable.

## 5. HARASSMENT

### 5.1 Sexual harassment

#### 5.1.1 Amending the definition of sexual harassment

Under the current Act, a person is taken to ‘harass sexually’ another person if they make an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person, or they engage in other unwelcome conduct of a sexual nature in relation to another person, and:

- the other person has reasonable grounds for believing that a rejection of the advance, a refusal of the request or the taking of objection to the conduct would disadvantage the other person in any way in connection with the area of life to which the ground applies; or
- as a result of the other person’s rejection of the advance, refusal of the request or taking of objection to the conduct, the other person is disadvantaged in any way in connection with the area of life to which the ground applies.<sup>462</sup>

In the Discussion Paper, the Commission asked whether the definition of sexual harassment should be amended to remove the requirement that it results, or the harassed person reasonably believes that it will result, in disadvantage (the ‘disadvantage requirement’). The Commission also sought stakeholders’ views on what an alternative requirement might be.<sup>463</sup>

Stakeholders overwhelmingly supported removing the disadvantage requirement from the definition of sexual harassment. Those stakeholders who supported removing the requirement were of the view that the Act should be concerned with the harasser’s conduct rather than the disadvantage suffered by the harassed person. It was submitted that shifting the focus to the harasser’s conduct would better align with community expectations.

The Commission received an example from a stakeholder highlighting how the disadvantage requirement can negatively impact complainants and limit their options under the Act.<sup>464</sup>

#### **Case example**

*An Aboriginal and Torres Strait Islander person, who is a single parent with a young child, decided to resign from their employment due to a toxic work environment. After resigning, while working out the required notice period, the person was sexually harassed by a co-worker at work. They objected to the harassment at the time but didn’t bother reporting the harassment to their employer as they were leaving in any case.*

In this example, it is unclear if the harassed person would meet the disadvantage requirement. On one view, the harassed person may not have experienced or feared any disadvantage in connection with their employment as a result of objecting to the sexual harassment, since the conduct occurred after their resignation. It was submitted, however, that the experience of and objection to the sexual

<sup>462</sup> *Equal Opportunity Act 1984* (WA) ss 24(3), 25(2), 26(2).

<sup>463</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 139-40.

<sup>464</sup> Submission from Circle Green Community Legal, 30 November 2021, 45.

harassment was inherently a disadvantage in connection with employment, and would have made the person feel unsafe and uncomfortable at work for the remainder of their employment.

Many submissions expressed support for adopting an approach similar to section 28A of the SDA, which provides:

- (1) For the purposes of this Act, a person sexually harasses another person (the *person harassed*) if:
  - (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
  - (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

- (1A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:
  - (a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;
  - (b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
  - (c) any disability of the person harassed;
  - (d) any other relevant circumstance.
- (2) In this section: *conduct of a sexual nature* includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

As observed in the Discussion Paper, the definition in section 28A of the SDA accords with the definitions in the NSW, South Australian, Tasmanian and Victorian Acts. Section 119 of the Queensland Act goes further, however, to add an alternative circumstance in which sexual harassment may arise: where the harasser *intended* to offend, humiliate or intimidate the harassed person. One stakeholder submitted that the inclusion of an intention element similar to the Queensland Act might unjustly redirect the focus away from the harm experienced by the harassed person, to the intention of the harasser.<sup>465</sup> However, the Commission is of the view that section 28A(1A)(b) is broad enough in scope to allow for considerations like this to be taken into account; that is, in the context of the particular relationship between the person harassed and the person who engaged in the conduct.

Having considered these constructive submissions, the Commission recommends that the Act adopt the definition of sexual harassment in section 28A of the SDA. The Commission considers that the SDA approach appropriately refocuses attention on the prohibition on sexually harassing behaviour, replacing the disadvantage requirement with an objective standard: the reasonable person test, which focuses on the possibility of the harasser's conduct causing offence, humiliation or intimidation. Conduct which satisfies this test should not be tolerated, and it ought not be incumbent on the harassed person to navigate complex legal arguments to satisfy the disadvantage requirement.

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<sup>465</sup> Submission from CPSUCSA, 12 November 2021, [10.19].

### **Recommendation 98**

The definition of sexual harassment should not include a requirement that the conduct results, or the harassed person reasonably believes that it will result, in disadvantage.

### **Recommendation 99**

The Act should adopt the definition of sexual harassment contained in section 28A of the *Sex Discrimination Act 1984* (Cth).

## **5.1.2 Extending protection from sexual harassment**

### **5.1.2.1 Areas of public life**

The Act currently provides that sexual harassment is unlawful in the areas of employment,<sup>466</sup> education<sup>467</sup> and accommodation.<sup>468</sup> In the Discussion Paper, the Commission sought views on whether the areas of protection should be broadened.<sup>469</sup>

Stakeholders supported extending the prohibition against sexual harassment to all areas of public life to which the Act applies. The Commission observes that this is the approach taken in the SDA, in which protection against sexual harassment is not limited to specific areas.

The Commission concurs with stakeholder submissions that sexual harassment should not be tolerated in any area of life. It thus recommends extending the prohibition against sexual harassment to all areas of public life protected by the Act. In the Commission's view this would better serve the Act's object of eliminating sexual harassment so far as it is possible. It would also be consistent with the Commission's recommendation that the grounds of discrimination should apply in all areas of public life.

### **Recommendation 100**

The prohibition against sexual harassment should apply to all the areas of public life to which the Act applies.

### **5.1.2.2 Members of Parliament, judicial officers and volunteer workers**

Under the current Act, one of the areas of public life in which sexual harassment is prohibited is employment. While this provides important protection to employees, it has been asserted that under the current wording of the Act, the requirement that there be an employment relationship potentially leaves some workers unprotected. This includes:

<sup>466</sup> *Equal Opportunity Act 1984* (WA), s 24.

<sup>467</sup> *Ibid* s 25.

<sup>468</sup> *Ibid* s 26.

<sup>469</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 139-40.

- Parliamentary workers, who do not have a direct employment relationship with members of Parliament;
- Court workers, who do not have a direct employment relationship with judicial officers; and
- Volunteer or unpaid workers, who are not considered to be employees.

In the Discussion Paper, the Commission asked whether the prohibition on sexual harassment should be extended to apply to members of Parliament and judicial officers, and whether they should also protect unpaid or volunteer workers.<sup>470</sup> Because the absence of an employer – employee relationship will often make it very difficult to demonstrate that the harassment will cause disadvantage in the harassed person’s employment), the Commission notes that if its recommendation with respect to the disadvantage test is accepted, this may go some way towards addressing this issue in so far as it concerns these categories of workers. However, the question remains as to whether the Act should more expressly apply to the categories of workers set out above.

Submissions supported extending the sexual harassment provisions in these ways. Stakeholders observed, in particular, that it is important to protect parliamentary and court staff, as members of Parliament and the judiciary occupy positions of power that are able to be abused. It was also noted that, if Parliament can pass laws prohibiting sexual harassment, it would send a conflicting message to the community if those in Parliament are not subject to those same laws.

Stakeholders referred to the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth), which took effect as the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) on 11 September 2021. These laws extended the protections in the FWA and the SDA to ensure that state MPs, judges and public servants are liable for, and protected from, sexual harassment in their workplace. There is thus existing protection at the Commonwealth level against sexual harassment for those who carry out duties at Parliament, as well as for staff or those who carry out duties at the court of which the judicial officer is a member.

The *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) also expands the work health and safety protections against sexual harassment to all individuals ‘sexually harassed at work’ regardless of the presence or absence of an employment relationship with the assailant. This provides some protection to volunteer and unpaid workers. However, it was noted by one stakeholder that this currently only applies to workers in a constitutionally-covered business and that protection was still required under the Act for complete coverage in state jurisdictions.

Many stakeholders suggested that the Act should incorporate the same protections relating to members of Parliament, members of the judiciary and unpaid and volunteer workers that are afforded in the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021*. The Commission agrees. It considers that there is merit in ensuring that the Act’s protections against sexual harassment eliminate sexual harassment so far as it is possible, regardless of any protection that may also be provided by Commonwealth laws. It sees little reason for excluding members of Parliament, judicial officers or unpaid and volunteer workers from the scope of the Act, especially in light of the power imbalances that often exist in the relevant relationships. Consequently, the Commission recommends expanding the scope of the Act to ensure that it covers members of Parliament, judicial officers and unpaid or volunteer workers.

The Commission observes, however, that if its recommendations that the definition of employment be extended to include unpaid or volunteer workers (see 4.3.3 above), and that the sexual harassment prohibition be expanded to apply to all protected areas of public life (see 5.1.2.1 above) are adopted, it

<sup>470</sup> Ibid 140-3.

should not be necessary to provide specific protection to unpaid or volunteer workers, as they will already be protected against sexual harassment.

#### **Recommendation 101**

The prohibition against sexual harassment in the Act should protect members of Parliament, staff and any other person who performs duties at Parliament or for a member of Parliament from sexual harassment.

#### **Recommendation 102**

The prohibition against sexual harassment in the Act should protect judicial officers, staff and any other person who performs duties at the court from sexual harassment.

#### **Recommendation 103**

The prohibition against sexual harassment in the Act should protect unpaid or volunteer workers from sexual harassment.

## **5.2 Racial harassment**

### **5.2.1 Amending the definition of racial harassment**

Under the Act, a person is taken to 'harass racially' another person if they threaten, abuse, insult or taunt the other person, and:

- the other person has reasonable grounds for believing that objecting to the relevant threat, abuse, insult or taunt would disadvantage the other person in connection with the area of life to which the ground applies; or
- as a result of the other person's objection to the relevant threat, abuse, insult or taunt the other person is disadvantaged in connection with the area of life to which the ground applies.<sup>471</sup>

In the Discussion Paper the Commission asked whether the definition of racial harassment should be amended to remove the requirement that it results, or the harassed person reasonably believes that it will result, in disadvantage (the 'disadvantage requirement'). The Commission also asked whether a new requirement should be introduced in its place.<sup>472</sup>

Submissions raised several concerns about the current definition of racial harassment. For example, ALSWA emphasised that it is often very difficult for Aboriginal people to provide evidence of additional 'disadvantage'. It was submitted that, as a result of the ongoing systemic disadvantage suffered by Aboriginal and Torres Strait Islander peoples, it is often hard to demonstrate disadvantage which is

<sup>471</sup> *Equal Opportunity Act 1984* (WA) ss 49A(3), 49B(2), 49C(2).

<sup>472</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 143.

distinct from ongoing social and economic disadvantage, or psychological damage which can be distinguished from pre-existing trauma. ALSWA further submitted that:<sup>473</sup>

[T]his test unduly places the burden on the person experiencing harassment to demonstrate some other disadvantage, and disregards the wealth of data concerning the negative impacts racial harassment itself can have on an individual's health and wellbeing. Placing such a burden on the victim of harassment only serves to perpetuate the power imbalance between marginalised and minority groups, and the mainstream community.

Stakeholders were overwhelmingly in support of removing the disadvantage requirement from the definition of racial harassment. They observed that the Act should properly be concerned with the harasser's conduct rather than the disadvantage suffered by the harassed person, reinforcing that racial harassment is unacceptable, as well as damaging in and of itself.

The Commission agrees that the disadvantage requirement should be removed from the Act. It recommends instead adopting an objective standard, which focuses on whether a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated. Such an approach was recommended in the context of sexual harassment (see above) and seems equally apt in the present context. It would appropriately refocus attention on the prohibition of racially harassing conduct, making it clear that such conduct will not be tolerated.

#### **Recommendation 104**

The definition of racial harassment should not require that the conduct results, or the harassed person reasonably believes that it will result, in disadvantage.

#### **Recommendation 105**

The definition of racial harassment should include an objective standard, which considers whether a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

## **5.2.2 Extending protection from racial harassment**

### **5.2.2.1 Areas of public life**

The Act currently provides that racial harassment is unlawful in the areas of employment,<sup>474</sup> education<sup>475</sup> and accommodation.<sup>476</sup> In the Discussion Paper, the Commission sought views on whether the areas of public life which are subject to the protection should be broadened.<sup>477</sup>

Stakeholders supported extending the prohibition against racial harassment to all areas of public life to which the Act applies. The Commission agrees with the position. It is of the view that racial harassment should not be tolerated in any area of life. It thus recommends extending the prohibition

<sup>473</sup> Submission from ALSWA, 25 November 2021, 18.

<sup>474</sup> *Equal Opportunity Act 1984* (WA), s 49A.

<sup>475</sup> *Ibid* s 49B.

<sup>476</sup> *Ibid* s 49C.

<sup>477</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 143.



against racial harassment to all areas of public life protected by the Act. In the Commission's view this would better serve the Act's object of eliminating racial harassment so far as it is possible. It would also be consistent with the Commission's recommendation that the grounds of discrimination should apply in all areas of public life.

#### ***Recommendation 106***

The prohibition against racial harassment should apply to all the areas of public life to which the Act applies.

#### **5.2.2.2 *Members of Parliament, judicial officers and volunteer workers***

Under the current Act, one of the areas of public life in which racial harassment is prohibited is employment. Similar issues arise in this context as arise in relation to sexual harassment (see above): there is potentially a gap in coverage for members of Parliament, judicial officers and unpaid or volunteer workers.

For the same reasons discussed in the sexual harassment context, the Commission recommends expanding the scope of the racial harassment provisions to cover these circumstances. It sees little reason for excluding members of Parliament, judicial officers and unpaid or volunteer workers from the scope of the Act. Rather, the Commission sees great merit in ensuring that the Act seeks to eliminate racial harassment as far as it is possible.

#### ***Recommendation 107***

The prohibition against racial harassment in the Act should protect members of Parliament, staff and any other person who performs duties at Parliament or for a member of Parliament from racial harassment.

#### ***Recommendation 108***

The prohibition against racial harassment in the Act should protect judicial officers, staff and any other person who performs duties at the court from racial harassment.

#### ***Recommendation 109***

The prohibition against racial harassment in the Act should protect unpaid or volunteer workers from racial harassment.

## 5.3 Other forms of harassment

### 5.3.1 Sex based harassment

The *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) recently amended the SDA to prohibit sex based harassment. It is now unlawful under the SDA to harass a person on the ground of their sex in a range of areas (provided for in ss 28B – 28L).

Section 28AA of the SDA defines 'harassment on the ground of sex' in the following way:

- (1) For the purposes of this Act, a person harasses another person (the **person harassed**) on the ground of sex if:
  - (a) by reason of:
    - (i) the sex of the person harassed; or
    - (ii) a characteristic that appertains generally to persons of the sex of the person harassed; or
    - (iii) a characteristic that is generally imputed to persons of the sex of the person harassed;the person engages in unwelcome conduct of a seriously demeaning nature in relation to the person harassed; and
  - (b) the person does so in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.
- (2) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:
  - (b) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;
  - (c) the relationship between the person harassed and the person who engaged in the conduct;
  - (d) any disability of the person harassed;
  - (e) any power imbalance in the relationship between the person harassed and the person who engaged in the conduct;
  - (f) the seriousness of the conduct;
  - (g) whether the conduct has been repeated;
  - (h) any other relevant circumstance.
- (3) In this section:  
**conduct** includes making a statement to a person, or in the presence of a person, whether the statement is made orally or in writing.

In the Discussion Paper, the Commission asked whether the Act should be amended to include sex based harassment, similarly to the recent changes to the SDA effected by the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth).<sup>478</sup>

ADLEG's submission emphasised the significance of this new protection in the SDA.<sup>479</sup>

The inclusion of a prohibition of 'harassment based on sex' in the SDA is of substantial importance as not all harassment of women relates to their own sexuality – much of it is simply misogynist, or anti-woman put downs, etc. This definition is intended to capture those forms of harassment.

<sup>478</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 142.

<sup>479</sup> Submission from ADLEG, 30 November 2021, 51.

However, ADLEG noted that the definition is too narrow and that a lower threshold than ‘seriously demeaning’ should be considered.<sup>480</sup>

The Commission recommends that the Act adopt a provision like s 28AA of the SDA but adopts a ‘demeaning’ rather than ‘seriously demeaning’ standard. This will set a more appropriate bar: it should not be necessary for the conduct to be ‘seriously demeaning’, especially given the additional inclusion of the reasonable person clause.

### **Recommendation 110**

The Act should adopt the definition of sex based harassment contained in section 28AA of the *Sex Discrimination Act 1984* (Cth). It should, however, only require the conduct to be demeaning rather than seriously demeaning.

## **5.3.2 Harassment in respect of all Protected Attributes**

The Commission received a submission from The State School Teachers Union of WA (SSTUWA) which argued that people can be subjected to harassment on the basis *any* of the attributes protected under the Act (including those proposed for inclusion). The SSTUWA submitted that harassment should be deemed unlawful for all protected attributes (rather than limited to racial and sexual harassment) and in all areas of public life.<sup>481</sup> In this regard, it was submitted:

if there were changes to the Act to recognise harassment occurring in relation to all Grounds, this may entail either one definition of ‘harassment’ which then identifies features of harassment which may be peculiar to only one or two Grounds, or that there may need to be a definition of ‘harassment’ for each Ground. The current definitions of sexual harassment and racial harassment each recognise the unique features of each type of harassment, and this makes them effective in clearly pinpointing the types of behaviours which are unlawful. In seeking to recognise more Grounds for harassment, it is important that each Ground is still characterised within the legislation in a manner which retains its specificity, so that the practical impact of these provisions is not diluted by ambiguity.

The SSTUWA submitted that by Act deeming all forms of harassment unlawful, the Act would recognise the serious and damaging nature of harassment. The Commission acknowledges this submission but considers that, as this proposal was not raised in the Discussion Paper, further stakeholder consultation would be required before making such a broad reaching change.

<sup>480</sup> Ibid.

<sup>481</sup> Submission from The State School Teachers Union of WA (SSTUWA), 24 October 2021, 11-12.

## 6. VILIFICATION

### 6.1 Inclusion of anti-vilification provisions

At present, Western Australians are offered some protection against vilification:

- The *Criminal Code Act 1913* (WA) (WA Criminal Code) contains criminal sanctions for certain acts of racial vilification; and
- The RDA provides that it is unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.<sup>482</sup>

However, the Act does not currently contain any anti-vilification provisions. By contrast, most other Australian jurisdictions have both civil and criminal laws dealing with racial vilification. Some jurisdictions also outlaw other types of vilification. For example, the ACT Act makes it unlawful to incite hatred toward, revulsion of, serious contempt for, or severe ridicule of a person or group of people on the grounds of disability, gender identity, HIV/AIDS status, race, religious conviction, sex characteristics or sexuality.<sup>483</sup> In the Discussion Paper, the Commission asked whether any anti-vilification provisions should be included in the Act.<sup>484</sup>

Many stakeholders supported the enactment of anti-vilification provisions, as they considered the current system to provide insufficient protection. It was argued that the criminal anti-vilification provisions are inadequate to address the problem, due to the lengthy process involved in charging and convicting a person under the criminal law, the need for the Director of Public Prosecutions (DPP) to approve any charges before a prosecution can commence and the higher standard of proof required in the criminal context. The combination of these factors means that the criminal provisions are rarely used, with only those people who engage in the most extreme acts of racial vilification being charged and convicted.<sup>485</sup> By contrast, a civil claim could be brought directly by an affected individual who wishes to seek vindication of their rights and obtain access to available legal remedies.

The ALSWA also highlighted that there may be an additional layer of difficulty for Indigenous people pursuing criminal charges of racial vilification. It was noted that police officers retain a general discretion to investigate criminal complaints and that this, coupled with the often-complex relationships between Indigenous people and the WA Police, may create barriers for Indigenous people in seeking and obtaining protection under the WA Criminal Code.<sup>486</sup>

The protection offered by section 18C of the RDA was also seen to be inadequate for two reasons. First, unlike the EOC, the AHRC does not provide for in-person conciliations. The availability of in-person conciliation was considered to be particularly important in this context, as it would give complainants the opportunity to speak directly with the perpetrator and express the impact that their behaviour has had on them. This could help a complainant to achieve closure. Secondly, if a complainant brings proceedings under the RDA, and the matter progresses to the Federal Circuit Court and is unsuccessful, they will typically be required to pay costs. By contrast, costs would not

<sup>482</sup> *Racial Discrimination Act 1975* (Cth) s 18C.

<sup>483</sup> *Discrimination Act 1991* (ACT) s 67A.

<sup>484</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 150 – 151.

<sup>485</sup> Another reason provided by one stakeholder for the limited use of these provisions is that, unlike most other criminal offences, the DPP is required to approve any charges made pursuant to the racial vilification provisions in the *Criminal Code Act 1913* (WA) before a prosecution can be commenced - see *Criminal Code Act 1913* (WA) s 80H.

<sup>486</sup> Submission from ALSWA, 25 November 2021, 27.

ordinarily be payable in the state jurisdiction. It was argued that a no-cost approach is preferable, as it helps facilitate access to justice.

By contrast, some stakeholders were opposed to enacting anti-vilification provisions. It was submitted that the *Occupational Safety and Health Act 1984* (WA) and the FW Act's anti-bullying jurisdiction already provide individuals with sufficient protections against psychosocial hazards, including hazards that arise from vilifying conduct. It was therefore suggested that introducing anti-vilification provisions into the Act would create unnecessary regulatory duplication and complexity. It was also argued that anti-vilification provisions may have a negative impact on other rights and freedom of speech. These concerns are discussed in the following section.

If anti-vilification provisions are to be enacted, stakeholders generally preferred that they be included in the Act rather than in a separate piece of legislation. In this regard, the Parliament of Victoria, in its *Inquiry into Anti-Vilification Protections*, suggested that the separation of the vilification provisions from the anti-discrimination provisions in Victoria was one of the reasons underlying the apparent underutilisation of the RRTA.<sup>487</sup>

## 6.2 Potential impact of anti-vilification provisions

In the Discussion Paper, the Commission flagged the possibility that anti-vilification provisions may impact on other rights and exceptions under the Act, as well as on freedom of speech. For example, if such provisions extended to protect against vilification on the grounds of gender identity and sexual orientation, that may interfere with the exceptions in the Act relating to religious opinions and beliefs. The Commission invited submissions on the best way to address this potential impact.<sup>488</sup>

### 6.2.1 Rights and exceptions under the Act

Some stakeholders argued that anti-vilification provisions should not be included in the Act if they would adversely impact existing rights and exceptions under the Act. However, most stakeholders suggested that any concerns on this front could be addressed by providing appropriate exceptions to the anti-vilification provisions. This is the approach adopted in many other Australian jurisdictions,<sup>489</sup> which provide that the anti-vilification provisions do not apply in certain circumstances, such as where the conduct is:

1. A fair report of a public act;
2. A communication or dissemination of a matter that is subject to a defence of absolute privilege in proceedings for defamation; or
3. A public act done in good faith for academic, artistic, scientific or research purposes, or for any other purpose in the public interest.

### 6.2.2 Freedom of speech

Many stakeholders expressed concerns that the introduction of anti-vilification provisions may also adversely affect freedom of speech. They suggested that such laws were likely to be used by vocal activists to silence contrary views, and that their implementation would encourage the making of unmeritorious and vexatious complaints against the expression of certain religious beliefs or opinions.

<sup>487</sup> Parliament of Victoria, *Inquiry into Anti-vilification Protections* (3 March 2021) 129, 134. Another reason for its apparent underutilisation was seen to be VEOHRC's limited jurisdiction under the RRTA.

<sup>488</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 153.

<sup>489</sup> *Anti-Discrimination Act 1998* (Tas) s 55; *Anti-Discrimination Act 1997* (NSW) s 49ZT; *Racial Discrimination Act 1975* (Cth) s 18D.

In this regard, the following examples of claims from other jurisdictions which were perceived to lack merit were commonly raised:

- 1) An anti-vilification claim made under the Tasmanian Act against Senator Claire Chandler for an opinion piece in which Senator Chandler stated that women's sports, women's toilets and women's change rooms are designed for people of the female sex and should remain that way;
- 2) An anti-vilification claim made in Tasmania against Archbishop Julian Porteous in the lead up to the federal same-sex marriage plebiscite in 2017. The claim related to a booklet distributed by the Catholic Church, titled 'Don't mess with Marriage', which contained the message that 'messing with marriage is messing with kids';
- 3) An anti-vilification claim made in Victoria under the RRTA in response to a seminar titled 'Insight into Islam' presented by a group of pastors from Catch the Fire Ministries. The seminar was alleged to have been critical of the Qur'an and Muslims generally.

Each of these claims were ultimately withdrawn or dismissed.<sup>490</sup>

Of particular concern to these stakeholders was the possibility that individuals could be targeted because of a statement of faith or expression of opinion or belief. This was seen to be contrary to the protections offered by the ICCPR, the UNDHR, and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. It was also argued that anti-vilification laws should not extend to the causing of offence or hurt feelings from the expression of opposing views.

Other stakeholders submitted that anti-vilification laws align with the protection and promotion of freedom of speech because vilifying conduct can be intimidatory and can impair or prevent the full participation of groups or individuals in public debate. It was contended by ADLEG that anti-vilification laws 'promote equal participation in society' by encouraging 'social cohesion and political inclusion', whilst 'deter[ring] conduct that is socially corrosive'.<sup>491</sup>

These stakeholders also noted that there are many other existing laws which already restrict freedom of speech or expression in order to protect other rights, such as laws relating to censorship, defamation, trade practices and cyber bullying. It was thus argued that enacting anti-vilification provisions which may curtail freedom of speech would not be an unusual step.

Stakeholders on both sides suggested that the best way to allay these concerns would be to enact appropriate exceptions in relation to certain types of speech. It was submitted that any exceptions should require there to be a degree of proportionality between the importance of any impugned speech and the harm it is likely to cause to members of the target group. Many stakeholders considered that section 18D of the RDA provided an appropriate balance between protection from harmful conduct and free speech. Under this provision, conduct that is done reasonably and in good faith, and which is carried out for a legitimate purpose, is exempt.

<sup>490</sup> The claim against the Catch the Fire Ministries was originally upheld but was ultimately overturned on appeal: see *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284.

<sup>491</sup> Submission from ADLEG, 30 November 2021, 65.

## 6.3 Scope of anti-vilification provisions

As noted above, most other Australian jurisdictions have civil laws dealing with racial vilification and some jurisdictions prohibit other types of vilification. In the Discussion Paper, the Commission asked whether any anti-vilification provisions (if introduced) should be extended beyond the scope of racial vilification.<sup>492</sup>

### 6.3.1 Which attributes should be protected?

A significant majority of those who supported the introduction of anti-vilification provisions submitted that the protections should extend beyond racial vilification. It was noted that vilification may be experienced by an individual in relation to various protected attributes, and there was little reason for confining the protection to racial vilification.

There was, however, some dispute over the appropriate scope of the provisions. While many stakeholders submitted that the provisions should extend to all grounds protected under the Act, some stakeholders suggested that they should only cover certain attributes, such as race, religion, sex, disability, sexual orientation, gender identity and sex characteristics. This latter view arose from a recognition that certain groups within society are the most vulnerable to the adverse effects of vilification. For example, many stakeholders referred to the susceptibility of LGBTIQ+ persons to vilifying conduct due to the impact of homophobia, biphobia, transphobia and intersex phobia in their day to day lives.

Some stakeholders submitted that vilification protections should extend to individuals with HIV/AIDS. The NSW and ACT Acts have taken such an approach. It was suggested that the LGBTIQ+ community, intravenous drug users and sex workers are most vulnerable to facing discrimination and vilification on the grounds of HIV/AIDS status.

### 6.3.2 What conduct should be prohibited?

In other Australian jurisdictions, three broad approaches have been taken to defining vilifying conduct:

- Some provisions focus on the actual effects of the vilifying conduct. For example, the ACT Act provides that it is unlawful for a person to incite hatred toward, revulsion of, serious contempt for, or severe ridicule of a person or group of people on the basis of certain listed attributes;<sup>493</sup>
- Some provisions focus on the likely effects of the vilifying conduct. For example, the RDA provides that it is unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and the act is done because of race.<sup>494</sup>
- Some provisions focus on both the actual effects and the likely effects of the vilifying conduct. For example, the Tasmanian Act provides that a person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of a listed attribute in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

<sup>492</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 150-1.

<sup>493</sup> *Discrimination Act 1991* (ACT) s 67A.

<sup>494</sup> *Racial Discrimination Act 1975* (Cth) s 18C.



Submissions on this issue were split. Some stakeholders argued that it was important to focus on the actual effects of the vilifying conduct. For example, Equality Australia argued that:

A harm-based protection would respond to a key limitation in traditional anti-vilification protections. Traditional anti-vilification protections tend to focus on the potential effects of the conduct in inciting hatred among a hypothetical audience, ignoring the very real and direct harm caused to the actual person who is targeted by that conduct. For example, in considering whether anti-LGBTIQ+ graffiti painted on someone's fence amounts to vilification, traditional anti-vilification protections focus on whether that conduct is likely to incite hatred, serious contempt or severe ridicule of persons on the ground of their sexual orientation, gender identity or sex characteristics among passers-by. It does not consider whether the person whose fence has been graffitied has suffered any harm, such as the experience of being humiliated, intimidated, or being made to feel unsafe in their own home.<sup>495</sup>

Other stakeholders contended that the provision should focus on the likely effects of the vilifying conduct. Drawing on the Victorian Parliament's report on its *Inquiry into Anti-Vilification Protections*, some stakeholders argued that this approach is preferable, as its focus is on protecting the human dignity of members of the target group. By contrast, the harm-based approach ultimately seeks to maintain public order. Others were concerned about the negative impact that focussing on the actual effects of the vilifying conduct may have on freedom of speech. It was argued that anti-vilification laws should not extend to the causing of offence or hurt feelings from the expression of opposing views or different opinions.

Regardless of the approach which is taken, a small number of stakeholders submitted that it is important to ensure that any anti-vilification provisions extend beyond written and pictorial materials to any conduct which occurs in public, including oral statements.

## 6.4 Reporting vilification

In the Discussion Paper, the Commission asked whether people were likely to experience problems reporting incidents of vilification and if so, whether a different reporting model should be introduced to assist in protection.<sup>496</sup>

Stakeholders suggested that the relatively small number of complaints made under anti-vilification laws in other jurisdictions may indicate that individuals in Western Australia could experience issues reporting incidents of vilification. It was submitted that those who most need protection may lack knowledge of the anti-vilification protections. They may also be reluctant to pursue a claim due to the inadequacy of available remedies. In this latter regard, one stakeholder suggested that complainants should be compensated for the time and expense involved in pursuing a claim, and that orders should be routinely made to ensure that complainants do not continue to experience vilification.<sup>497</sup>

To address any possible issues with reporting vilification, stakeholders contended that the Act should expressly permit the EOC to hear complaints. They also submitted the Equal Opportunity Commissioner should be adequately resourced to perform an educative function with respect to these protections for the benefit of the wider community.

It was also submitted that giving organisations standing to bring claims on behalf of affected groups or individuals (sometimes referred to as a 'representative complaint') would improve the accessibility of anti-vilification protections. Stakeholders suggested that the Act should allow representative complaints to be brought without the need to name an individual complainant.

<sup>495</sup> Submission from Equality Australia, 31 October 2021, 16.

<sup>496</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 154.

<sup>497</sup> Submission from ADLEG, 30 November 2021, 67.

It was noted, however, that for the most marginalised or disadvantaged groups in society, often there is a lack of organisations that can assist by taking enforcement action in relation to anti-vilification rights. For example, cases involving the vilification of Aboriginal people have largely been brought by individuals or small groups, due to the unavailability of organisational support.<sup>498</sup> It was thus argued that providing additional funding for organisations (such as Legal Aid or an appropriate equality agency) to assist with vilification claims is essential to better encourage strategic enforcement attempts through representative complaints. The issue of representative complaints is discussed in further detail at section 10.1.1.2.

## 6.5 The Commission's View

### 6.5.1 Enactment of anti-vilification provisions

Having considered the submissions, the Commission's view is that current Western Australian law offers insufficient protection from vilification. For practical and procedural reasons, the offences in the WA Criminal Code only protect against the most egregious examples of racial vilification; and the RDA scheme lacks an in-person conciliation process that can help achieve an effective resolution. Pursuing a claim under the RDA also entails potential cost implications which potentially creates an inappropriate barrier to seeking justice.

While the Act does contain prohibitions against racial and sexual harassment, harassment provisions are directed towards conduct involving threats, abuse, insults or taunts made against a single individual. By contrast, anti-vilification provisions have a broader focus, extending to conduct which vilifies either a particular individual or a group of people.

Consequently, the Commission recommends that anti-vilification provisions be enacted. This will help ensure the protection of vulnerable groups within society, providing them with an appropriate avenue to seek redress for the harm they have suffered. It will also bring Western Australian law into line with most other Australian jurisdictions, which already contain civil and criminal anti-vilification laws.

The Commission does not consider that the examples of perceived unmeritorious claims provided by some stakeholders provide a sufficient or compelling basis to forego the protections offered by anti-vilification laws. None of these claims ultimately succeeded, indicating the ability of the law to appropriately deal with claims that lack merit. Moreover, spurious or overly optimistic claims are, from time to time, knowingly (or otherwise) brought by parties in many areas of law. That does not provide a sound basis for dismissing protections for those who genuinely require them. Further s 89 of the Act provides the Equal Opportunity Commissioner with the power to dismiss a complaint that is frivolous, vexatious, misconceived or lacking in substance, or relates to an act that is not unlawful by reason of a provision of the Act.

In the Commission's view, the provisions should be incorporated into the Act rather than made the subject of a separate piece of legislation, as they share the same underlying purpose as the discrimination and harassment provisions: to promote substantive equality and combat systemic causes of discrimination. Incorporating the provisions in the same Act will also readily allow complainants to utilise the same procedural mechanisms as for anti-discrimination and harassment claims, such as the EOC conciliation process. This will hopefully allow the provisions to be utilised to their full extent.

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<sup>498</sup> See, for example, *McGlade v Lightfoot* (2002) 124 FCR 106; *Clarke v Nationwide News* (2012) 201 FCR 389; *Eatock v Bolt* (2011) 197 FCR 261.

The Commission acknowledges that enacting anti-vilification laws will create a certain amount of regulatory duplication and complexity, due to overlap with the protections against psychosocial hazards contained in the *Occupational Safety and Health Act 1984* (WA). However, the Commission notes these protections are limited to the workplace. Freedom from vilifying conduct should not be limited to the workplace context; the enactment of anti-vilification provisions should provide protection in all areas of public life covered by the Act.

#### **Recommendation 111**

The Act should include anti-vilification provisions.

#### **Recommendation 112**

The anti-vilification provisions should apply to all areas of public life covered by the Act.

### **6.5.2 Definition of vilification**

The Commission is of the view that the definition of vilification should focus on the likely effects of the vilifying conduct. It should be based on the WA Criminal Code definition, such that it is unlawful to engage in any conduct, otherwise than in private, that is likely to create, promote or increase animosity towards, or threaten, seriously abuse or severely ridicule, a group, or a person as a member of a group.

#### **Recommendation 113**

The Act should define vilification to focus on the likely effects of the vilifying conduct. It should be unlawful to engage in any conduct, otherwise than in private, that is likely to:

- Create, promote or increase animosity towards;
- Threaten;
- Seriously abuse; or
- Severely ridicule

a group, or a person as a member of a group.

### **6.5.3 Scope of vilification laws**

The Commission agrees with the majority of stakeholders that the anti-vilification provisions should extend beyond racial vilification. In the Commission's view it is unacceptable to vilify individuals or groups of individuals for any reason, and the protections offered should be broadly drawn.

The Commission notes, however, that there may be unforeseen consequences from extending the anti-vilification laws to all the protected attributes. To avoid this possibility, the Commission recommends that the Act instead adopt an approach similar to that taken in the ACT,<sup>499</sup> to protect against vilification on the basis of disability (which would include HIV/AIDS status and a range of other

<sup>499</sup> *Discrimination Act 1991* (ACT) s 67A.

conditions including hepatitis C), gender identity, sex, sex characteristics, race, religious conviction and sexual orientation. In the Commission's view this would be a proportionate measure which would ensure that those groups within society who are likely to be the most vulnerable to vilification are provided with appropriate protections.

The Commission acknowledges that the EOC, in its 2007 Review, recommended that Western Australians should have redress for public acts of vilification on the basis of their sexual orientation, religion and impairment.<sup>500</sup> In the Commission's view, extending the prohibitions against vilification to the grounds similar to those included in the ACT Act provides a more comprehensive suite of protections relevant to contemporary circumstances.

While the focus of the Commission's inquiry has been civil anti-vilification laws, the Commission considers there is potential merit in expanding existing criminal anti-vilification laws to cover serious or harmful instances of vilification on the basis of similar attributes to those recommended. In this regard, Commission observes that the *Crimes Act 1900* (NSW),<sup>501</sup> the Queensland Act,<sup>502</sup> the RRTA<sup>503</sup> and the *Racial Vilification Act 1996* (SA)<sup>504</sup> each contain examples of provisions establishing criminal offences for broader instances of vilification. The Commission recommends that further consideration be given to expanding the scope of the criminal anti-vilification provisions.

#### **Recommendation 114**

The anti-vilification provisions in the Act should apply to vilification on the grounds of disability, gender identity, sex, sex characteristics, race, religious conviction and sexual orientation.

#### **Recommendation 115**

Consideration should be given to expanding the scope of existing criminal anti-vilification provisions to cover serious or harmful instances of vilification on the basis of disability, gender identity, sex, sex characteristics, race, religious conviction and sexual orientation.

### **6.5.4 Exceptions to the anti-vilification provisions**

While the Commission is of the view that anti-vilification provisions should be enacted, it acknowledges there are widespread concerns about the potential impact on freedom of speech and on other rights and protections under the Act. The Commission recognises that it is essential to ensure that the legislative scheme maintains an appropriate balance. In this regard, the Commission makes the following points.

<sup>500</sup> Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report, May 2007) 19 - 20.

<sup>501</sup> *Crimes Act 1900* (NSW) s 93Z; This provision replaced the *Anti-Discrimination Act 1977* (NSW) s 20D, which was repealed by *Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018* (NSW).

<sup>502</sup> *Anti-Discrimination Act 1991* (Qld) s 131A.

<sup>503</sup> *Racial and Religious Tolerance Act 2001* (Vic) s 24.

<sup>504</sup> *Racial Vilification Act 1996* (SA) s 4.

First, notwithstanding the existence of an implied freedom of political communication derived from the Australian Constitution<sup>505</sup> or the *Constitution Act 1889* (WA)<sup>506</sup> there is no absolute right to freedom of speech in Australia. Therefore, any anti-vilification provisions that are enacted will be valid to the extent that they do not curtail this constitutional freedom.

Secondly, the object of eliminating vilification towards certain vulnerable groups is a legitimate end that is compatible with the maintenance of representative and responsible government. The case of *Sunol v Collier (No 2)*,<sup>507</sup> which concerned the homosexual vilification provisions in the NSW Act, illustrates this point:

... seeking to prevent homosexual vilification is a legitimate end of government. A law seeking to prevent the incitement of such conduct seems to me compatible with the maintenance of the constitutionally provided system of government. It does not seem to me that debate, however robust, needs to descend to public acts which incite hatred, serious contempt or severe ridicule of a particular group of persons. Further, to the extent that what is recognised as legitimate political debate would fall within s 49ZT the exemption in s 49ZT(2)(c) in my opinion provides adequate protection. In those circumstances the legislation provides the appropriate balance between the legitimate end of preventing homosexual vilification and the requirement of freedom to discuss and debate government or political matters...

Thirdly, the recommended anti-vilification provisions do not unduly prevent individuals from expressing their religious views and opinions. As noted above, the Commission's view is that vilification should be defined in terms of likely effects, such that it is unlawful to engage in any conduct, otherwise than in private, that is likely to create, promote or increase animosity towards, or threaten, seriously abuse or severely ridicule, a group, or a person as a member of a group. The Commission considers that individuals can hold, and even strongly express, religious views without engaging in such conduct.

Fourthly, vilification is a uniquely harmful activity which should not be permitted or authorised by virtue of any rights or exceptions established under the Act.<sup>508</sup> To do so would be contrary to the objects of the Act. Consequently, there is likely to be limited, if any, overlap between any established rights or exceptions under the Act and the recommended anti-vilification provisions.

The Commission accepts, however, that there are limited circumstances in which conduct which may otherwise be considered vilifying should be allowed. For example, artists making vilifying comments in artistic works should be permitted, so long as they are made reasonably and in good faith. In this regard, the Commission recommends adopting the approach taken in section 18D of the RDA, which provides that the anti-vilification provisions do not render unlawful anything said or done reasonably and in good faith:

- in the performance, exhibition or distribution of an artistic work; or
- in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- in making or publishing:
  - a fair and accurate report of any event or matter of public interest; or
  - a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

<sup>505</sup> *McCloy v New South Wales* (2015) 257 CLR 178.

<sup>506</sup> *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

<sup>507</sup> (2012) 289 ALR 128. See also *Jones v Scully* (2002) 120 FCR 243.

<sup>508</sup> Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report, May 2007) 19.

### ***Recommendation 116***

The anti-vilification provisions should not render unlawful anything said or done reasonably and in good faith:

- in the performance, exhibition or distribution of an artistic work;
- in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- in making or publishing:
  - a fair and accurate report of any event or matter of public interest; or
  - a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

#### **6.5.5 Reporting vilifying conduct**

The Commission agrees with stakeholders that complainants face numerous barriers to reporting vilifying conduct. However, these are barriers that are faced by all prospective complainants under the Act, whether their complaint be one of vilification, discrimination or harassment. Therefore, the Commission does not see any justification for establishing a different model for reporting vilification than is applicable to other complaints under the Act.

However, the Commission is of the view that the EOC should be better empowered to exercise its community education powers and to provide support and advocacy to complainants generally, including in relation to complaints of vilification. The powers of the EOC are addressed in Chapter 10.

## 7. VICTIMISATION

### 7.1 Current protection under the Act

Section 67 of the Act relates to victimisation and provides that:

- (1) It is unlawful for a person (in this section referred to as the *victimiser*) to subject, or threaten to subject, another person (in this subsection referred to as the person victimised) to any detriment on the ground that the person victimised —
  - (a) has made, or proposes to make, a complaint under this Act; or
  - (b) has brought, or proposes to bring, proceedings against the victimiser or any other person under this Act; or
  - (c) has furnished, or proposes to furnish, any information, or has produced or proposes to produce, any documents to a person exercising or performing any function under this Act; or
  - (d) has appeared, or proposes to appear, as a witness before the Tribunal in a proceeding commenced under this Act; or
  - (e) has reasonably asserted, or proposes to assert, any rights of the person victimised or the rights of any other person under this Act; or
  - (f) has made an allegation that a person has done an act that is unlawful by reason of a provision of Part II, IIAA, IIA, IIB, III, IV, IVA, IVB or IVC,  
or on the ground that the victimiser believes that the person victimised has done, or proposes to do, an act or thing referred to in any of paragraphs (a) to (f).
- (2) Subsection (1)(f) does not apply if it is proved that the allegation was false and was not made in good faith.

In the Discussion Paper, the Commission asked whether this provision, or any related protections in the Act, require reform.<sup>509</sup> Stakeholders made a range of suggestions for reform which have been considered below.

### 7.2 Terminology

In its submission, the EOC suggested that, to provide clarity, consideration could be given to changing the term victimisation to another term, such as retaliatory conduct.<sup>510</sup> While the Commission acknowledges the force of this argument, it considers that the term victimisation should be retained to maintain consistency with the terminology used in Commonwealth anti-discrimination legislation.

### 7.3 Threats

Under section 67, it is unlawful for a person to threaten to subject another person to any detriment for a prohibited reason. The Act does not contain any definition of what it means to 'threaten to subject' a person to such detriment. In contrast, section 51(3) of the ADA specifies that a threat to cause detriment to another person may be express or implied, or conditional or unconditional. One stakeholder recommended that the Act adopt such an approach.<sup>511</sup>

Whilst the Commission considers that the interpretation of 'threaten to subject' may well lead to the same conclusion, for the purposes of clarity the Commission recommends adopting the approach

<sup>509</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 147-148.

<sup>510</sup> Submission from EOC, 1 November 2021, 8.

<sup>511</sup> Submission from ADLEG, 30 November 2021, 59.



taken in section 51(3) of the ADA so that a threat can be express or implied, or conditional or unconditional.

## 7.4 Acts done for two or more reasons

Under the current Act, discrimination, harassment, vilification and victimisation all require proof that the relevant conduct was done 'on the ground of' a particular matter (for example, race or sex). It is common, however, for acts to be done for multiple reasons, some of which may not be prohibited. This raises the question of whether such acts are prohibited under the Act.

For cases of discrimination, harassment and vilification, this issue is addressed in section 5 of the Act, which states that 'the doing of an act on the ground of a particular matter includes a reference to the doing of an act on the ground of 2 or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act'. This provision does not, however, apply to complaints of victimisation.

In its 2007 review, the EOC recommended that the scope of section 5 should be extended to include complaints of victimisation. It reasoned:

The effect of this section is that a person complaining of victimisation, as defined under the Act, must establish that the dominant or substantial reason for the doing of the act or acts was to victimise that person. The [EOC] accepts that acts of victimisation are usually intended to cause disadvantage, whereas acts of discrimination can be unintentional, so it is a more serious claim to allege that one has been victimised. However, the seriousness of victimisation can be addressed through conciliation and, if required, the remedies available to the SAT under the Act. A complainant should not have to carry the burden of proving victimisation to a higher standard than discrimination.<sup>512</sup>

Although one stakeholder contended that it was not unreasonable to expect claims of victimisation to be held to a higher standard of proof than discrimination claims,<sup>513</sup> most stakeholders supported amending section 5 to include a reference to section 67 (victimisation). They agreed with the EOC that complainants should not have to carry the burden of proving victimisation to a higher standard than in other areas under the Act. It was observed that respondents would typically be better placed to prove why they had subjected a complainant to detriment, as they possessed knowledge of the reasons for the conduct.

One stakeholder suggested that to make it clear that victimisation need not be the only reason for the conduct, a clause based on section 104(3) of the Victorian Act should be enacted.<sup>514</sup> Section 104(3) of the Victorian Act provides that:

- In determining whether a person victimises another person it is irrelevant -
- (a) whether or not a factor in subsection (1) is the only or dominant reason for the treatment or threatened treatment provided that it is a substantial reason;
  - (b) whether the person acts alone or in association with any other person.

The Commission agrees that it should not be necessary for victimisation complainants to prove that one of the matters listed in section 67 was the dominant or substantial reason for the victimiser's action. Given that the issue of acting for two or more reasons is already addressed in section 5, the Commission does not consider it necessary to enact a victimisation-specific provision such as section 104(3) of the Victorian Act. Instead, it recommends that the scope of section 5 be extended to include

<sup>512</sup> Equal Opportunity Commission, *Review of the Equal Opportunity Act 1984* (Report, May 2007) 35.

<sup>513</sup> Submission from AMMA, 29 October 2021, 16.

<sup>514</sup> Submission from ADLEG, 30 November 2021, 10.

victimisation complaints. This will not only ensure the consistent operation of the Act's provisions but will help further the Act's object of eliminating victimisation.

The EOC also stated in their submission:

In addition, victimisation for making a public interest disclosure (PID), as defined by the *Public Interest Disclosure Act 2003*, and discrimination on the ground of having a spent conviction under the *Spent Conviction Act 2000*, complaints about which the EOC is required to investigate, are similarly omitted from section 5 of the Act. Like victimisation, they should be referenced in section 5.

The Commission is of the view that section 5 should be amended to include these complaints under the *Public Interest Disclosure Act 2003* (WA) and the *Spent Conviction Act 2000* (WA).

### **Recommendation 117**

The Act should provide that it is not necessary for a victimisation complainant to prove that the dominant or substantial reason for the alleged victimiser doing the relevant act was to victimise that person.

### **Recommendation 118**

The provisions of section 5 of the Act should include victimisation complaints under the *Public Interest Disclosure Act 2003* (WA) and discrimination on the ground of having a spent conviction under the *Spent Convictions Act 1988* (WA).

## **7.5 Reversing the onus of proof**

One stakeholder suggested that the aims of the Act would be better served by reversing the onus of proof in relation to victimisation complaints.<sup>515</sup> It was submitted that this could be achieved in a manner similar to that provided by section 361 of the FW Act, which states:

Reason for action to be presumed unless proved otherwise

- If:
  - (a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and
  - (b) taking that action for that reason or with that intent would constitute a contravention of this Part;it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.
- Subsection (1) does not apply in relation to orders for an interim injunction.

In light of the serious nature of a victimisation complaint and the absence of extensive submissions on the issue when the issue was not directly raised by the Discussion Paper, the Commission does not consider that this recommendation should be adopted at this point in time.

<sup>515</sup> Submission from Circle Green Community Legal, 30 November 2021, 53.

## 8. CONVERSION PRACTICES

The Act does not deal with conversion practices which seek to change or suppress an individual's sexual orientation or gender identity.<sup>516</sup> In the Discussion Paper the Commission asked whether a prohibition on conversion practices should be included in the Act, or whether any such prohibition would best be the subject of separate consideration and introduced in specific legislation.<sup>517</sup>

While some submissions took the view that conversion practices should not be addressed in any legislation, the majority of stakeholders submitted that conversion practices should be prohibited in Western Australia. Some stakeholders noted that this could be done within the scope of the current Act, by providing that such conversion practices amount to discrimination on the grounds of sexual orientation and/or gender identity. A civil response scheme could also be established within the EOC if appropriate access and funding was made available.

However, most stakeholders were of the view that the prohibition of conversion practices would be better dealt with under separate legislation due to the complexity of the subject matter. This is the approach that has been taken in other Australian jurisdictions. It was further submitted that the issue should be the subject of a separate inquiry where specific submissions on the issues can be considered in detail.

The Commission concurs with these submissions. In particular, it agrees with the EOC that prohibitions on conversion practices are not an appropriate fit for the Act,<sup>518</sup> and should be the subject of separate legislation and dealt with under a separate review.

### ***Recommendation 119***

The Act should not address conversion practices. These should be dealt with in standalone legislation.

### ***Recommendation 120***

The prohibition of conversion practices should be the subject of a separate review.

<sup>516</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 39.

<sup>517</sup> Ibid 193.

<sup>518</sup> Submission from EOC, 1 November 2021, 17.

## 9. DUTY TO ELIMINATE DISCRIMINATION, HARASSMENT, VICTIMISATION AND VILIFICATION

### 9.1 Introduction of a duty

In the Discussion Paper, the Commission sought views on whether a positive duty to eliminate discrimination, beyond a responsibility to make reasonable adjustments, should be introduced in Western Australia.<sup>519</sup>

A significant number of stakeholders supported the introduction of a positive duty to eliminate discrimination, harassment, victimisation, such as that in Victoria, into Western Australia. A common theme in their submissions was a view that the introduction of a positive duty would encourage duty holders to take proactive steps to monitor and eliminate discriminatory behaviours as opposed to simply responding to lodged complaints.

Stakeholders suggested that a positive duty would help to address issues of systemic discrimination, harassment and victimisation, as duty holders would be required to take proactive measures even before a formal complaint is lodged. For example, a positive duty may encourage proactive measures such as cultural awareness training, which would go some way to addressing structural racism. A positive duty approach also avoids the ‘pay to go away’ strategy – with confidentiality and non-disparagement clauses in settlement agreements – which is employed in response to a discrimination claim. In essence, these stakeholder submissions reinforced the view that true equality necessitates a proactive approach to discrimination, and not one which is merely reactive.

Stakeholders noted that creating a positive duty is not a new concept. For instance, there are positive duties in employment contexts with respect to work health and safety<sup>520</sup> and workplace gender equality.<sup>521</sup> Other examples include reporting obligations, such as those related to modern slavery,<sup>522</sup> as well as the monitoring and reporting of customer transactions in a financial services context.<sup>523</sup>

Some stakeholders were opposed to the introduction of a positive duty because industry (or at least certain sectors of industry) is already required to take steps to prevent such conduct and there are already similar positive obligations under work health and safety laws. It was submitted that the introduction of a positive duty would merely create a second layer of regulatory compliance, particularly where regulators such as WorkSafe Western Australia already have jurisdiction over psychosocial risks, including those risks arising from discrimination and harassment in the workplace.

To illustrate this point, submissions highlighted the fact that while the AHRC’s Respect@Work Report recommended including a positive duty to prevent sexual harassment in the SDA,<sup>524</sup> this recommendation was not adopted by the Commonwealth Government. This was because the Government was of the view that work health and safety laws already imposed a sufficient positive obligation on employers to prevent sexual harassment in the workplace.<sup>525</sup> Stakeholders suggested that instead of introducing a positive duty in this Act, it would instead be preferable to allocate

<sup>519</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 158.

<sup>520</sup> See, for example, *Occupational Health and Safety Act 1984* (WA), ss 19 - 23, 23I, 23K.

<sup>521</sup> See generally *Workplace Gender Equality Act 2012* (Cth).

<sup>522</sup> *Modern Slavery Act 2018* (Cth) s 16.

<sup>523</sup> *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ss 41, 43, 45.

<sup>524</sup> Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) (Respect@Work Report).

<sup>525</sup> Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (8 April 2021) 12.

additional resources to WorkSafe Western Australia to better enable it to undertake proactive compliance activities.

The Commission notes that some stakeholders who supported introducing a positive duty into the Act submitted that great care should be exercised to ensure that any additional costs associated with a new positive duty are justified. This requires careful consideration to be given to certain aspects of the positive duty, such as its purpose and content, who can take enforcement action and the consequences of non-compliance.

Having considered these submissions, the Commission is of the view that the Act should incorporate a positive duty to eliminate discrimination, harassment and victimisation, as well as vilification. While a positive duty to eliminate vilification was not the subject of detailed submissions, the Commission considers there is no reason for it to be excluded from the scope of the positive duty.

The incorporation of a positive duty to eliminate discrimination, harassment, victimisation and vilification will no doubt be a significant change. However, the Commission considers that there are compelling reasons to justify this course of action.

First, while the Commission acknowledges that some entities have adopted such proactive measures, this is not the case for all entities. And while Part IX of the Act does impose positive obligations to put in place policies and practices that eliminate discrimination, these do not extend to all protected attributes or all classes of employers. The Commission takes the view that introducing a positive duty would encourage all duty holders to proactively address such conduct and to align their systems and procedures with the Act's revised objects.

Secondly, the Commission does not consider that the potential burden arising from any additional compliance costs provides a sufficient justification for rejecting the introduction of a positive duty. As noted below, concerns about the costs of compliance are best addressed by carefully delimiting the scope of the positive duty. In particular, the Commission highlights that the Act should make clear what positive measures are considered reasonable and proportionate in the circumstances. Those measures may differ depending upon the size of the organisation and the costs involved in their implementation.

Thirdly, while the *Work Health and Safety Act 2020* (WA) imposes a positive duty on persons conducting a business or undertaking to reduce psychosocial risks arising from discrimination and harassment,<sup>526</sup> this positive duty is limited to the workplace. The Commission does not consider that a positive duty arising under the Act should be limited to this context. The purpose of a positive duty in anti-discrimination legislation, as opposed to workplace legislation, is also different in nature. While work health and safety legislation is directed towards minimising risks to health and safety in workplaces, the Act focusses on promoting equality and addressing systemic discrimination.

Further, any positive duty in the work health and safety context must be understood from a perspective which acknowledges the reality of WorkSafe Western Australia's enforcement practices. The Commission notes the WorkSafe Western Australia Commissioner's submission to the AHRC's *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*,<sup>527</sup> in which the Commissioner stated the following in respect of the Department of Mines, Industry Regulation and Safety's management of sexual harassment complaints:<sup>528</sup>

<sup>526</sup> See *Work Health and Safety Act 2020* (WA) ss 4 (definition of 'health'), 19.

<sup>527</sup> Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020).

<sup>528</sup> WorkSafe Western Australia Commissioner, Submission to Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (5 February 2019) 1.

The Department's processes for managing matters where claims of sexual harassment are raised, include referring complainants directly to the EOC. For circumstances where a caller is distressed or may require support and assistance, the process also includes referral to the Mental Health Emergency Referral Line.

In Western Australia, the EOC has specific legislation to address complaints of sexual harassment matters. As a safety regulator, WorkSafe is not sufficiently resourced and does not have the expertise to adequately address sexual harassment matters. Therefore, these matters are appropriate to remain in the jurisdictional control of the EOC. The EOC is also better positioned to respond to the Inquiry in respect to the terms of reference that relates to drivers of harassment and measures to address sexual harassment.

Accordingly, the Commission believes that incorporating a positive duty into the Act will be the best way to operationalise the Act's objectives and to minimise or prevent harm arising from discrimination, harassment, victimisation and vilification; not only in the workplace, but also in other areas of public life.

Finally, while concerns have been raised that a positive duty would require employers and other duty holders to demonstrate that discrimination, harassment, victimisation and vilification could not occur within their workplaces, such concerns are misconceived. A positive duty does not require duty holders to prove that such conduct is impossible. Rather, it requires duty holders to take appropriate proactive and preventative measures to minimise the incidence of such conduct. It also makes it clear that discrimination, harassment, victimisation and vilification are inappropriate forms of conduct and that organisations bear some responsibility for addressing such conduct.

### **Recommendation 121**

The Act should include a positive duty to eliminate discrimination, harassment, victimisation and vilification.

## **9.2 Reasonable and proportionate measures**

In the Discussion Paper, the Commission asked for submissions on the measures that must be fulfilled by duty holders if a positive duty is introduced.<sup>529</sup> Many stakeholders expressed the view that the duty must be limited to reasonable and proportionate measures. It was also observed that the content of any positive duty would need to be sufficiently broad so that it can apply to different circumstances and keep up with evolving standards, yet specific enough to guide duty holders as to the necessary steps and due diligence to meet their obligations.

Some stakeholders suggested that the Act should contain similar guidelines to section 15(6) of the Victorian Act. That provision requires the following factors to be considered in determining whether a measure is reasonable and proportionate:<sup>530</sup>

- (i) the size of the duty holder's business;
- (ii) the nature and circumstances of the duty holder's business;
- (iii) the duty holder's available resources;
- (iv) the duty holder's business and operational priorities; and
- (v) the practicability and the cost of the measures.

<sup>529</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 154 – 158.

<sup>530</sup> *Equal Opportunity Act 2010* (Vic) s 15(6).

Section 15(6) of the Victorian Act provides the following examples of reasonable and proportionate measures:

- a) A small, not-for-profit community organisation takes steps to ensure that its staff are aware of the organisation's commitment to treating staff with dignity, fairness and respect and makes a clear statement about how complaints from staff will be managed.
- b) A large company undertakes an assessment of its compliance with this Act. As a result of the assessment, the company develops a compliance strategy that includes regular monitoring and provides for continuous improvement of the strategy.

These examples are identical to those mentioned by the AHRC in the Respect@Work Report, which proposed introducing into the SDA a positive duty on all employers to take reasonable and proportionate measures to eliminate, as far as possible, sex discrimination, sexual harassment and victimisation.

Stakeholders also suggested it would be reasonable and proportionate for duty holders to provide education, training and guidance materials to relevant persons in order to promote awareness of the law and to promote best practice in relation to complying with the positive duty. It was also submitted that duty holders should be required to introduce policies and procedures dealing with how people may raise complaints of discrimination and how those complaints will be handled (including to protect complainants' confidentiality and prevent their victimisation).

Some stakeholders suggested that the EOC should publish detailed guidelines concerning the positive duty requirement, providing examples of 'reasonable and proportionate' measures for different industries and sizes of organisations. The resources on the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) website were provided as an example of this approach.

Having considered the views of stakeholders, the Commission recommends that the positive duty to eliminate discrimination, harassment, victimisation and vilification should be limited to taking reasonable and proportionate measures. It recommends adopting the approach taken in section 15(6) of the Victorian Act, to help duty holders and decision makers determine what measures will be considered reasonable and proportionate in the circumstances. While the Commission acknowledges there would be some benefit to specifying more detailed measures, it considers that the factors outlined in section 15(6) of the Victorian Act strike the right balance between giving the positive duty sufficient content to be meaningful, but not overly burdensome on duty holders.

In the Discussion Paper, the Commission noted that one significant concern in this context is the negative impact that a positive duty may have on small businesses and organisations.<sup>531</sup> In the Commission's view, prescribing the factors listed in the Victorian Act will help to ensure that any positive duty can be appropriately tailored to the size of each duty holder organisation, whether it be large or small. In the Commission's view, there is considerable utility in the Act providing examples to reflect this, like those contained in section 15(6) of the Victorian Act, although the Commission acknowledges that it is ultimately a matter for the legislative drafter as to how clarity is best achieved.

The Commission also considers that the EOC's publication of detailed guidelines (so as to give further guidance to organisations of different sizes about the kinds of reasonable and proportionate measures that should be implemented) would also be a welcome complement to any new positive duty in the Act.

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<sup>531</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 156.



### **Recommendation 122**

The positive duty to eliminate discrimination, harassment, victimisation and vilification should be limited to taking reasonable and proportionate measures.

### **Recommendation 123**

The Act should provide that the following factors must be considered in determining whether a measure is reasonable and proportionate:

- The size of the duty holder's business;
- The nature and circumstances of the duty holder's business;
- The duty holder's available resources;
- The duty holder's business and operational priorities; and
- The practicability and the cost of the measures.

### **Recommendation 124**

The Act should provide examples of reasonable and proportionate measures that are tailored to different types of organisation, such as:

- A small, not-for-profit community organisation takes steps to ensure that its staff are aware of the organisation's commitment to treating staff with dignity, fairness and respect and makes a clear statement about how complaints from staff will be managed.
- A large company undertakes an assessment of its compliance with this Act. As a result of the assessment, the company develops a compliance strategy that includes regular monitoring and provides for continuous improvement of the strategy.

## **9.3 Grounds to which the positive duty may apply**

In the Discussion Paper, the Commission sought submissions as to which grounds and prohibitions the positive duty should apply.<sup>532</sup> The majority of stakeholders supported extending the duty to all areas protected under the Act. It was noted that this would make the position in Western Australia consistent with the positions in both Victoria and the United Kingdom.<sup>533</sup>

The Commission agrees with these submissions. It sees no sound basis for excluding any specific grounds or prohibitions established under the Act from the positive duty, and consequently recommends that the positive duty should apply across the board.

### **Recommendation 125**

The positive duty to eliminate discrimination, harassment, victimisation and vilification should apply to all areas protected under the Act.

<sup>532</sup> Ibid 154-8.

<sup>533</sup> Ibid 158. *Equality Act 2010* (UK) s 149.

## 9.4 Avenues for redress

In the Discussion Paper, the Commission asked whether an individual complainant should be able to make a complaint for a breach of the positive duty, or whether breaches should only be able to be investigated at the EOC's initiative.<sup>534</sup> If individual complaints were to be allowed, the Commission wanted to know whether the SAT should be empowered to hear applications, or whether redress should be limited to EOC recommendations.

There was broad support from stakeholders for permitting individual complaints to be made and for the process to be the same as for other complaints made under the Act. That is, complaints should initially be directed to the EOC for investigation and conciliation. If they are not resolved, the SAT should be empowered to hear applications and to make relevant orders. It was submitted that the Act should allow affected individuals to claim compensation for any loss they have suffered by reason of a respondent's failure to comply with a positive duty. Such claims should be capable of being brought concurrently with, and separate to, any regulatory action. Additionally, it was suggested that the Act should provide a mechanism for protecting any witnesses and whistle-blowers who report a breach of duty in respect of victimisation.

It was argued that this approach would give practical force to any new positive duty and increase duty holders' proactive compliance. Stakeholders highlighted the limited efficacy of the positive duty contained in the Victorian Act, which was seen to arise from the inability of individuals to bring a complaint for a breach of the obligation. It was said that the introduction of a positive duty without any enforcement measures would be 'ephemeral' and would not be effective in eliminating discrimination. Moreover, it was submitted that it would create confusion and increase compliance burdens without justification (as has been suggested to be the experience in the UK and Victoria).

Stakeholders contended that allowing the SAT to hear positive duty cases would empower the EOC to enforce the outcomes of any investigations that it conducts in the SAT. It would also overcome the problems claimed to have been experienced in the UK, where judicial review proceedings must be used to enforce the public sector positive equality duty.

Stakeholders also supported giving investigative and enforcement powers in relation to the positive duty to the EOC. Some stakeholders observed that because positive duties are largely directed at effecting structural change and addressing systemic discrimination, individuals may not always have a sufficient interest to take enforcement action in relation to a contravention of the positive duty. Notably, in the EOC's own submission, it expressed support for the Act empowering it to assess compliance with, and enforcement of, the positive duty, as well as giving individuals the right to bring a claim in relation to the duty (initially to the EOC, and then to the SAT).<sup>535</sup>

There was support for providing the EOC with a range of escalating powers to enforce the positive duty. For example, the EOC could be given the power to work with organisations to encourage voluntary compliance, investigate allegations of non-compliance, issue enforceable undertakings and seek SAT or court-imposed sanctions for failing to comply. It was also proposed that the EOC should have the ability to review an organisation's practices and policies to determine if they are compliant with the Act and, if necessary, consult with those organisations to formulate action plans. Examples of these kinds of compliance powers can be found in sections 151 and 152 of the Victorian Act.<sup>536</sup>

<sup>534</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 154-9.

<sup>535</sup> Submission from EOC, 1 November 2021, 10.

<sup>536</sup> Other possible example provisions include the powers given to the Victorian Public Sector Gender Equality Commissioner to secure compliance with the *Gender Equality Act 2020* (Vic) and the powers conferred on the UK Equality and Human Rights Commission to enforce the public sector equality duty under the *Equality Act 2010* (UK).

It was noted, however, that the EOC is likely to have resourcing constraints which would make it difficult to investigate and enforce all claims relating to a breach of the positive duty. Accordingly, many stakeholders emphasised the importance of the EOC being adequately funded to meet any additional proposed duties, including educating the community about, and taking enforcement measures in relation to, a positive duty in the Act. These sentiments were also expressed by the EOC in its submission to the Commission. The EOC noted ‘that there may be more proactive ways to enhance the achievement of a positive duty by publicly funded agencies, i.e. state government agencies and local government’.<sup>537</sup>

Having considered these submissions, the Commission is of the view that individual complainants should have the ability to make a complaint for a breach of the positive duty to eliminate discrimination, harassment, victimisation and vilification, including through representative complaints as discussed in Chapter 10. Such complaints should be managed in the same way that other claims are dealt with under the Act: through an initial complaint to the EOC, which may be referred at a later stage to the SAT. Complainants should be entitled to claim compensation for any loss they have suffered by reason of a duty-holder’s failure to comply with their duties.

The Commission considers that providing affected individuals with the ability to bring complaints will likely encourage greater levels of proactive compliance with the positive duty. Moreover, providing an avenue of redress, which is not solely reliant on the EOC to enforce the positive duty, may alleviate some of the concerns relating to the EOC’s resourcing levels.

However, other than through representative complaint mechanisms discussed in Chapter 10, the Commission recommends that only individuals who have been aggrieved by a duty holder’s non-compliance with the positive duty should have standing to make a complaint.

To ensure that complainants are appropriately protected from retaliation, the Commission recommends that the victimisation provisions be amended to cover complainants who allege that a duty holder has failed to comply with their positive duties.

The Commission also recommends that the EOC be given the power to conduct investigations and exercise other enforcement powers in relation to the positive duty to prevent discrimination, harassment, victimisation and vilification. The Commission considers regulator activity to be an important factor affecting general deterrence level. Given the limited investigations concerning possible breaches of the positive duty in Victoria by the VEOHRC,<sup>538</sup> the Commission reiterates the importance of the EOC being adequately funded to fulfil its various functions, including any investigative and enforcement functions with respect to a new positive duty in the Act.

### **Recommendation 126**

The EOC should be empowered to investigate breaches of the positive duty to eliminate discrimination, harassment, victimisation and vilification. The EOC should be empowered to enforce compliance with the duty, with escalating powers of enforcement including conducting compliance reviews in line with sections 151 and 152 of the Equal Opportunity Act 2010 (Vic).

<sup>537</sup> Submission from EOC, 1 November 2021, 10.

<sup>538</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 157.

### **Recommendation 127**

Individual complainants who have been aggrieved by a duty holder's non-compliance with the positive duty to eliminate discrimination, harassment, victimisation and vilification should have standing to make a complaint for a breach of the duty, and to claim compensation for any losses they have suffered by reason of the duty holder's non-compliance.

Representative bodies, as defined in Recommendation 139, should also have standing to make a complaint for a breach of the duty. In accordance with Recommendation 140, if they make a complaint without identifying a specific complainant, they should only be entitled to seek systemic or structural remedies that will benefit the people they represent as a whole.

### **Recommendation 128**

Complaints about breaches of the positive duty to eliminate discrimination, harassment, victimisation and vilification should be managed in the same way as other complaints under the Act. That is, an initial complaint should be made to the EOC, which may be referred at a later stage to the SAT.

### **Recommendation 129**

The victimisation provisions should be amended to protect complainants who allege that a duty holder has failed to comply with their positive duties.

## **9.5 Reporting obligations of duty holders**

In the Discussion Paper, the Commission asked whether duty holders should be required to publish information about their compliance with the positive duty and, if so, which duty holders should be subject to this obligation.<sup>539</sup>

Some submissions supported the introduction of such a reporting requirement. This requirement was seen to be an important step towards changing cultural attitudes by ensuring that duty holders carefully considered their responsibilities to eliminate such conduct.

It was submitted that reporting requirements should generally consist of publishing, to a specified timetable, standardised, comparable and disaggregated information relating to the fulfilment of positive duties through specific equality practices, and across all grounds. Other suggestions included reporting on the due diligence undertaken by duty holders to identify, mitigate and address likely areas of discrimination, as well as information relating to the outcome of complaints made, and any other metrics relevant to the Act.

One stakeholder submitted that the *Gender Equality Act 2020* (Vic) offers an example of the information duty holders could be required to publish, and how an 'action cycle' of disclosure, which seeks to encourage organisations to effect change and improve their practices to reduce the risk of

<sup>539</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 154-9.

inequality, may be created.<sup>540</sup> Under the *Gender Equality Act 2020* (Vic), relevant duty holder entities are required to:

- (a) gather data (through workplace audits), including on intersectional disadvantage;
- (b) set data-informed goals, action plans and strategies in consultation with key stakeholders; and
- (c) publish data on progress in an accessible way.

By contrast, some stakeholders submitted that, although information-sharing through publication may assist with achieving best practice and reduce the compliance costs associated with taking enforcement-related action, requiring publication should be carefully considered if a failure to comply with the positive duty is, itself, actionable. It was said that, at least at the outset, provided that the EOC publishes adequate guidance and templates on how organisations may comply with the positive duty, an enforceable positive duty may be a sufficient measure.

If there is to be a reporting requirement, another issue is to which duty holders any publication requirement should extend. In its submission, ADLEG considered both public organisations and medium to large private organisations should be brought within the scope of any publication requirement.<sup>541</sup> In contrast, the ACT Human Rights Commission, following a consultation on reforms to the ACT Act, advocated for a divided reporting approach for public as opposed to non-public authorities:<sup>542</sup>

public authority entities, including entities undertaking functions of a public nature having requirements to plan for and report on measures to meet the duty. Those organisations not falling within the public authority definition would not be required to document and evidence the same level of specific planning and actions, and report on that and might only be required to provide outlines of measures taken to meet the duty if requested by the Commission.

The EOC recommended that equal opportunity management plans in Part IX of the Act be required to address plans for the achievement of substantive equality in service provision. The EOC noted the substantial impact of unequal access to government services and also favoured amending the *Public Sector Management Act 1994* (WA) ‘to provide a legislative mandate for substantive equality in public sector service delivery’.

Considering these views, the Commission recommends amendments to the Act to expand the use of equal opportunity management plans beyond the current scope of Part IX of the Act. The Commission’s view is that management plans should extend to compliance with the positive duty to eliminate discrimination, harassment, victimisation and vilification (including in the context of access to government services and service provision) as well as the ability to direct compliance and enforce any reporting obligations. As noted, in Chapter 10, the Commission recommends that the Director of Equal Opportunity in Public Employment retain an advising and assisting role for authorities within the scope of sections 138 and 139. The Equal Opportunity Commissioner would be responsible for the evaluation and auditing of these plans with expanded investigatory and enforcement powers in the context of compliance failures. Other organisations (that are not authorities within the current scope of Part IX) could be required to provide evidence of compliance with the positive duty through the lodgement of a limited equal opportunity management plan that is directed towards the positive duty, if requested by the Equal Opportunity Commissioner. This approach will balance the potential compliance costs for organisations with the need to ensure a viable positive duty that supports the Act’s object of addressing systemic instances of discrimination and promoting substantive equality.

<sup>540</sup> Submission from ADLEG, 20 December 2021, 71.

<sup>541</sup> Submission from ADLEG, 20 December 2021, 11.

<sup>542</sup> <https://hrc.act.gov.au/wp-content/uploads/2022/02/20220131-HRC-Letter-Submission-on-Discrimination-Act-1991-Review.pdf>

The Commission recognises the additional resourcing implications of these recommendations. Accordingly, the Commission considers that the new role of the Equal Opportunity Commissioner in this context should be the subject of further consultation with the EOC and the Director of Equal Opportunity in Public Employment. It should be reviewed after a 5 year period.

***Recommendation 130***

The provisions concerning equal opportunity management plans should be extended to require authorities who fall within the scope of sections 138 and 139 of the Act to demonstrate compliance with the positive duty to eliminate discrimination, harassment, victimisation and vilification (including in the context of access to government services and service provision).

***Recommendation 131***

Organisations not within the current scope of sections 138 and 139 of the Act, upon request of the Equal Opportunity Commissioner, be required to provide evidence of compliance with the positive duty to eliminate discrimination, harassment, victimisation and vilification through the lodgement of an equal opportunity management plan.

***Recommendation 132***

The reforms concerning the monitoring of compliance with the positive duty to eliminate discrimination, harassment, victimisation and vilification should be reviewed after a five-year period.

## 10. PROCEDURAL MATTERS

This chapter of the Report focuses on the processes involved in addressing compliance with the Act. It examines matters such as filing complaints, EOC investigations and conciliations, dismissal of complaints and SAT hearings. It also looks at the use of management plans and considers whether the EOC's powers should be expanded to include a more proactive role in monitoring and regulating breaches of the Act.

The extent to which some or all the Commission's recommendations are appropriate will depend upon the extent to which the Commission's recommendations made earlier in this Report are adopted. In the event that those recommendations are not adopted, some of the positions expressed in this chapter will need to be revisited.

The Commission notes that there are funding and resourcing implications for some of the recommendations made in this chapter and that those implications may not be insignificant. It is a matter for the government of the day as to whether those funding and resourcing needs can be accommodated at any given time.

### 10.1 The complaints process

#### 10.1.1 Filing a complaint

Under the current Act, the complaints process is initiated by filing a complaint with the EOC. This section considers three key issues related to the process of filing complaints:

- The timeframe in which a complaint needs to be lodged;
- The people and bodies who should be permitted to lodge a complaint; and
- Whether it should be permissible to lodge a complaint with the EOC if a complaint has already been made under Commonwealth anti-discrimination legislation.

##### 10.1.1.1 Timeframe for lodging complaints

Currently, a complaint must be lodged within 12 months of the date on which the alleged contravention of the Act occurred.<sup>543</sup> The EOC does, however, have power to accept a late complaint if 'good cause' is shown.<sup>544</sup> In the Discussion Paper, the Commission asked whether the timeframe for lodging a complaint should be increased, and whether the discretion to accept out of time complaints should be amended in any way.<sup>545</sup> These issues require a consideration of the specific needs of complainants and any reasons why it may take a certain period of time to lodge a complaint under the Act. It is also necessary to consider the potential prejudice (to respondents or to a fair inquiry into the matter by a decision-maker) arising from the different approaches that might be taken, with a balance between the two ultimately needing to be reached.

<sup>543</sup> *Equal Opportunity Act 1984* (WA) s 83A(4).

<sup>544</sup> *Equal Opportunity Act 1984* (WA) s 83A(5).

<sup>545</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 192.



Other jurisdictions have taken two general approaches to this issue:

- Queensland, the Northern Territory, Tasmania and South Australia take a similar approach to Western Australia.<sup>546</sup> They require a complaint to be dismissed if it is lodged after 12 months but provide some scope for accepting out of time complaints. There is a slight variation in the wording used in their respective late complaint provisions. For example, the Tasmanian Act allows the Commissioner to accept a late application if 'satisfied that it is reasonable to do so', while the South Australian Act allows out of time complaints if there is 'good reason why the complaint was not made within the stipulated time period', and it is 'just and equitable to allow it in all the circumstances'. In these jurisdictions, the position is essentially that a complaint over the threshold age is not valid unless the relevant complaints body says it is, which they may only do if certain criteria are met.
- NSW, Victoria, the ACT and the Commonwealth do not impose a time limit for lodging a complaint. Instead, they provide a discretionary power to dismiss a complaint that is lodged after a certain period.<sup>547</sup> The specified time period varies between jurisdictions: in Victoria and NSW it is 12 months; in the ACT it is 24 months; and at the Commonwealth level it is 24 months for sex discrimination complaints and 6 months for other complaints. In these jurisdictions, the position is essentially that a complaint of any age is valid, unless the relevant complaints body says it is not, which they may only do on the basis of time if the complaint is made after the conclusion of the specified time period. There are no set criteria to be applied in making that determination, although the decision-maker's discretion is constrained by the same general principles that apply to administrative decision making in other similar statutory contexts.
- Although the processes in different jurisdictions do not align, it will potentially be the case that they ultimately lead to the same outcome. However, unlike the process in Queensland, the Northern Territory, Tasmania and South Australia, the process in NSW, Victoria, the ACT and the Commonwealth arguably leaves the door more open to complainants. That is because the presumption is one of complaints being accepted, not rejected, after a period of time. It is arguable that this approach presents a lower risk of deterring complainants from bringing complaints. Conversely though, such an approach may create a greater degree of uncertainty for the parties involved.

The Commonwealth's 24-month period for sex discrimination complaints was enacted in response to the Australian Human Rights Commission's *Respect@Work* Report. In that report the AHRC noted that there are complex reasons why an applicant may delay making a complaint immediately after an alleged incident of sexual harassment. This can include 'the impact of the harassment on their mental state, fear of victimisation, lack of awareness of their legal rights, or where they are awaiting the outcome of an internal workplace investigation'.<sup>548</sup> In addition, complainants may be reluctant to report an incident of sexual harassment while they are still employed.

The AHRC also acknowledged the potential problems with extending the time frame. A lengthy delay may make it difficult to seek information from people about the matters that occurred, or to locate individuals and witnesses involved in the alleged incidents. This could affect the Commission's ability

<sup>546</sup> *Anti-Discrimination Act 1991* (Qld) s 138; *Anti-Discrimination Act 1992* (NT) s 65; *Equal Opportunity Act 1984* (SA) s 93; *Anti-Discrimination Act 1998* (Tas) s 63.

<sup>547</sup> *Anti-Discrimination Act 1997* (NSW) s 89B; *Equal Opportunity Act 2010* (Vic) s 116; *Human Rights Commission Act 2005* (ACT) s 78(1); *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1)(b).

<sup>548</sup> Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 575 (*Respect@Work* Report).

to conduct a fair inquiry and effective conciliation.<sup>549</sup> Despite these concerns, on balance the AHRC was of the view that the timeframe for sex discrimination complaints should be extended to 24 months.

In its submission to the current inquiry, the EOC proposed that the timeframe for lodging complaints under the Act should similarly be extended to 24 months. In support of this position, the EOC pointed to the reasons set out in the Respect@Work Report. It also noted that, in its experience pregnancy discrimination is often not apparent until the employee endeavours to return to work sometime after the baby's birth, which will frequently be after the current 12-month time limit.

The EOC further noted that the #MeToo movement, and the advocacy work of Grace Tame, who was awarded Australian of the Year in 2021, has prompted discussion about the need to investigate complaints of sexual harassment that are out of time. It was supportive of being given a more unfettered general discretion to accept out of time complaints, as is the case in NSW, Victoria and the ACT. It was their position that this discretion should apply to all complaints.

Two technical issues were also raised by the EOC. First, it suggested that if the Act prescribes criteria for the Equal Opportunity Commissioner's decision to accept an out of time complaint, there should be a mechanism for the SAT to review that decision. Secondly, it noted that many complainants allege several incidents, some of which are out of time by a few days, while others are out of time by many years. At present, the Act seems to require an 'all or nothing' approach to accepting out of time allegations. It argued that this should be amended, so as to allow the Equal Opportunity Commissioner the discretion to accept a part of the complaint only.

The EOC's concern about pregnancy discrimination was highlighted by other stakeholders, one of whom provided the following example:

#### **Case example**

*A person was dismissed from their employment without explanation while pregnant. This left the person in a financially vulnerable position and the stress of the situation took a toll on the person's health while pregnant. The person had miscarried before, so did not feel comfortable going through the stress of making a legal complaint while pregnant. After the arrival of the child, the person had the responsibility for caring for the child, who had some health issues.*

*After 15 months, the person felt physically, mentally, and financially stable enough to pursue a pregnancy discrimination complaint against their former employer. However, the complaint was outside of the 12-month timeframe stipulated in the Act, the 6-month timeframe stated in the AHRC Act and the 21-day timeframe for dismissal claims as per the FW Act.*

*While the person had the option of pursuing a complaint outside of the 12-month timeframe stated in the Act, they felt discouraged by the idea they would have to fight to even have the complaint considered. The person would have been assisted by a longer time frame to make a discrimination complaint.<sup>550</sup>*

Many other stakeholders were also supportive of increasing the time limit. They argued that complainants would benefit from having more time to recover from the relevant incident. This was seen to be especially important for vulnerable and disadvantaged complainants, whose primary and immediate concern following such incidents is often their physical, mental, and financial wellbeing, rather than the timely lodgement of a complaint. Stakeholders also submitted that a longer timeframe would encourage complainants to fully participate in informal resolution processes (such as internal

<sup>549</sup> Ibid 576.

<sup>550</sup> Submission from Circle Green Community Legal, 30 November 2021, 17, 65-67.

grievance proceedings) without the fear that they may run out of time to make a complaint with the EOC.

Stakeholders also highlighted the fact that individuals often delay the making of a complaint due to a concern that they will lose their jobs. Although termination of employment in these circumstances would likely be actionable under the Act's victimisation provisions, it was submitted that vulnerable and disadvantaged employees are not always able to afford to take this risk. This is especially the case where:

- it would be difficult for them to find other jobs, because of their geographical location, age, disability, level of education, or visa status;
- they support others with their incomes; or
- they rely on employer sponsored visas to stay in Australia.

A longer period for making a complaint may enable such individuals to gain alternative employment prior to lodgement.

There was some division amongst stakeholders about the desirable length of the period for lodging a complaint. Some stakeholders supported a 24-month period for all complaints, noting that this would align with the time for making a complaint in the ACT and to the Health and Disability Services Complaints Office. Others suggested that, at the very least, the timeframe for lodging a sex discrimination complaint should be increased to 24 months, to align it with the Commonwealth scheme under the SDA. This would recognise the various underlying reasons for the delayed nature of many sexual harassment claims, as outlined in the *Respect@Work* Report. Other stakeholders suggested that the timeframe for lodging complaints should align with the limitation periods in the *Limitations Act 2005* (WA). This Act sets a general limitation period of six years and a personal injury limitation period of three years.

Many stakeholders also supported providing the EOC with greater discretion to accept out of time complaints. It was argued that the current good cause exception unfairly places the burden of proof on the complainant to demonstrate the reasons for late lodgement. It was suggested that this may deter a person from reporting a complaint, as it is an additional barrier for the complainant to overcome to have their complaint heard. Rather than imposing a fixed time limit in the Act, a preference was expressed for adopting the discretionary approach taken in NSW, Victoria and the ACT. This would allow the EOC to decline a complaint if it is made out of time but would not require it to do so.

Conversely, some stakeholders submitted that the current 12-month timeframe is appropriate and should not be amended. It was suggested that the current scheme, which allows an extension to be obtained if good cause is shown, provides a fair balance between the needs of complainants and those who must respond to complaints. It was argued that any period longer than 12 months would create practical difficulties for respondents in actively responding to and defending allegations of discrimination, as well as prolonging uncertainty for respondents. It was also contended that where there is an extended period between the alleged discrimination and the claim being made, there is a generally lower prospect of the parties reaching a negotiated outcome that practically addresses the issue. This is due to the focus shifting towards compensation, rather than achieving positive change in behaviour or attitudes to prevent future discrimination.

Some stakeholders went further, and suggested that in the case of employment matters, the timeframe should be decreased to 21 days. This would be consistent with the period for lodging unfair dismissal claims under the FW Act, as well as for general protections claims (which can include claims of adverse action because of a protected attribute that is unlawful under the Act or another Australian anti-discrimination law). Notwithstanding the FW Act's position, the Commission's view is that 21 days

is well short of a reasonable time limit for the bringing of a complaint under the Act. Complainants, as mentioned above by other stakeholders, may have legitimate reasons for not lodging a complaint immediately after an alleged discriminatory act. Further, requiring the complaint to be made immediately following the alleged discrimination may in fact increase the number of complaints lodged, as this does not allow time for the parties to informally resolve their issues. Instead, it encourages them to immediately escalate the dispute into a formal conflict. That escalation may further have a deleterious effect on parties' willingness to work towards a conciliated outcome. Neither does such a timeframe give a complainant the time to obtain legal and other advice about ways to resolve the issue.

Having considered these competing submissions, it is the Commission's view that the time limit for making a discrimination, harassment, vilification or victimisation complaint should be increased to 24 months. While the Commission acknowledges this has the potential to prejudice some respondents, it is of the view that this risk is outweighed by the need to support and encourage people to make complaints about unlawful behaviour. In the Commission's opinion, the current presumption that a complaint that is older than 12-months should be rejected unless the complainant can justify its acceptance, is not consistent with the aims of the Act. The Commission believes that a 24-month period strikes an appropriate balance between the needs of complainants and the potential prejudice to respondents.

In reaching this decision, the Commission notes there is a growing body of evidence to suggest that there will often be valid reasons for individuals failing to comply with the 12-month timeframe. This is particularly the case in the context of sexual harassment claims, where there are various complex reasons for complaints being delayed. These include a need for time for the complainant to recover from the incident, a lack of awareness of the right to make a complaint or a fear of victimisation. Similarly, as noted by the EOC, the nature of pregnancy discrimination is such that it will often not become apparent until after the 12-month period has passed. While it would be possible to restrict the lengthier timeframe to sexual harassment and pregnancy discrimination complaints, the Commission does not believe these problems only arise in those contexts. Any vulnerable and disadvantaged complainant may, following an incident of discrimination, harassment, vilification or victimisation, justifiably be more concerned about their physical, mental, and financial wellbeing than with the timely lodgement of a complaint. In addition, the Commission is of the view that it is preferable to have just one 24-month time limit for all complaints rather than multiple time limits.

The Commission recommends that complaints which are lodged outside the 24-month time limit be rejected, unless good reason is shown for accepting all or part of the complaint. While the Commission sees merit in the discretionary approach to accepting delayed complaints (such as that taken in NSW and Victoria) where there is a shorter specified timeframe, it does not consider such an approach to be appropriate where the relevant period is 24 months. Given the length of this period and the difficulties that would be created for respondents if it were extended further, the Commission's view is that complaints lodged out of time should not generally be accepted. The burden should be placed on the complainant to provide a good reason for the Commission to accept the complaint, despite the extended delay.

However, the Commission acknowledges that there may sometimes be good reasons for allowing older complaints to be filed. In determining whether this is the case, the Commission recommends that the EOC be required to take into account the seriousness of the conduct alleged in the complaint, the impact its late acceptance would have on the prospects of a fair determination and any other matters it considers relevant.

### **Recommendation 133**

The time limit for making a discrimination, harassment, vilification or victimisation complaint should be increased to 24 months.

### **Recommendation 134**

The Equal Opportunity Commissioner should have discretion to accept all or part of an out-of-time complaint where there is good reason to do so. The Act should specify that in determining whether to accept an out-of-time complaint, the Equal Opportunity Commissioner must take into account the following factors:

- The seriousness of the conduct alleged in the complaint;
- Whether the late acceptance of the complaint would unacceptably diminish the prospects of a fair determination; and
- Any other matters the Commissioner considers relevant.

#### **10.1.1.2 Standing to lodge a complaint**

The second issue concerning the filing of complaints relates to which individuals or bodies should be permitted to lodge a complaint with the EOC and to communicate with the EOC about that complaint.<sup>551</sup> This is separate from the issue of who is entitled to represent a complainant at conciliation proceedings, which is addressed in section 10.1.2.2 below.

The current Act is quite restrictive in this regard. It only permits a complaint to be lodged by:

- One or more persons on their own behalf;
- One or more persons on behalf of themselves and other persons;
- A trade union on behalf of one or more members who are aggrieved by the alleged contravention; or
- If the affected person has an impairment and is unable to write or sign their name, a person authorised to lodge the complaint, or a person who satisfies the Equal Opportunity Commissioner that they have a proper interest in the care and protection of the person.<sup>552</sup>

While representative complaints can be lodged by complainants on behalf of themselves and a class of affected people,<sup>553</sup> the Act does not permit representative bodies to lodge complaints on behalf of a particular individual or its members generally. The Act also does not permit complaints to be lodged by legal representatives or other agents.

By contrast, other jurisdictions have taken a broader approach to the people and organisations that can file complaints. For example, in addition to the people affected by the relevant conduct and their trade unions, some jurisdictions permit complaints to be made by parents or guardians,<sup>554</sup> agents<sup>555</sup>

<sup>551</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 191.

<sup>552</sup> *Equal Opportunity Act 1984* (WA) s 83.

<sup>553</sup> *Ibid* s 83(3).

<sup>554</sup> *Anti-Discrimination Act 1997* (NSW) s 87A(1)(b); *Equal Opportunity Act 2010* (Vic) s 113; *Human Rights Commission Act 2005* (ACT) ss 43(1)(c)-(e).

<sup>555</sup> *Human Rights Commission Act 2005* (ACT) s 43(1)(b).

and representative bodies.<sup>556</sup> While the definition of a ‘representative body’ varies between jurisdictions, it generally covers bodies who are considered to have a sufficient interest in the matter because it adversely affects, or has the potential to adversely affect, the interests of the body or the interests or welfare of the persons it represents.

In its submission, the EOC noted that while the Act currently allows people to lodge representative complaints, it is uncommon as it requires the complainant to shoulder the burden of attempting to resolve the complaint, often against large respondent organisations. It submitted that relevant representative organisations and advocates should be permitted to file complaints on behalf of their constituents. Further, they should be permitted to represent their constituents during the complaints process, subject to the Equal Opportunity Commissioner being satisfied that the organisation has a sufficient interest. The EOC noted there are many advocacy organisations that represent a diverse range of people with protected attributes, such as persons of a particular ethnic background, gender identity or with a particular disability. The EOC was also of the view that legal representatives and other agents should be permitted to lodge complaints, as should any other person who satisfies the Equal Opportunity Commissioner that they have a sufficient interest.

Stakeholders generally supported amending the Act to enable bodies representing disadvantaged groups to lodge complaints on behalf of those groups. It was submitted that representative actions can significantly assist the enforcement of discrimination law. It was also contended that permitting representative bodies to make a complaint would avoid the need for individuals to make their own individual complaint, reducing the risk of victimisation. There was, however, some concern that if representative bodies were permitted to lodge complaints, discrimination complaints may end up being run in a similar manner to class action suits.

Having considered these submissions, it is the Commission’s view that the current requirements for lodging a complaint are too restrictive. As noted above, the Commission believes that it is important to support and encourage people to make complaints about potentially unlawful behaviour. To achieve this aim, the Commission recommends that the Act allow anybody with a sufficient interest in a matter who has the consent of the complainant, to file a complaint on their behalf and communicate with the EOC about the matter. This includes legal representatives, agents, parents or guardians of child complainants and representative bodies. The question of whether that person or body should also be able to represent a complainant at a conciliation conference is addressed in section 10.1.2.2 below.

It is important to note that this recommendation relates to complaints that are made on behalf of a named individual. There, the third party is acting as a representative of the complainant. To ensure that they are properly authorised to do so, the Commission recommends that complainants ordinarily be required to provide written consent in a prescribed form. The only exceptions should be where a complaint is lodged on behalf of a child under the age of 12, or a person who does not have the capacity to consent or to convey their consent in the prescribed manner.

As the Commission believes it is important to be as inclusive as possible in this regard, it recommends that children should be able to lodge complaints either with or without assistance from their parents or guardians. The mere fact that a complaint can be lodged on their behalf should not preclude them from being able to do so personally where they have the capacity to do so.

The Commission agrees with stakeholders that allowing representative bodies to file complaints on behalf of its members or constituents would assist with the enforcement of discrimination law. There are many advocacy bodies around Western Australia that represent the interests of individuals with protected attributes. These bodies will often be the first port of call for an individual who has suffered

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<sup>556</sup> *Anti-Discrimination Act 1997* (NSW) s 87A(1)(c); *Equal Opportunity Act 2010* (Vic) s 114; *Anti-Discrimination Act 1991* (Qld) s 134.



discrimination, harassment, victimisation or vilification. It makes sense to allow such bodies to help complainants put together their complaint, file the complaint with the EOC and communicate with the EOC about that complaint. This is especially so given that many complainants are vulnerable or disadvantaged and may need assistance to navigate the complaints process. They may also have little prior experience with a formal complaint mechanism, or may face linguistic barriers and so would benefit from the help that can be provided by a representative body. There seems little reason to prevent such a body from providing that assistance.

In addition to being able to lodge complaints on behalf of named complainants, the Commission recommends that representative bodies with a sufficient interest in a matter be empowered to lodge complaints on behalf of the people it represents generally, without identifying a specific complainant. This type of complaint will be useful where the individuals involved fear, victimisation or are unwilling to personally pursue a complaint for other reasons. It will allow the representative body to seek redress for unlawful actions, thereby assisting with the enforcement of the law.

To help avoid the possibility that discrimination complaints may end up being run in a similar manner to class action suits, the Commission recommends that representative bodies should not be entitled to seek a monetary remedy where no specific complainant is involved in a matter. They should be limited to seeking systemic or structural remedies that will benefit the people they represent as a whole. In addition, representative bodies should only be able to file complaints where the relevant matter adversely affects, or has the potential to adversely affect, the interests of the body or the interests or welfare of the people it represents.

#### ***Recommendation 135***

The complaints procedure should be clarified to enable the following persons or bodies to lodge a complaint under the Act, and to communicate with the Equal Opportunity Commission about that complaint, on behalf of an affected person or persons:

- Legal representatives;
- Agents;
- Parents or guardians of child complainants;
- Representative bodies with a sufficient interest in the matter; or
- Anyone else the Equal Opportunity Commissioner considers has a sufficient interest in the matter.

#### ***Recommendation 136***

The Act should provide that a representative body has a sufficient interest in a matter if it adversely affects, or has the potential to adversely affect, the interests of the body or the interests or welfare of the persons it represents.



### **Recommendation 137**

Where a complaint is lodged on behalf of a person or persons, that person or persons should ordinarily be required to have provided written consent in a prescribed form. The only exceptions should be where the complaint is lodged on behalf of:

- A child complainant under the age of 12; or
- A complainant who does not have the capacity to consent.

### **Recommendation 138**

The fact that a parent or guardian can lodge a complaint on behalf of a child should not preclude children from being able to lodge complaints on their own behalf.

### **Recommendation 139**

Representative bodies with a sufficient interest in a matter should also be able to lodge a complaint about that matter on behalf of the people it represents, without identifying a specific complainant.

### **Recommendation 140**

Where a representative body makes a complaint without identifying a specific complainant, it should only be entitled to seek systemic or structural remedies that will benefit the people it represents as a whole. It should not be entitled to seek a monetary remedy.

#### **10.1.1.3 Complaints made under Commonwealth Legislation**

There is some overlap between Commonwealth anti-discrimination legislation (the DDA, RDA and SDA) and the Western Australian equal opportunity legislation. This means that if a person is discriminated against or harassed in relation to an attribute that is protected in both jurisdictions (for example, race) they may choose which laws to rely on when lodging a complaint. In the Discussion Paper, it was noted that under the current Act, a complainant may lodge a complaint even if they have already lodged one under a Commonwealth Act. The Commission asked whether the Act should be amended to prevent complainants from lodging complaints in different forums with respect to the same matter.

At the Commonwealth level, each of the anti-discrimination Acts contain provisions which prevent a complainant from lodging a complaint under the Commonwealth law if the complainant has already done so under a State or Territory law in relation to the same matter. The position taken by states and territories is not uniform. Some states and territories allow complaints to be terminated where they have been pursued in other fora,<sup>557</sup> but do not require this to occur. Some states expressly preserve the ability to make complaints in different forums. The NSW Act specifically states that 'A person is not prevented from making a complaint ... only because the person has made a complaint or taken

<sup>557</sup> *Anti-Discrimination Act 1997* (NSW) s92(1); *Anti-Discrimination Act 1991* (Qld) ss 140, 168A; *Anti-Discrimination Act 1998* (Tas) s 64.

proceedings in relation to the same facts in another jurisdiction, whether in New South Wales or elsewhere'.<sup>558</sup>

Numerous stakeholders commented on the complexity of the relationship between the State and Commonwealth jurisdictions and the confusion it causes for complainants. It was submitted that complainants often have difficulty deciding in which jurisdiction to pursue their claims. This issue is further exacerbated in situations where employees have discrimination-based claims available to them under workplace laws in addition to the Act and the AHRCA.

Some stakeholders supported amending the Act to prevent people from lodging complaints if they have already done so at the Commonwealth level. They argued that, by amending the Act in this way, it would be made clear to complainants that multiple claims cannot be made for the same conduct. In turn, it was contended that complainants would be encouraged to properly consider the claim they wish to make and to make an informed decision as to the most appropriate avenue in which to pursue it.

The EOC expressed in-principle support for preventing a complaint from being lodged where a complaint has already been made under a Commonwealth Act. However, it suggested that unless State and Commonwealth legislation is aligned, the relevant body should be required to ensure a complainant has made an informed decision about the jurisdiction before the complaint is accepted. The EOC noted that its current procedure is to treat all claims as an enquiry until it has conducted a preliminary assessment to determine the jurisdiction's appropriateness for the claim. If the federal jurisdiction may be more suitable, the EOC discusses options of jurisdiction with the complainant before accepting the matter as a complaint.<sup>559</sup>

Other stakeholders were concerned about the possibility that some people who cannot readily access legal advice may initially bring a claim in an undesirable forum. Upon receipt of legal advice, they may then wish to pursue an alternative option. It was submitted that so long as a final determination had not been made in the other forum, the Act should allow them to withdraw the initial complaint and instead pursue a complaint in the EOC.

In a similar vein, some stakeholders suggested that it would be inappropriate to exclude a complainant from relying on the EOC process where their Commonwealth complaint has been dismissed without dealing with the complaint's merits (for example, due to it being made out of time). To overcome this problem, it was suggested that complainants only be prevented from lodging a complaint if their other complaint has been dealt with, rather than made. As this may be difficult to determine, it was recommended that this be handled as a matter of dismissal rather than an exclusion from lodgement.

Having considered the submissions, it is the Commission's recommendation that complainants not be prevented from lodging complaints that have also been lodged in another jurisdiction. The Commission agrees with stakeholders that relationship between Commonwealth and State jurisdictions, and between various different pieces of anti-discrimination legislation, is complex. This complexity creates a significant risk that people will initially select an inappropriate forum in which to pursue their complaint. This is especially likely if they have not received adequate legal advice prior to lodging a complaint. The Commission is concerned that in circumstances where legislative positions across jurisdictions (including in relation to when complaints can and cannot be made) are not aligned, such that it remains difficult for complainants to anticipate whether their complaint might be more successful in one jurisdiction over another, prohibiting complaints would unnecessarily prejudice complainants and potentially result in very valid complaints being statute barred.

<sup>558</sup> *Anti-Discrimination Act 1997* (NSW) s 88B(1).

<sup>559</sup> Submission from EOC, 1 November 2021, 14.

It was also noted that although it is currently possible to file a complaint at the State and Commonwealth level, there is little risk of double dipping, as the SAT can take past compensation into account when determining compensation under the Act. This was seen to provide a disincentive to lodging multiple complaints, even if it is technically possible.

The Commission notes that any residual concerns about double dipping might best be dealt with by the conferral of a discretion on the EOC to dismiss a complaint in circumstances where it has been dealt with in another jurisdiction. The Commission further notes that the absence of a prohibition on complaints being made does not inhibit the operation of common law doctrines of issues estoppel and the like, to the extent they operate.

### **Recommendation 141**

Complainants should not be prevented from lodging complaints that have also been lodged in another jurisdiction.

## **10.1.2 Investigations, conciliations, dismissals and referrals**

Under the Act, the Equal Opportunity Commissioner must investigate each complaint that is lodged.<sup>560</sup> The Equal Opportunity Commissioner has the power to dismiss complaints in certain circumstances.<sup>561</sup> If a complaint is not dismissed, the Equal Opportunity Commissioner must endeavour to resolve it by conciliation.<sup>562</sup> If they are unable to do so, it must be referred to the SAT.<sup>563</sup> A complaint that has been dismissed may also be referred to the SAT.<sup>564</sup> This section addresses seven issues relating to this process:

- The investigation and conciliation process;
- Representation at conciliation conferences;
- The use of technology by the EOC;
- Written records of conciliation agreements;
- The dismissal of complaints;
- The referral of dismissed complaints to the SAT; and
- The enforcement of EOC directions.

Prior to addressing these issues, however, the Commission wishes to address a preliminary matter. Under the current Act, the EOC does not have the express power to require or permit the amendment of a complaint.<sup>565</sup> Nor is such a power conferred directly on complainants. In its submission, the EOC suggested that its powers should be expanded in this regard, referring to the NSW approach. Section 91C of the NSW Act states:

- If, at any time after a complaint is made and before the complaint is declined, terminated or otherwise resolved by the President, or referred to the Tribunal—

<sup>560</sup> *Equal Opportunity Act 1984* (WA) s 84

<sup>561</sup> *Ibid* s 89.

<sup>562</sup> *Ibid* s 91.

<sup>563</sup> *Ibid* s 93.

<sup>564</sup> *Ibid* s 90.

<sup>565</sup> The SAT may amend complaints, but only in relation to their representative nature: *Equal Opportunity Act 1984* (WA) s 116.

- the person making the complaint seeks to amend the complaint, or
  - the President becomes aware of information that could conveniently be dealt with as part of the complaint,
- the person making the complaint is to be offered the opportunity to amend the complaint.

While the Commission did not raise this issue in the Discussion Paper, and did not seek submissions on it, it sees little reason to deny complainants the opportunity to amend their complaints in these circumstances. This will ensure that the merits of the complaint are adequately dealt with in an efficient and transparent manner. Consequently, it recommends that a provision to this effect be included in the Act.

#### **Recommendation 142**

A complainant should be entitled to amend their complaint upon request before it is declined, dismissed, referred to the SAT or otherwise resolved. If the EOC becomes aware of information that could conveniently be dealt with as part of the complaint, it should be empowered to offer the complainant the opportunity to amend their complaint.

#### **10.1.2.1 The investigation and conciliation process**

Under the current Act, for the purpose of investigating or conciliating a complaint, the Equal opportunity Commissioner may require the complainant, respondent or anyone else who may have relevant information to attend a 'compulsory conference'.<sup>566</sup> The Equal Opportunity Commissioner may also require the complainant or respondent to attend a 'conciliation proceeding'.<sup>567</sup>

This bifurcated system of conciliation proceedings and compulsory conferences is unique in Australia. All other jurisdictions have a single dispute resolution process. In its 2007 Review, the EOC recommended that Western Australia also adopt a single system for attempting to resolve complaints by conciliation.<sup>568</sup> It reiterated its view in its submissions to the Commission, noting that the current system is 'somewhat confusing'.

The Commission agrees with the sentiment that confusion as to the complaint resolution process is best avoided, not least of all because it may act as a deterrent from engaging in the process and reduce a party's satisfaction with the complaints process, even in circumstances where a favourable outcome is ultimately obtained. The Commission recommends that rather than mandating a specific process for the resolution of complaints, the Act should empower the Equal Opportunity Commissioner to adopt a dispute resolution process that is tailored to the specific circumstances of the case.

The Commission considers that the complaints process should maximise incentive and opportunity for parties to resolve matters through informal means such as conciliation, and by consent wherever possible. However, it is apparent that parties will not always be minded to do so; there will be situations where resolution of a complaint by the parties' mutual agreement is a very unlikely outcome, whether because of the nature of the discrimination alleged, the power imbalance between the parties or some other reason altogether. In those circumstances, it is essential that the Equal Opportunity Commissioner retains the power to guide the complaints process through to a resolution.

<sup>566</sup> Ibid ss 87-88.

<sup>567</sup> Ibid s 91.

<sup>568</sup> Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report, May 2007) 178.

In addition, the Commission considers that the Equal Opportunity Commissioner should retain the power to compel the provision of information and documents, as well as to compel parties to attend at a conciliation conference to ensure that complaints can be resolved with the benefit of all relevant information and are not dependent on a party's willingness to volunteer information or submit to a process.

#### **Recommendation 143**

The Act should empower the Equal Opportunity Commissioner to tailor the dispute resolution process to the nature of the dispute.

#### **Recommendation 144**

The parties to a dispute should be permitted to resolve a complaint by consent on the papers, without having to attend a conciliation conference.

#### **Recommendation 145**

The Equal Opportunity Commissioner should retain the power to compel the provision of documents or information, orally or in writing, and to require attendance at a conciliation conference.

#### **10.1.2.2 Representation at conciliation conferences**

Under the current Act, a person may only be represented at a compulsory conference with the consent of the person presiding at the conference.<sup>569</sup> Similarly, they are only entitled to legal representation in conciliation proceedings with the Equal Opportunity Commissioner's leave.<sup>570</sup> However, they are entitled to representation by an agent, who is not permitted to receive fees for their representation.<sup>571</sup>

Other jurisdictions take various approaches to the issue of representation:

- In NSW, Queensland, Tasmania, the ACT and the Northern Territory, a person can only be represented with consent of the conciliating body.<sup>572</sup> In Tasmania, if a party is granted permission to be represented, the other party is also entitled to representation.<sup>573</sup>
- At the Commonwealth level, people also need consent to be represented. However, people with disabilities may nominate another person to attend the proceedings for them (if they are unable to do so), or to assist them with the proceedings (if they are unable to participate fully).<sup>574</sup>
- In South Australia, a party is not entitled to legal representation without permission. However, children can be supported by adults who, in the opinion of the Equal Opportunity Commissioner,

<sup>569</sup> *Equal Opportunity Act 1984* (WA) s 88(4).

<sup>570</sup> *Ibid* s 92.

<sup>571</sup> *Ibid*.

<sup>572</sup> *Anti-Discrimination Act 1997* (NSW) s 91B; *Anti-Discrimination Act 1991* (Qld) s 163; *Anti-Discrimination Act 1998* (Tas) s 75; *Human Rights Commission Act 2005* (ACT) s 57. While the Northern Territory Act is silent on this issue, the Northern Territory's Anti-Discrimination website states that permission is required to bring a lawyer or support person: Northern Territory Anti-Discrimination Commission *Complaints* <<https://adc.nt.gov.au/complaints/what-happens-next>>.

<sup>573</sup> *Anti-Discrimination Act 1998* (Tas) s 75.

<sup>574</sup> *Australian Human Rights Commission Act 1986* (Cth) s 46PK.

would be of assistance in that role.<sup>575</sup> The South Australian Act is otherwise silent in relation to non-legal representation.

- The Victorian Act is silent on the issue of representation, and the Victorian Equal Opportunity & Human Rights Commission permits people to bring legal representatives, advocates or other support people with them.<sup>576</sup>

In its 2007 Report on the Act, the EOC supported adopting the NSW approach to this issue, which would require the Equal Opportunity Commissioner's leave for any representation. It reiterated this view in the current inquiry.

The Commission did not explicitly seek views on this issue in the Discussion Paper and did not receive any other submissions on it. However, given the recommended changes to the standing rules, as well as to the dispute resolution process, the Commission is of the view that it is important to be clear about the right to representation.

Consistent with its views regarding the need to ensure that the complaints process can be tailored to best meet the participants' individual needs and the matters under consideration, the Commission considers that parties should only be represented in complaints processes where that representation is permitted by the Equal Opportunity Commissioner. Such an approach will ensure that proceedings do not become overly complex or legalistic, whilst still ensuring that representation can be permitted in circumstances where it is appropriate for that to occur in the interests of fairness. To ensure equality of access for all complainants, the Act should allow for representation of children by a parent or guardian as a matter of course. Further, a person who is unable to participate fully in a conciliation conference should be entitled to nominate a person to act on their behalf or to assist them as required.

#### **Recommendation 146**

Subject to the exceptions contained in Recommendations 147 and 148, complainants and respondents should not be permitted to be represented at conciliation conferences except by leave of the Equal Opportunity Commissioner.

#### **Recommendation 147**

A child under 12 should be entitled to be represented at a conciliation conference by their parents or guardians.

#### **Recommendation 148**

A person who is unable to attend a conciliation conference because of a disability should be entitled to nominate another person to attend on their behalf. A person who is unable to participate fully in a conciliation conference because of a disability should be entitled to nominate another person to assist them at the conference.

<sup>575</sup> *Equal Opportunity Act 1984* (SA) s 95(7).

<sup>576</sup> VEOHRC, *FAQs – Do I need a lawyer for advice or to represent me at conciliation?* <<https://www.humanrights.vic.gov.au/dispute-resolution/faqs/>>.

### 10.1.2.3 *Use of technology*

In the Discussion Paper, the Commission asked how the Act could best facilitate the just and efficient disposition of complaints using technology.<sup>577</sup> In response, several stakeholders highlighted the usefulness of technology, noting that it can offer various benefits such as enhancing accessibility for people living in remote areas, or whose access to written materials is hindered.

However, the importance of ensuring that technological measures are designed and implemented to enhance access to justice, and not as a way of cutting costs, was also emphasised. It was submitted that while the EOC faces particular challenges in ensuring services are available irrespective of their location, it is most often a lack of resources that prevent such bodies from fulfilling the full range of their functions. Stakeholders suggested that, in addition to utilising technology, there needs to be sufficient funds and staffing available to enable regular visits to regional and remote areas.

It was further submitted that in order to ensure that the use of technology enhances access to justice and the services of the EOC, provision needs to be made for the EOC to have available to it technology and communication experts who are skilled in ensuring that the access needs of people with disabilities are met. This would include ensuring that online materials comply with the government-agreed AA level of Web Content Accessibility Guidelines, as well as providing appropriate easy English materials and materials in community languages, including Auslan.

In addressing this issue, the EOC noted that it already conducts conciliation conferences by telephone or audio and/or video link and receives over 95% of documents electronically.<sup>578</sup> While it was not opposed to modifying the Act to expressly authorise the use of modern technology for conciliation conferences, the EOC questioned the need for this legislative change when there have been no issues raised by a complainant or respondent regarding the Commission's use of modern technology in its existing processes, as supported by the Act's provisions.

The Commission agrees with the EOC that there is no need for legislative change in this area. While it considers that the appropriate use of technology can be a useful tool for facilitating the just and efficient disposition of complaints, and advocates its continuing use and development, the Commission does not see a need for any legislative measures to be implemented to enable this to occur. As noted above, the EOC is already using technological means to achieve its objectives and is likely to continue doing so. In the Commission's view, the main barrier to the further implementation of technological solutions, such as ensuring the EOC has available to it experts who are skilled in ensuring that the access needs of people with disabilities are met, is one of resourcing rather than statutory empowerment. Consequently, the Commission does not make any recommendations in this regard.

### 10.1.2.4 *Written records of conciliation agreements*

Under the current Act, the EOC must endeavour to resolve by conciliation any complaints received. If they are unable to do so, the Act provides a mechanism for referring the complaint to the SAT.<sup>579</sup> The Act does not, however, contain any provisions relating to successful conciliations. By contrast, many other Australian jurisdictions establish a procedure for recording the agreement reached and for registering that agreement.

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<sup>577</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 192-3.

<sup>578</sup> Submission from EOC, 1 November 2021, 16.

<sup>579</sup> *Equal Opportunity Act 1984* (WA) s 93. This provision is discussed in section 10.1.2.6 below.



The nature of that procedure varies between jurisdictions:

- In the ACT and the Northern Territory, the Commissioner may make a record of the agreement, with the consent of the parties.<sup>580</sup> In the ACT the parties may agree to allow the Commission to use the information in the agreement for any purpose.<sup>581</sup>
- In NSW, a written record of the agreement must be made if a party requests it within 28 days. If an agreement is made and a party holds the view that another party has not complied with it, they may apply to the tribunal to have the agreement registered. If the tribunal is satisfied of non-compliance, the tribunal member must register any terms of the agreement that could have been the subject of an order. Those terms are then to be treated as an order of the tribunal and may be enforced accordingly.<sup>582</sup>
- In Victoria, a written record of the agreement must be made if a party requests it within 30 days. Any party may lodge that agreement with the tribunal for registration. The tribunal must register any parts of the agreement that are practicable to enforce or supervise compliance with. The registered parts of the agreement are taken to be orders of the tribunal and may be enforced accordingly.<sup>583</sup>
- In Queensland, a written record of the agreement must be made and filed with the tribunal. The agreement is then enforceable as if it were an order of the tribunal.<sup>584</sup>
- In Tasmania, a written record of the agreement must also be made. The Commission must hold the record on file, and the agreement is enforceable as if it were an order made by the tribunal.<sup>585</sup>

In its 2007 Review,<sup>586</sup> the EOC recommended adoption of the NSW approach to complaint handling. This included its approach to preparing written agreements and having them registered in the tribunal. It reiterated this view in its submissions to this inquiry. While the Commission did not specifically ask about this issue, another stakeholder also expressed support for allowing a party to a complaint to register any agreement reached in respect of that complaint in the SAT, so that the terms of the agreement are enforceable to the greatest extent possible.<sup>587</sup>

In the Commission's view, it would be appropriate to adopt an approach which is broadly similar to that in Queensland. That is, agreements are to be drawn up and registered as a matter of course and, upon registration with the SAT, become enforceable as a matter of law (to the extent that the terms reflect matters that could have been the subject of an order by the SAT). The Commission considers that such an approach provides certainty for parties to complaints and ensures that a party's right to enforce an outcome does not depend on the party independently triggering the writing up and registration of the agreement, which may not always be at the forefront of a complainant's mind. This approach also ensures a balance between enforceability and informality: the complaints process is sufficiently formal and enforceable to require appropriate investment from all parties, whilst maintaining a level of informality of proceedings so as to encourage conciliated outcomes. Such an approach provision will also ensure that complainants do not then need to go through another curial process to obtain a common law remedy for enforcing the agreement.

<sup>580</sup> *Human Rights Commission Act 2005* (ACT) s 62; *Anti-Discrimination Act 1992* (NT) s 81.

<sup>581</sup> *Human Rights Commission Act 2005* (ACT) s 63.

<sup>582</sup> *Anti-Discrimination Act 1997* (NSW) s 91A(5)-(9). The application must be made within 6 months of the date of the agreement.

<sup>583</sup> *Equal Opportunity Act 2010* (Vic) s 119.

<sup>584</sup> *Anti-Discrimination Act 1991* (Qld) s 164.

<sup>585</sup> *Anti-Discrimination Act 1998* (Tas) s 76.

<sup>586</sup> Equal Opportunity Commission, *Review of the Equal Opportunity Act 1984* (Report, May 2007).

<sup>587</sup> Submission from Circle Green Community Legal, 30 November 2021, 59.

### **Recommendation 149**

Where a complaint is resolved by conciliation, the Equal Opportunity Commissioner should be required to record the terms of the agreement and have the document signed by the complainant and the respondent. The Commissioner should be required to file the document with the SAT. To the extent that its terms reflect matters that could have been the subject of an order by the SAT, the agreement should be enforceable as if it were an order of the SAT.

#### **10.1.2.5 Dismissal of complaints**

Under section 89 of the Act, the Equal Opportunity Commissioner may dismiss a complaint at any stage of an investigation if they are satisfied that the complaint 'is frivolous, vexatious, misconceived, lacking in substance or relates to an act that is not unlawful by reason of a provision of this Act'. The Equal Opportunity Commissioner may also initiate a procedure to end the complaint process if a complaint is not being pursued or has been abandoned.<sup>588</sup> In the Discussion Paper the Commission asked whether the EOC's dismissal powers should be expanded.<sup>589</sup>

Other jurisdictions take various approaches to this issue. While they almost all allow a complaint to be dismissed if it is frivolous, vexatious, lacks substance or has been abandoned, some jurisdictions also allow complaints to be dismissed where:

- The matter raised by the complaint has been, or is being, dealt with in another forum;<sup>590</sup>
- The matter would be more appropriately dealt with in another forum;<sup>591</sup>
- The nature of the conduct alleged is such that no further action is warranted;<sup>592</sup>
- The complainant has unreasonably failed to cooperate in the investigation or conciliation of the matter (for example, by failing to provide documents upon request), or has failed to take reasonable steps to resolve the complaint;<sup>593</sup>
- The complainant has been given a reasonable explanation for the conduct, and the Equal Opportunity Commissioner is of the view that no further action is required;<sup>594</sup>
- There is no reasonable prospect of an order being made that is more favourable to the complainant than an offer refused by the complainant;<sup>595</sup>
- It is not in the public interest to take any further action;<sup>596</sup>

<sup>588</sup> *Equal Opportunity Act 1984* (WA) s 83A. While technically such complaints 'lapse' rather than being dismissed by the Commissioner, for the sake of simplicity this is treated as a ground of dismissal in this Final Report.

<sup>589</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 180-2.

<sup>590</sup> *Equal Opportunity Act 1984* (WA) s 78; *Australian Human Rights Commission Act 1986* (Cth) s 46H; *Anti-Discrimination Act 1997* (NSW) s 92; *Anti-Discrimination Act 1992* (NT) s 68; *Anti-Discrimination Act 1991* (Qld) s 168A; *Anti-Discrimination Act 1998* (Tas) s 64; *Equal Opportunity Act 2010* (Vic) s 116.

<sup>591</sup> *Australian Human Rights Commission Act 1986* (Cth) s 46H; *Anti-Discrimination Act 1997* (NSW) s 92; *Anti-Discrimination Act 1991* (Qld) s 168A; *Anti-Discrimination Act 1998* (Tas) s 64; *Equal Opportunity Act 2010* (Vic) s 116.

<sup>592</sup> *Anti-Discrimination Act 1997* (NSW) s 92.

<sup>593</sup> *Equal Opportunity Act 1984* (WA) s 78; *Anti-Discrimination Act 1997* (NSW) s 92; *Equal Opportunity Act 1984* (SA) s 95A.

<sup>594</sup> *Equal Opportunity Act 1984* (WA) s 78.

<sup>595</sup> *Equal Opportunity Act 1984* (SA) s 95A.

<sup>596</sup> *Anti-Discrimination Act 1997* (NSW) s 92

- The Equal Opportunity Commissioner is satisfied, for any reason, that no further action is warranted.<sup>597</sup>

There is no consensus between jurisdictions about whether the Equal Opportunity Commissioner's powers should be mandatory or discretionary. The legislation in most jurisdictions enables the Equal Opportunity Commissioner to dismiss complaints in relevant circumstances but does not require them to do so. However, in some jurisdictions the Equal Opportunity Commissioner must dismiss complaints which are frivolous, vexatious, dishonest or lacking in substance,<sup>598</sup> where the complainant has failed to take reasonable steps to resolve the complaint,<sup>599</sup> or where the matter has already been dealt with to their satisfaction.<sup>600</sup>

In its preliminary submission to this inquiry, the EOC suggested that its powers be expanded to allow it to dismiss a complaint if, in its opinion, a complainant refuses a reasonable settlement or refuses to settle based on unrealistic settlement expectations.<sup>601</sup> In its final submission, it reaffirmed its support for expanding its dismissal powers, referring to the NSW and South Australian Acts by way of example.<sup>602</sup> These Acts are, however, quite different in scope. The South Australian Act is much narrower than the NSW Act, only allowing the Commissioner to dismiss a complaint where:

- the complaint is frivolous, vexatious, misconceived or lacking in substance;
- the complainant has died, is unable to be contacted, or has evidenced a lack of interest in proceeding with the complaint;
- the complainant has unreasonably refused or failed to cooperate; or
- there is no reasonable prospect of an order being made by the Tribunal that is more favourable to the complainant than offers refused by the complainant in conciliation proceedings.<sup>603</sup>

By contrast, the NSW Act allows the President to dismiss a complaint if they are satisfied that:

- the complaint is frivolous, vexatious, misconceived or lacking in substance;
- the conduct alleged, if proven, would not disclose the contravention of a provision of this Act or the regulations;
- the nature of the conduct alleged is such that further action by the President in relation to the complaint is not warranted;
- another more appropriate remedy has been, is being, or should be, pursued in relation to the complaint;
- the subject-matter of the complaint has been, is being, or should be, dealt with by another person or body;
- the respondent has taken appropriate steps to remedy or redress the conduct complained of;
- it is not in the public interest to take any further action in respect of the complaint; or

<sup>597</sup> *Australian Human Rights Commission Act 1986* (Cth) Act s 46H; *Anti-Discrimination Act 1997* (NSW) s 92; *Anti-Discrimination Act 1992* (NT) s66E; *Equal Opportunity Act 2010* (Vic) s 116.

<sup>598</sup> *Human Rights Commission Act 2005* (ACT) s 78; *Australian Human Rights Commission Act 1986* (Cth) Act s 46H(1B); *Anti-Discrimination Act 1991* (Qld) ss 139, 168.

<sup>599</sup> *Human Rights Commission Act 2005* (ACT) s 78.

<sup>600</sup> *Ibid.*

<sup>601</sup> Submission from the EOC, 20 November 2020, 9.

<sup>602</sup> Submission from the EOC, 1 November 2021, 13.

<sup>603</sup> *Equal Opportunity Act 1984* (SA) s 95A.

- the President is satisfied that for any other reason no further action should be taken in respect of the complaint.<sup>604</sup>

Many stakeholders supported expanding the EOC's dismissal powers, also referring to the NSW and South Australian Acts. There was, however, some concern that adopting an extensive list of bases upon which a complaint can be dismissed may, in practice, impose a greater burden than is already imposed on individuals bringing complaints.

There was also support for adopting an approach which would enable the EOC to dismiss a complaint where it had been adequately dealt with by another body, or where the EOC held the opinion that the subject matter of the complaint may be more effectively or conveniently dealt with by a different authority. A few stakeholders also suggested that the EOC be required to dismiss complaints that are frivolous, vexatious, misconceived, lacking in substance or which relate to an act that is not unlawful by reason of a provision of the Act.

By contrast, there was some opposition to allowing the EOC to dismiss complaints where the complainant refuses a reasonable settlement sum or refuses to settle based on unrealistic settlement expectations. There were seen to be inherent difficulties with assessing whether a settlement sum is reasonable or not, or if a complainant's settlement expectations are unrealistic, especially if the compensation cap under the Act is removed. In addition, it was argued that the question of what is reasonable or unrealistic is a matter for determination by the SAT, not the EOC.

In the Commission's view, the Act should provide for the dismissal of complaints in a manner similar to that which currently operates in NSW. The Commission acknowledges stakeholders' concerns in relation to the potential that an extensive list of reasons to dismiss a complaint may act as a barrier to complaints or place too great a burden on individual complainants. However, the Commission considers that those risks can at least, in part, be mitigated by the dismissal power being discretionary, allowing the EOC to take into account the specific circumstances of the case. Whilst some stakeholders submitted that it should be mandatory for the EOC to dismiss complaints that are frivolous, vexatious, misconceived or lacking in substance, the Commission notes that it would be unlikely that the EOC would elect not to exercise its discretion to dismiss a complaint in those circumstances.

The Commission does not consider that it should be open to the EOC to dismiss a complaint on the basis that the complainant refuses a reasonable settlement sum or refuses to settle based on unrealistic settlement expectations. The Commission concurs with submissions that the question of what a person considers to be unrealistic or unreasonable will vary dramatically with individual circumstances and experiences and that such determinations are not appropriately made by the EOC in the context of a complaints process focused on conciliatory outcomes.

### **Recommendation 150**

The Equal Opportunity Commissioner should have discretion to dismiss a complaint where:

- The complaint is frivolous, vexatious, misconceived or lacking in substance;
- The matters raised by the complaint, if proven, would not disclose the contravention of a provision of the Act;
- The matters raised by the complaint have been adequately dealt with by another person or body;

<sup>604</sup> *Anti-Discrimination Act 1997 (NSW)* s 92.

- The complainant has commenced proceedings in a commission, court or tribunal in relation to the matters raised by the complaint, and that commission, court or tribunal may order remedies similar to those available under this Act;
- The nature of the matters raised by the complaint is such that no further action is warranted;
- The complainant has failed to comply with a requirement to provide information or documents to the Commissioner, or to attend a dispute resolution proceeding; or
- The Commissioner is satisfied that for any other reason no further action should be taken in respect of the complaint.

### **Recommendation 151**

The Equal Opportunity Commissioner should not be permitted to dismiss a complaint simply because, in the Commissioner's view:

- The matter would be more appropriately dealt with in another forum; or
- There is no reasonable prospect of an order being made by the SAT that is more favourable to the complainant than an offer refused by the complainant.

#### **10.1.2.6 Referral of dismissed complaints to the SAT**

Under the current Act, there are two provisions which enable the Equal Opportunity Commissioner to refer a matter to the SAT:

- Section 90 relates to complaints which have been dismissed due to being frivolous, vexatious, misconceived, lacking substance or not relating to an unlawful act. It allows a complainant to serve a notice on the Equal Opportunity Commissioner within 21 days of the dismissal, seeking referral of the complaint to the SAT. Where this occurs, the Equal Opportunity Commissioner must refer the matter.
- Section 93 relates to complaints which have not been dismissed. It requires the Equal Opportunity Commissioner to refer a matter to the SAT if they are of the opinion that it cannot be resolved by conciliation, if conciliation was unsuccessful, or if they are of the opinion that it should be referred to the SAT due to its nature.<sup>605</sup>

Unless the complainant does not want to proceed, the SAT is required to hold an inquiry into each complaint referred to it under either of these provisions.<sup>606</sup>

In the Discussion Paper, the Commission asked whether section 90 should be retained.<sup>607</sup> It was suggested that perhaps the EOC should be empowered to refuse a complainant's request for a referral, to ensure that the SAT does not have to consider unmeritorious, vexatious or frivolous complaints.

The Commission received a submission from the Deputy President of the SAT, which noted that in the past 10 years, 180 matters had been referred by the EOC under section 90. Ten of those matters remained active at the date the submission was written. Of the remaining 170 matters, only two were substantiated. All of the other matters were either dismissed, struck out, discontinued or withdrawn. It

<sup>605</sup> *Equal Opportunity Act 1984* (WA) s 89.

<sup>606</sup> *Ibid* s 107.

<sup>607</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 185.

was submitted that, having regard to the limited success of such referrals, consideration should be given to the significant time and costs that are expended in maintaining this option.<sup>608</sup>

Despite this concern, the EOC was opposed to being given the final say in the disposition of any complaint. It was of the view that complainants should continue to be able to have their matters referred to the SAT. However, it suggested that the SAT be given the power to refuse leave to hear complaints referred under section 90. This is the approach that is taken in NSW and under the AHRCA.<sup>609</sup> The EOC also suggested that it may be appropriate to allow for the referral of a complaint to the SAT where the Equal Opportunity Commissioner has declined to accept it due to being out of time, or where a valid ground or area of public life has not been disclosed to the EOC.<sup>610</sup> The SAT should also be able to refuse leave to hear such matters.

Stakeholders were divided on this issue. While some argued that section 90 of the Act should be repealed, others supported retaining the option of referring dismissed complaints to the SAT. In this regard, one stakeholder expressed concern that if this option was not retained, there was a risk that individuals would be prevented from pursuing a test case, which may suppress the evolution of case law.<sup>611</sup>

ADLEG recommended that the Act adopt a modified form of the Victorian process.<sup>612</sup> Under the Victorian Act the complainant can initially elect to make their complaint either to the VEOHRC or directly to the Victorian Civil and Administrative Tribunal (VCAT). Most complainants elect to go to the VEOHRC where they participate in a dispute resolution process. If the complaint is not resolved, complainants are then able to proceed to VCAT. ADLEG suggested that this model be adopted, subject to the following modifications:

- (1) That the EOC determine if a fulsome investigation is required and if so, undertake such an investigation;
- (2) That the EOC be given the power to compel production of information in the course of such an investigation; and
- (3) That the EOC be required to provide the product of any investigation to the SAT where a complainant applies to the SAT for hearing and determination.

The Commission notes that two distinct issues arise here: the importance of ensuring that complainants are given appropriate opportunity to have their complaints fully considered; and the need to manage the significant investment of time and resources which is currently required to sustain the current process for that to occur. The Commission considers that complainants should continue to be able to have matters referred to the SAT. In saying that, the Commission acknowledges that some changes to the current process may be necessary to mitigate the risk that significant time and resources are invested in a process which will not often lead to a different conclusion. To that end, the Commission supports the approach proposed by the EOC whereby the matter need only be heard with the SAT's leave. The SAT should have the power to refuse leave to hear a complaint in appropriate cases. In doing so, the Commission considers that it should be clear that the SAT may dispose of an application for leave on the papers where appropriate. The Commission notes that this approach brings the Act more into alignment with the position in other jurisdictions and will potentially manage some of the concerns that have been raised by the SAT.

<sup>608</sup> Submission from the Deputy President of the SAT, 28 October 2021, 1.

<sup>609</sup> *Anti-Discrimination Act 1997* (NSW) s 96(1); *Australian Human Rights Commission Act 1986* (Cth) s 46PO.

<sup>610</sup> Submission from the EOC, 1 November 2021, 14.

<sup>611</sup> Submission from Circle Green Community Legal, 30 November 2021, 61.

<sup>612</sup> Submission from ADLEG, 30 November 2021, 87.



The Commission further considers that these provisions should also extend to a refusal to accept a complaint on the basis that it is out of time.

### **Recommendation 152**

Where the Equal Opportunity Commissioner has:

- refused to accept lodgement of a complaint; or
- dismissed a complaint

the complainant should be entitled, within 21 days, to require the Commissioner to refer the matter to the SAT.

Where a complaint is referred to the SAT in this way, it should only be permitted to be heard with the leave of the SAT. The SAT should be entitled to determine applications for leave on the papers.

#### **10.1.2.7 Enforcement of EOC directions**

When investigating a complaint, the Equal Opportunity Commissioner may require the production of relevant documents or information.<sup>613</sup> It is an offence to fail to produce such documents or information without reasonable excuse,<sup>614</sup> or to knowingly provide false or misleading information.<sup>615</sup> It is also an offence to fail to attend a compulsory conference or conciliation proceeding without a reasonable excuse,<sup>616</sup> or to otherwise wilfully obstruct, hinder or resist the Equal Opportunity Commissioner, an officer of the Commissioner, the Director or an officer of the Director in the exercise or the performance of a function under the Act.<sup>617</sup> Breaches of these provisions must be prosecuted in the criminal courts. The penalty for a natural person is \$1,000 and for a body corporate is \$5,000.

Reliance on criminal processes to enforce requirements of the Act is not a unique approach to enforcement. It is broadly reflective of the position taken by, for example, the *Freedom of Information Act 1992* (WA), where the Information Commissioner has not dissimilar powers to compel the production of documents and attendance at conferences (albeit the freedom of information process concerns a very different subject matter than the Act).

In the Discussion Paper, the Commission asked whether the Act should be amended to empower the SAT to enforce the Commission's investigatory powers. This would avoid the need to rely on criminal proceedings to ensure that parties provide the information and documentation necessary to resolve a complaint or attend dispute resolution proceedings.

Many stakeholders, including the EOC, submitted that in addition to the existing criminal penalties (which should be retained), the SAT should be given the power to compel breaching parties to comply with their obligations. The current process, which relies on a prosecutorial body to file criminal charges, was seen to undermine the effectiveness of the EOC as an investigative body and to result in significant delays. It was suggested that this could cause additional stress to complainants, whose time and resources may be wasted through respondents' non-compliance. This may discourage complainants from pursuing their claims. It was considered preferable to provide the SAT with the power to intervene in a timely manner.

<sup>613</sup> *Equal Opportunity Act 1984* (WA) s 86.

<sup>614</sup> *Ibid* s 158

<sup>615</sup> *Ibid* s 159

<sup>616</sup> *Ibid* s 157.

<sup>617</sup> *Ibid* s 155.



By contrast, the Deputy President of the SAT opposed this expansion of the Tribunal's powers due to several practical difficulties. The Deputy President noted that under this proposal, a breach of the EOC's investigative obligations would be considered to be contempt, but that the SAT does not currently have any formal procedures in place for dealing with contempt proceedings.<sup>618</sup> In addition, the SAT does not have any formal rules of evidence in place for conducting a hearing in such matters. The SAT's statutory obligations are to act with as little formality as possible and without having to apply the rules of evidence. Finally, the general standard of proof applied in SAT matters differs from the criminal standard of proof that is required in contempt proceedings. It was the Deputy President's view that existing court-based contempt processes should be used, rather than requiring the SAT to deal with such breaches.<sup>619</sup>

The Commission notes that the model proposed in the EOC's submission is a fairly fundamental shift from the existing position. The Commission recognises that potential delays may arise where a recalcitrant party to a complaint must be dealt with through the criminal process (noting that such a process is punitive and would not in any case necessarily lead to the outcome that was sought in the first place – such as attendance at the conciliation conference). However, those risks must be balanced against the practicality of introducing a new regulatory regime: from a cost and resourcing perspective, as well as by reference to whether the new process is likely to secure more appropriate outcomes in a more timely manner and the frequency with which it will need to be invoked.

In this regard, the Commission notes that the SAT has raised concern that its processes are not well adapted to enforcing the EOC's directions for a range of reasons and that it does not currently have contempt processes in place which would enable these matters to be dealt with under existing processes.<sup>620</sup> Whilst that submission does not suggest that no process could ever be implemented, it does raise very relevant concerns about the extent to which an enforcement process completely reliant on the SAT is consistent with the underlying nature of the way in which the SAT conducts its proceedings, as well as the workability of the model proposed by the EOC.

The Commission notes that the approaches taken in both Tasmania and Queensland potentially strike an appropriate balance between the concerns raised by the EOC and the SAT.

Under the Tasmanian Act, section 97 empowers the making of a request for the production of specified information and documents relevant to the complaint. A person who fails to comply with such a request without reasonable excuse is liable to a criminal penalty. In addition, in the event that a person fails to comply with a requirement to produce documents, the Commissioner under that Act may report the matter to the Tribunal. After considering the report, the Tribunal may make an order requiring a person to provide the specified information or produce the specified documents. That order may be filed in the Supreme Court and is enforceable as if it were an order of the Supreme Court (such that the Supreme Court processes for contempt would apply).

A similar regime is used in Queensland, except that it does not include the interim step of the relevant tribunal needing to make an order.

The Commission has had regard to the concerns expressed by the SAT and also acknowledges the need for sufficient enforcement procedures to ensure effective achievement of the Act's purposes. Accordingly, the Commission recommends that the Act include an enforcement process beyond the current offence provisions such that a certificate by the Equal Opportunity Commissioner can be filed in an appropriate court, upon which the default may be dealt with as if it were a contempt of that court.

<sup>618</sup> Contempt proceedings are ordinarily dealt with by the Supreme Court of Western Australia.

<sup>619</sup> Submission from the Deputy President of the SAT, 28 October 2021, 4.

<sup>620</sup> Ibid 3.

The Commission understands that the existing criminal provisions in the Act are rarely utilised by way of commencement of legal proceedings. However, what is more difficult to ascertain is the extent to which those provisions might act as a deterrent, and encourage parties to refrain from conduct which would otherwise inhibit the complaints process. The current penalties provided for in the Act are arguably comparatively low when compared to not dissimilar provisions in other legislative regimes, including the *Freedom of Information Act 1992* (WA). This raises a question as to the extent to which that may then impact on the provisions' deterrent effect. Undoubtedly, penalties must be determined by reference to the legislative regime as a whole and the detriment that might be occasioned in any given case by a breach of a provision, such that no two legislative regimes are entirely comparable. However, the Commission recommends a review of the quantum of the penalties provided for in the Act to ensure that they continue to disincentivise breaches of the provisions.

There is one further issue that arises for consideration in the Commission's view. That issue is whether it might be appropriate to impose a cost consequence for non-compliance with a direction to attend a conciliation conference. This issue must be considered in light of the Commission's recommendations to enhance the Act's provisions for enforcement of orders and to review the penalty amounts to ensure breaches are disincentivised. A provision requiring a non-complying party to pay costs may well serve to further encourage compliance with the Act's procedural provisions and therefore support the effectiveness of the complaint processes. However, the Commission does not think such a provision is necessary on that basis alone. Such a provision would only be justifiable in the Commission's view if it was thought necessary to also compensate a party for their investment of time and resources. Whether or not that is necessary is something that may depend upon the specific circumstances of the matter. The Commission notes that it is contrary to the current costs approach implemented in the Act and recommended by the Commission in this Report. Accordingly, the Commission makes no recommendation for such a provision to be included. The Commission notes that this is an issue which may be appropriately considered after a period of time if the Commission's other recommendations in this section are adopted.

#### **Recommendation 153**

The Equal Opportunity Commissioner should be empowered to enforce a direction to provide information, produce documents or attend a dispute resolution proceeding by filing a copy of a certificate setting out the details of the act or omission that constitutes a failure to comply with the direction in a court of competent jurisdiction. Where a certificate is filed, the court should have jurisdiction as if the failure to comply with the direction was a contempt of that court.

#### **Recommendation 154**

The government should review the criminal penalty levels in Part X of the Act to ensure that they sufficiently disincentivise breaches of the Equal Opportunity Commissioner's directions.

## 10.2 Tribunal hearings

### 10.2.1 Provision of assistance by the Equal Opportunity Commission

Under the current Act, where a complaint is referred to the SAT under section 93 (see above), and the complainant requests assistance in the presentation of their case, the Equal Opportunity Commissioner is required to provide such assistance. The Equal Opportunity Commissioner may also, upon request, contribute towards the cost of witnesses and other expenses, if they consider it appropriate in the circumstances. They may make that contribution subject to such conditions as they think fit, including repayment.<sup>621</sup> The Discussion Paper sought views on whether the Equal Opportunity Commissioner's assistance function should be amended.<sup>622</sup>

Stakeholders were generally supportive of expanding the Equal Opportunity Commissioner's assistance functions. One stakeholder suggested that this could help highly vulnerable people, such as those from culturally and linguistically diverse backgrounds, or those who have experienced sexual harassment, including by assisting a person to initially make a complaint.<sup>623</sup> They observed that expanding the Equal Opportunity Commissioner's assistance powers could help to reduce barriers for vulnerable complainants who have difficulty with language and literacy. It could enable them to be best placed to advocate for themselves and access protections under the Act.

However, one stakeholder was concerned about the possible counterproductive effects of requiring the Equal Opportunity Commissioner to provide assistance to complainants.<sup>624</sup> It was suggested that a lack of resources may, in practice, lead the EOC to dismiss matters in order to avoid the financial costs. It was submitted that this may discourage complainants from pursuing complaints, which may negatively impact the aim of achieving greater equality. Another stakeholder argued there should be a limit on the assistance that can be provided to serial complainants, and that the Equal Opportunity Commissioner should be required to give equal assistance to complainants and respondents.

The EOC submitted that it should be given broad discretion to provide, refuse or discontinue assistance to a complainant. It suggested adopting a similar approach to section 95C of the South Australian Act, which states:

- (1) Subject to subsection (2), the Commissioner may, at the request of the complainant or respondent, provide representation for the complainant or respondent in proceedings before the Tribunal.
- (2) The Commissioner must apply available public funds judiciously taking into account—
  - (a) the capacity of the complainant or respondent to represent himself or herself or provide his or her own representation; and
  - (b) the nature and circumstances of the alleged contravention of this Act; and
  - (c) any other matter considered relevant by the Commissioner.
- (3) If the Commissioner provides representation to a complainant or respondent, the person representing the complainant or respondent—
  - (a) must disclose to the Commissioner information reasonably required by the Commissioner to determine whether the Commissioner should cease to provide representation; and
  - (b) may disclose to the Commissioner information that the person considers relevant to the question of whether the Commissioner should cease to provide representation,

<sup>621</sup> *Equal Opportunity Act 1984* (WA) s 93.

<sup>622</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 182-3.

<sup>623</sup> Submission from Circle Green Community Legal, 30 November 2021, 59.

<sup>624</sup> Submission from John Curtin Law Clinic, 19 October 2021, 14.

and the complainant or respondent will be taken to have waived any right or privilege that might prevent such disclosure.

The Commission notes that section 95C of the South Australian Act confers power on the Commissioner under that Act to assist both respondents and complainants, not solely complainants as is the position under the Act.

By contrast, ADLEG recommended the adoption of the Canadian approach. Under that approach, rather than providing assistance to complainants, the EOC would take the role of counsel assisting the SAT in all hearings. It was submitted this would ensure that the legal factors relevant to determining the issues in dispute and any interpretive considerations would be fully presented to the SAT without the need for legal representation.<sup>625</sup> It should be noted that under the current Act, the SAT already has the power to make arrangements with the Equal Opportunity Commissioner for an officer of the Commissioner to appear at an inquiry to assist the Tribunal. That officer will be subject to the control and direction of the SAT.<sup>626</sup> The Commission notes that the approach suggested by ADLEG is one which ensures that the role of the officer in the Tribunal proceedings is one that supports neither the complainant nor the respondent (noting that the Act does not currently provide for a respondent assistance function equivalent to the complainant assistance in section 93). The Commission considers that the ability for an officer of the Tribunal to perform this role is important and should be maintained. However, in the Commission's view, adopting that approach does not wholly dispose of the difficulties that may nonetheless be faced by complainants and respondents in properly resourcing and advocating with respect to complaints, which may also deter complainants from proceeding with a complaint.

Although concerns were expressed at expanding, or perhaps retaining, the EOC's current assistance function, the Commission notes that the Equal Opportunity Commissioner has, to date, had to manage the exercise of that discretion, and the performance of those obligations, within its existing resources. The inclusion of a provision obliging the Equal Opportunity Commissioner to only provide assistance judiciously and permitting the Commissioner to cease to provide representation where appropriate, may safeguard against the provision of assistance to complainants who have the financial and/or personal resources to competently present their case to the SAT. There is no suggestion that the Equal Opportunity Commissioner does otherwise at present. The addition of statutory criteria may, however, ensure that the Commissioner's resources can be more easily preserved for those most in need of assistance, such as those facing financial hardship or people from culturally and linguistically diverse backgrounds.

The question arises as to whether the Equal Opportunity Commissioner's assistance should be limited to complainants and not to respondents. Questions of resourcing aside, the Commission can see no reason in principle why the Equal Opportunity Commissioner's discretion to provide assistance ought not to extend to both parties. This is particularly so given the Commission recommends the introduction of specific statutory criteria against which decisions to provide assistance must be made (and against which requests for assistance ought ideally to be gauged). However, if the Commissioner decides to provide assistance to both parties in a matter, it should ensure that it takes appropriate steps to manage any potential conflict of interest or breach of confidence.

If statutory criteria for determining requests for assistance are to be created, it follows that the Equal Opportunity Commissioner needs to be in a position to obtain appropriate information for the purposes of making an assessment against those criteria, both initially and on an ongoing basis (should there be a change in circumstances). The Commission notes the complainant's financial circumstances are

<sup>625</sup> Submission from ADLEG, 30 November 2021, 85.

<sup>626</sup> *Equal Opportunity Act 1984* (WA) s 113.

already a relevant consideration under the Act for the purposes of determining whether financial assistance towards the cost of witnesses and other expenses is necessary and appropriate. It may well be that such information can be obtained informally without reference to statutory requirements, given that it is likely to be in the party's interests to provide it at the stage of requesting assistance. However, in view of its recommendations in this section, the Commission considers that it would be appropriate for the Act to both empower the Equal Opportunity Commissioner to request information of a certain kind, and in the event that a decision is made to provide assistance, for a party to remain under a continuing obligation to disclose information to the Equal Opportunity Commissioner where it is material to the considerations involved in deciding whether to provide assistance.

Where Equal Opportunity Commissioner is providing funding for the purposes of assisting a party with the costs of representation, a question arises as to the extent to which the party's representative should be required to provide information to the EOC where it is reasonably relevant to determining whether that assistance with representation should continue to be provided. The Commission acknowledges that an obligation of that nature (whether imposed on the individual who is a party to the complaint or the representative) raises complex issues of privilege. The Commission considers the need to ensure that limited resources are used judiciously necessitates such a provision. However, it acknowledges that such a provision needs to properly deal with the protections that will continue to apply to any disclosed material which is privileged, including the uses to which it may be put and the effect of the disclosure on the maintenance of privilege in other contexts. The Commission is of the view that the uses to which the material can be put should be strictly limited and privilege should be expressly maintained in all contexts, other than that for which the Equal Opportunity Commissioner is entitled to use the information.

### **Recommendation 155**

When requested, the Equal Opportunity Commissioner should be permitted, but not required, to assist the complainant or respondent in the presentation of their case before the SAT.

When determining whether to provide assistance, and what assistance to provide, the Commissioner should be required to apply available public funds judiciously, taking into account factors including:

- the capacity of the complainant or respondent to represent themselves or provide their own representation;
- the nature and circumstances of the alleged contravention of this Act; and
- any other matter considered relevant by the Commissioner, including the extent to which the complainant or respondent (as the case may be) provides information and assistance to demonstrate their need for assistance in proceeding with the complaint.

The Equal Opportunity Commissioner should be entitled to request information from a party to enable them to determine what assistance (if any) to provide. They should also be required to inform the Commissioner of any relevant change of circumstances.

If the Commissioner provides representation to a complainant or respondent, the person representing the complainant or respondent should be required to disclose to the Commissioner non-privileged information reasonably required by the Commissioner to determine whether the Commissioner should cease to provide representation. The representative should also be permitted to disclose to the Commissioner information that the person considers relevant to the question of whether the Commissioner should cease to provide representation, but the uses to which that information can be put must be strictly limited. In addition, privilege in the material should be expressly preserved in other contexts.

## **10.2.2 Amendment of complaints by the SAT**

Under the current Act, the SAT only has a very limited power to amend complaints: it can amend a non-representative complaint to make it a representative complaint and *vice versa*.<sup>627</sup> In its submission, the EOC suggested that the SAT's power to amend complaints be extended so that it may, on the application of a party to the complaint or on its own motion, amend the complaint.<sup>628</sup> In the EOC's submission this should be permitted at any stage in the proceedings. It should allow the complaint to be amended to include additional complaints and anything else that was not included in the complaint as investigated by the EOC. Any amendment may be made subject to such conditions as the SAT thinks fit.

The Commission agrees. It sees no reason for limiting the SAT's amendment power to representative complaints. The SAT should have the ability to modify a complaint in such a way as to ensure that the whole issue is adequately dealt with in one proceeding. This will help to ensure that complaints are resolved in a fair and timely manner.

<sup>627</sup> *Equal Opportunity Act 1984* (WA) s 116.

<sup>628</sup> This recommendation is based on *Anti-Discrimination Act 1997* (NSW) s 103.

### **Recommendation 156**

The SAT should be given broader powers to amend complaints. This should be permitted at any stage during proceedings, on the application of a party to the complaint or on the SAT's own motion. A complaint may be amended to include additional complaints and anything else that was not included in the complaint as investigated by the EOC. An amendment may be made subject to such conditions as the SAT thinks fit.

## **10.2.3 Remedies**

Under the Act, after holding an inquiry, if the SAT finds that the complaint has been substantiated, it may:

- (a) Order the respondent to pay to the complainant damages by way of compensation for any loss or damage suffered by reason of the respondent's conduct;
- (b) Make an order enjoining the respondent from continuing or repeating any conduct rendered unlawful by the Act;
- (c) Order the respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant;
- (d) Make an order declaring void in whole or in part and either ab initio or from such other time as is specified in the order any contract or agreement made in contravention of the Act; or
- (e) Decline to take any further action in the matter.<sup>629</sup>

Apart from in the case of representative proceedings or matters referred to the SAT by the Minister, compensation is capped at \$40,000.

This section addresses two issues related to the SAT's remedial powers: the compensation cap and the payment of interest on compensation amounts.

### **10.2.3.1 Compensation cap**

In the Discussion Paper, the Commission asked whether the \$40,000 compensation cap should be retained, increased or removed. While there was some divergence in the responses received, the majority of stakeholders, including the EOC, favoured replacement of the cap with a compensation regime commensurate with the range of options available to superior courts in civil awards of damages.

Several reasons were given in support of this position. It was submitted that the compensation cap has resulted in awards of damages that do not adequately reflect the harm suffered by the complainant. This is especially the case given that the \$40,000 upper limit is only awarded in the most egregious cases of discrimination. In most cases the compensation received is much lower. It was suggested that this may deter people from pursuing legitimate complaints, as the compensation received may not be worth the time and effort that needs to be invested.

It was noted that the compensation cap has not been updated since the commencement of the Act in 1985. It was submitted that the cap has thus failed to reflect changes in the Western Australian economy, wage growth, the cost of living and inflation. Stakeholders submitted that, had the

<sup>629</sup> *Equal Opportunity Act 1984 (WA)* s 127.



compensation cap been amended to reflect the rise in national inflation since 1985, compensation would now have a maximum cap of approximately \$140,000.

Stakeholders also observed there is a risk that the costs expended pursuing a complaint may be greater than the damages awarded. It was contended that this discourages people from making complaints, even in situations where the complainant is more concerned about the broader public good than their own personal needs. It was submitted that the cap puts pressure on individuals to settle their complaints because they may be out of pocket once they pay their legal costs. It was thus argued that having no limits on compensation may encourage greater participation in progressing complaints under the Act.

It was also submitted that the compensation cap has created a wide disparity between jurisdictions in the amounts of compensation awarded. Removing the cap would align Western Australia with most other Australian jurisdictions, which do not have any limits on compensation. This would ensure that a Western Australian complainant would be able to receive a similar quantum of relief to an equally placed complainant in the unlimited jurisdictions.

However, some stakeholders favoured retaining the compensation cap. It was submitted that removing the compensation cap may discourage respondents from addressing systemic discrimination, as it may become more cost effective to simply pay out awards. It was also suggested that any increase or removal of the cap may result in the Act becoming an avenue for vexatious claims by encouraging complainants to bring a complaint in the hope that compensation will be paid. This argument was disputed by numerous stakeholders, who argued that it is unlikely that removing the compensation cap would encourage unmeritorious complaints because compensation is only ordered for successful complaints and is based on the loss suffered by a complainant. The EOC also noted that complaints that have limited merit tend to be settled for less than the cost to the respondent of defending them which, in its experience, is significantly less than the current cap. Moreover, the ability of the SAT to award costs in appropriate cases tends to discourage complainants with unmeritorious complaints from proceeding beyond mediation. The EOC observed that where a respondent settles on a commercial basis, the complaint is usually arguable and generally not without merit.

In the Commission's view, the current cap, having been unchanged since 1985, cannot be said to reflect currently appropriate compensation for the effects of discriminatory conduct. Even on the basis of inflation alone, the cap clearly requires revision. The Commission notes that the current cap is unlikely to deter discriminatory behaviour and may deter the making of complaints where there is a (not insignificant) risk that the costs of running a complaint may exceed any award of damages. This is particularly so in a case where the value of the complaint proceeding is a matter of principle, rather than remedying particular damage.

The more vexed question that must be considered though is whether to retain a cap of some amount, or whether a cap should be abandoned in favour of a regime which is entirely commensurate with the range of options available to superior courts in civil awards of damages.

Compensation caps are not infrequently a feature of legislative complaint regimes including, for example, criminal injuries compensation schemes and privacy complaint regimes. It is difficult to find a unifying feature of those regimes which adequately explains the imposition of a cap or otherwise, save as to note that complainants will often suffer both economic and non-economic losses and damage in those circumstances. Even within the antidiscrimination context, the position on caps is inconsistent across jurisdictions. Whilst there is a cap in NSW, Western Australia and the Northern Territory, there is no cap in other jurisdictions.

The Commission considers that the current cap fails to reflect the contemporary value placed on a society free from discrimination. It supports the removal of the cap to enable the making of awards that

are commensurate with the range of options available to superior courts in civil awards of damages. The Commission notes this may raise concerns about the value of awards to be made, particularly in a circumstance where compensation may be paid for non-economic losses, including to compensate for pain and suffering or injured feelings. The Commission is concerned, however, that the imposition of a cap limits the flexibility of the Act to respond to shifting societal expectations and in some cases, does not enable the extent of even economic losses to be recovered.

In the event that the Commission's recommendation to remove the cap is not accepted, the Commission considers that the imposition of an appropriate cap, having regard to comparable regimes in other jurisdictions and the range of awards of damages made thereunder, can ensure that the protection of individuals from discrimination is not undervalued. It will also provide some certainty of consequence having regard to the breadth of the scope of the Act's obligations and the breadth of the Commission's recommendations with respect to the inclusion of additional protected attributes and the expansion of the areas of public life where those attributes will be protected.

### **Recommendation 157**

The \$40,000 compensation cap should be removed. The Commission recommends that the cap be dispensed with, but if it is to be retained, the cap needs to be increased to an amount which takes into account inflation, in addition to the increasing significance that has been accorded to protection from discrimination and the need to deter persons from engaging in discriminatory behaviour.

#### **10.2.3.2 Interest payments**

Under the current Act it is not clear whether the SAT can order the payment of interest on compensation amounts. In the Discussion Paper, the Commission asked whether the Act should be amended to clarify that this is permissible.<sup>630</sup>

All submissions received on this issue favoured clarifying the Act in this way. It was argued that the inclusion of such a provision would recognise the lost value of past payments, encourage parties to finalise their matters without delay and ensure that complainants are not further disadvantaged by the value of their damages diminishing as they pursue enforcement of the order. Awards of interest may also discourage respondents from delaying the process to gain a litigation advantage.

While it was acknowledged that the Act may already permit the SAT to order interest payments, it was considered to be beneficial to clarify this point by inserting an express provision to this end. This would also align the Act with the anti-discrimination legislation in other states and territories.

The Commission concurs and recommends that the Act be amended to clarify that an order may be made for the payment of interest on compensation amounts.

### **Recommendation 158**

The SAT should be expressly empowered to order the payment of interest on compensation amounts.

<sup>630</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 189.

#### 10.2.4 Costs

Under section 87(1) of the *State Administrative Tribunal Act 2004* (WA), parties ordinarily bear their own costs in a SAT proceeding. However, the SAT has the discretion to ‘make an order for the payment by a party of all or any of the costs of another party’.<sup>631</sup> In practice, the SAT rarely exercises this discretion.<sup>632</sup> In the Discussion Paper, the Commission asked whether the Act should be amended to provide the SAT with the power to order that costs follow the event in a broader range of circumstances.<sup>633</sup>

A number of stakeholders were concerned that amending the circumstances in which the SAT may order costs would create significant barriers to access to justice for vulnerable or disadvantaged individuals, or persons who cannot afford legal assistance. Due to the low-risk costs jurisdiction, complainants who lack monetary resources are not discouraged from bringing their claims and, accordingly, are not further entrenched by their disadvantage.

However, one stakeholder submitted that costs should be ordered to ensure that, where a complainant is successful, any award granted under the Act would properly compensate them, rather than just allowing that complainant to break even.<sup>634</sup> Another stakeholder submitted the following list of factors the SAT should consider when making a costs order, drawing upon section 109 of the *Victorian Civil and Administration Tribunal Act 1998* (Vic) and section 102 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld):<sup>635</sup>

- The manner in which the parties conducted the proceedings;
- Any failure to comply with an order or direction of the Tribunal without reasonable excuse or failure to comply with the SAT Act;
- Whether a party was responsible for prolonging unreasonably the time taken to complete the proceeding;
- The financial circumstances of the parties to the proceeding; and
- The relative strengths of the claims made by each of the parties, including whether a party made a claim that had no tenable basis in fact or law.

The Commission notes that some of the concerns raised by stakeholders with respect to costs will, to some degree, potentially be addressed by the Commission’s recommendation with respect to the compensation cap. In any case, the question of the SAT’s powers to order costs is a matter that needs to be determined by reference to the range of functions performed by the SAT. It involves considerations outside the scope of the Act, which is beyond the scope of this reference. Accordingly, the Commission makes no recommendation.

<sup>631</sup> *State Administrative Tribunal Act 2004* (WA) s 87(2).

<sup>632</sup> *Commission for Equal Opportunity v Alcoa of Australia Ltd* [2007] WASAT 317, [47].

<sup>633</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 187.

<sup>634</sup> Submission from Dominique Allen, 5 November 2021, 3.

<sup>635</sup> Submission from ADLEG, 30 November 2021, 88, citing *Victorian Civil and Administration Tribunal Act 1998* (Vic) s 109 and *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 102.

## 10.3 Management plans

### 10.3.1 Scope of management plans

The Discussion Paper sought submissions from stakeholders as to whether management plans are effective and whether the processes under the Act should be amended to make them more effective.<sup>636</sup>

Part IX of the Act contains provisions relating to equal opportunity in public employment. Within this Part, section 145(1) provides that an authority is required to prepare and implement an equal opportunity management plan in order to achieve the objects of Part IX. An authority is defined in section 138 of the Act to include the Western Australian Public Service and all State trading concerns, State instrumentalities, State agencies, or any public statutory body, corporate or unincorporate established by or under a law of the State. The term ‘authority’ therefore extends beyond just government departments to include bodies such as statutory authorities, government trading enterprises and universities.

The objects of Part IX are set out in section 140 of the Act and include the elimination of discrimination in employment on a number of bases (being essentially all of the existing protected attributes with the exclusion of breastfeeding) and to promote equal employment opportunity for all persons.

Pursuant to section 145(2) of the Act, the management plan must include provisions relating to, amongst other matters, the devising of policies and programmes and the review of personnel practices within the authority, with a view to the identification of any discriminatory practices.

The Commission notes that in August 2014, the Public Sector Commission published its *Review of Organisational Structures Under the Equal Opportunity Act 1984*.<sup>637</sup> The Review considered a range of issues, including the utility of management plans in circumstances where many (but certainly not all) of the bodies required to have a management plan under the Act, were also required to report annually on human resource management standards to the Public Sector Commissioner, such that there was a degree of overlap between the reporting obligations.

The Public Sector Commission ultimately recommended the abolition of the office of Director of Equal Opportunity in Public Employment in favour of that office’s functions being transferred to the Public Sector Commissioner and potentially streamlined with existing reporting obligations. The Public Sector Commission did not recommend that management plans be abolished. Rather, it was noted that further consultation with affected agencies would be required on the question of whether there should be any change to the scope and content of the responsibilities in Part IX of the Act once transferred to the Public Sector Commissioner. The Public Sector Commissioner also considered that an examination of the provisions of Part IX was required, with the objective of streamlining and rationalising the regime with the current regimes under the *Public Sector Management Act 1994* (WA) (PSMA). It was further noted that such an examination could consider: whether all public authorities should continue to be required to have a management plan for the purposes of the Act or whether a high-level policy statement may suffice in some instances; and whether there was continued benefit in prescribing what should go in those plans.

It is unclear to the Commission whether further examination or consultation was undertaken on those points, although the Commission notes that the Act’s provisions regarding management plans remain unchanged since the Public Sector Commission issued its report.

<sup>636</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 184.

<sup>637</sup> Public Sector Commission, *Review of Organisational Structures Under the Equal Opportunity Act 1984* (August 2014).

Generally, stakeholders were of the view that management plans have the potential to be successful but noted that amendments were needed to facilitate their success. The EOC submitted that equal opportunity management plans are limited by the competitive merit assessment requirements in the *Public Sector Commissioner's Instruction No. 2* which extend to positions that are externally advertised. This requirement impedes agencies from appointing candidates who meet selection criteria based on equity and diversity criteria. The EOC observed that:

the *Public Sector Management Act 1994* (WA)...at section 8(1)(a) places equity and merit on an equal footing. Section 8(3) provides that a proper assessment of merit does not require a competitive assessment of merit, yet also requires that assessment of merit must be carried out in accordance with the Public Sector Commissioner's Instructions.<sup>638</sup>

The EOC recommended that management plans should be re-evaluated in conjunction with a review of the merit assessment process under the PSMA. The Commission also notes the relevance of Recommendations 130-132 above in relation to the use of equal opportunity management plans under Part IX of the Act to demonstrate compliance with the positive duty to eliminate discrimination, harassment, victimisation and vilification (including in the context of access to government services and service provision).

The Community and Public Sector Union/The Civil Service Association of WA recommended all employers be required to produce an equal opportunity management plan with provision for 'employer associations or business councils' to lodge plans 'covering a number of similar enterprises...to assist small businesses to comply'.<sup>639</sup> Other submissions also noted the potential for these management plans to extend beyond the scope of authority in Part IX of the Act, so as to require private organisations to produce them.

It is the Commission's view, based on the submissions and in light of its related recommendations on the positive duty reporting obligations that are set out earlier in this Report, that the scope of management plans under the Act be reviewed, along with their intersection with the PSMA.

### **Recommendation 159**

The scope of management plans under the Act should be reviewed along with their intersection with the *Public Sector Management Act 1994* (WA).

## **10.3.2 Monitoring and auditing of management plans**

### **10.3.2.1 Responsibility for monitoring and auditing management plans**

Under section 145 of the Act, management plans must be prepared and submitted to the Director of Equal Opportunity in Public Employment. Authorities may amend their management plans from time to time. Although the Act does not specifically impose an obligation to report on the effectiveness of a management plan per se, it requires an authority to provide an annual report to the Director of Equal Opportunity in Public Employment which effectively addresses a number of matters. These include: the measures that the authority has put in place to achieve the objects of Part IX; the results achieved

<sup>638</sup> Submission from the EOC, 1 November 2021, 13.

<sup>639</sup> Submission from CPSU/CSAWA, 5 November 2021, 9.

by those measures; and the proposed activities and aims the authority has set for the following reporting year.

Pursuant to section 147 of the Act, if the Director of Equal Opportunity in Public Employment is dissatisfied with any matter relating to the preparation or implementation of a management plan, the Director may commence an investigation. Upon resolution of the investigation, the Director may make recommendations to the authority to whom the investigation relates and may also issue a report to the Minister, who may then direct the authority to amend its management plan.

The effectiveness of the current process for management plans was criticised by some stakeholders, consistent with the concerns raised in the Discussion Paper (which reflected preliminary submissions received by the Commission).<sup>640</sup> In particular, one stakeholder submitted that there is no efficient process for monitoring or auditing management plans, meaning that they are often not honoured.<sup>641</sup>

In terms of who should be responsible for monitoring and auditing management plans, stakeholders favoured amendments that would allow management plans to be registered with the EOC under the Act and for the EOC to monitor and support the enforcement of management plans.

It was apparent that stakeholders were concerned that the current processes lacked a degree of independence. This concern arose, at least in part, due to the role traditionally being performed by a person who is also a public service officer. The Commission notes that while the current Director performs a dual role (also holding a role in executive government), the Act does not require this. The position of Director itself remains a separate statutory office, the duties of which are to be performed in accordance with the requirements of the Act. Notwithstanding the Act's provision for structural independence, one stakeholder submitted that the Equal Opportunity Commissioner should monitor and evaluate management plans. This would better ensure independence than the current arrangement whereby the Director of Equal Opportunity in Public Employment is also an executive director at the WA Public Sector Commission.<sup>642</sup> It was also submitted that there should be penalties for breaches of plans, to ensure implementation.

In light of the submissions received and the relevance of Recommendations 130-132 in relation to the use of equal opportunity management plans to demonstrate compliance with the positive duty, the Commission considers the Director of Equal Opportunity in Public Employment should retain an advising and assisting role for authorities falling within the scope of sections 138 and 139 of the Act. However, the Commission considers there may be merit in transferring responsibility for the evaluation and auditing of equal opportunity management plans to the Equal Opportunity Commissioner. The EOC could, in turn, be empowered to take action for compliance failures in line with its expanded investigatory and enforcement powers. As identified in Recommendation 131, the Equal Opportunity Commissioner should be empowered to require other organisations (that are not authorities within the current scope of Part IX) to lodge an equal opportunity management plan, at the Equal Opportunity Commissioner's request. In light of these recommendations and their resourcing implications, the Commission considers that further consultation with the Equal Opportunity Commissioner and the Director of Equal Opportunity in Public Employment is advisable.

In the event that the Commission's recommendation is adopted, the Commission recommends that the Equal Opportunity Commissioner's new role in this context should be reviewed after a five-year period.

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<sup>640</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 183.

<sup>641</sup> Submission from Sussex Street Community Legal Service, 29 October 2021, 16.

<sup>642</sup> Submission from the State School Teachers' Union of WA, 29 October 2021, 7.



In the event that the Commission's recommendation in this regard is not adopted, then given the concerns raised by some stakeholders regarding the function's independence, there may be some value to considering ways in which the independence of the function and the importance of equal opportunity management plans might be reinforced.

#### **Recommendation 160**

The Equal Opportunity Commissioner should be responsible for evaluating and auditing equal opportunity management plans. The Commissioner should be provided with expanded investigatory and enforcement powers to assist them in this role. The Director of Equal Opportunity in Public Employment should retain an advising and assisting role.

#### **Recommendation 161**

The role of the Equal Opportunity Commissioner in relation to equal opportunity management plans should be reviewed after a five-year period.

#### **10.3.2.2 Appropriate location of Part IX of the Act**

The Discussion Paper also raised the question of whether Part IX of the Act should be moved into the PSMA.<sup>643</sup> This question was prompted by the EOC's preliminary submission, which noted that Part IX of the Act establishes the Director of Equal Opportunity in Public Employment and sets out the functions and powers of the Director. However, the Director is now located within the Public Sector Commission which is established under the PSMA.<sup>644</sup> As noted above, although the Director may perform dual roles, the position of Director itself remains an independent statutory office created under, and for the purposes of, the Act.

The EOC supported the removal of Part IX from the Act and its inclusion in the PSMA.<sup>645</sup> However, there was some support retaining Part IX in the Act in order to retain the capacity for independent scrutiny of equal opportunity in employment in the State public sector. The Commission notes that given its recommendations with respect to an expanded role for the Equal Opportunity Commissioner in relation to monitoring and enforcement of management plans, the removal of Part IX of the Act into the PSMA would pose some difficulty.

Acknowledging that the Commission did not receive a submission from the Director of Equal Opportunity in Public Employment and that further consultation with this office may be advisable, the Commission considers that Part IX should remain in the Act and it should be revised in line with Recommendations 159 -161.

<sup>643</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 184.

<sup>644</sup> Ibid; Preliminary submission from the EOC, 20 November 2020, 10.

<sup>645</sup> Submission from the EOC, 1 November 2021, 13-14.



### **Recommendation 162**

The matters contained in Part IX of the Act should remain in the Act. They should be revised in line with Recommendations 159-161.

## **10.4 Proactive monitoring and regulation**

### **10.4.1 Power of EOC to monitor and regulate compliance with anti-discrimination legislation**

The Discussion Paper asked whether the statutory framework should be changed to require the EOC to play a greater role in monitoring and regulating compliance with anti-discrimination legislation or in preventing discrimination.<sup>646</sup>

In this regard, the Commission notes that the ACT Human Rights Commission may consider a matter by a 'commission-initiated consideration', including where a complaint has been withdrawn but the Commission considers it is in the public interest to consider it.<sup>647</sup> The Victorian Equal Opportunity and Human Rights Commission also has broad scope to initiate an investigation. Section 127 of the Victorian Act provides that:

The Commission may conduct an investigation into any matter relating to the operation of this Act if—

- (a) the matter—
  - (i) raises an issue that is serious in nature; and
  - (ii) relates to a class or group of persons; and
  - (iii) cannot reasonably be expected to be resolved by dispute resolution or by making an application to the Tribunal under section 122; and
- (b) there are reasonable grounds to suspect that one or more contraventions of this Act have occurred; and
- (c) the investigation would advance the objectives of this Act.

#### **Example**

An organisation has a policy that indirectly discriminates against persons with a particular attribute. The Commission has received several calls complaining about this policy and the policy has received media attention. Although some claims that the policy is discriminatory have been settled on an individual basis, the policy has not been changed. The Commission may decide that, in these circumstances, an investigation could help identify and eliminate a systemic cause of discrimination.

The Victorian Commission also has extensive powers in relation to the conduct of investigations.<sup>648</sup> Section 139 of the Victorian Act grants broad powers at the conclusion of the investigation as follows:

#### **Outcome of an investigation**

- (1) After conducting an investigation, the Commission may take any action it thinks fit.
- (2) Without limiting subsection (1), the Commission may—
  - (a) take no further action;
  - (b) enter into an agreement with a person about action required to comply with this Act;

<sup>646</sup> Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 185.

<sup>647</sup> *Human Rights Commission Act 2005* (ACT) s 48.

<sup>648</sup> See *Equal Opportunity Act 2010* (Vic) ss 139-144.

- (c) refer a matter to the Tribunal;
- (d) make a report with respect to the matter to the Attorney-General;
- (e) make a report with respect to the matter to the Parliament.

There was support among stakeholders for expanding the Equal Opportunity Commissioner's powers to proactively investigate complaints on the Commissioner's own initiative, and to commence proceedings on behalf of complainants, similar to the powers held by the Fair Work Ombudsman. Submissions suggested that empowering the Equal Opportunity Commissioner to proactively investigate complaints may assist in alleviating the burden on complainants to commence and progress complaints on their own. Stakeholders submitted that this approach may have the effect of greatly assisting those individuals who may lack the confidence and resources to make a complaint, such as people with disabilities. It was also submitted that this is necessary for the Commissioner to be able to enforce a positive duty to eliminate discrimination, harassment and vilification under the Act, which is discussed in more detail above in Chapter 9.

It was submitted that the Equal Opportunity Commissioner's powers of investigation should be extended to investigating whether organisations have committed unlawful acts, consistent with the role of the Equality and Human Rights Commission (UK) (EHRC) in the United Kingdom, as well as to proactively audit public sector agencies and private organisations with an educative focus.

There was support from stakeholders for the expansion of the EOC's regulatory powers, with one stakeholder submitting the EOC needs greater proactive compliance powers to best achieve its functions. More generally, stakeholders supported the EOC playing a greater role in monitoring and dealing with non-compliance, as well as supporting duty holders to avoid discrimination. Stakeholders called for the EOC's focus to shift from providing a forum for dispute resolution to more active participation in monitoring and regulating compliance with the Act.

The Commission agrees with these submissions. It considers a greater role for the EOC in monitoring and regulating compliance with anti-discrimination legislation is necessary. Such a role would support other recommendations by the Commission, including in relation to a responsibility to make reasonable adjustments and a positive duty to prevent discrimination, harassment and victimisation. A more expansive role for the EOC in this regard will help to proactively pursue the Act's protections and allow the EOC to work toward better achieving the objects of the Act, including substantive equality.

### ***Recommendation 163***

The EOC should be empowered to investigate matters within the scope of the Act on its own motion, including in circumstances where a complaint has been withdrawn and where it considers it would be in the public interest. It should have broad powers to take action at the conclusion of an investigation.

## **10.4.2 Conflict of interest**

A further issue that was drawn to the Commission's attention was the potential problems arising from the conferral of greater regulatory powers on the EOC, alongside its dispute resolution powers, including whether this might, in some instances, result in a conflict of interest. The Commission did not receive extensive submissions on this issue and is unable to comment further without additional consultation. However, it observes that the division of EOC functions between the 'Office of the

Commissioner' and 'Commission Services'<sup>649</sup> may provide an institutional mechanism to constrain potential conflicts.

### 10.4.3 Funding

While funding considerations are outside the scope of this review, some stakeholders raised concerns regarding the impact of a lack of funding on the performance of functions by the EOC. It was submitted that, despite the Equal Opportunity Commissioner having power to investigate the subject matter of complaints made to it, its capacity to undertake an investigation (that goes beyond an exchange of correspondence) is limited by resourcing. It was submitted that in some, but not all circumstances, this an exchange of correspondence will be sufficient to reach a resolution. Stakeholders also noted the impact of a lack of funding may contribute to the risk of underutilisation of any expanded powers and functions, should the EOC not be properly resourced to perform these functions. The Commission notes that the recommendations made above, both with respect to management plans and in relation to proactive monitoring and regulation, potentially present significant funding implications. Those funding impacts are matters which must be considered by the government of the day and it may be that they prove inhibitive to implementing some of the Commission's recommendations.

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<sup>649</sup> Equal Opportunity Commission of Western Australia, *Annual Report 2020-21*, <<https://www.wa.gov.au/system/files/2021-11/Equal%20Opportunity%20Commission%20Annual%20Report%20-%202020%20-%202021.2.pdf>>.

## 11. CONCLUSION

The Commission has made a considerable number of recommendations for changes to the way in which the existing Act works. Those recommendations are, in the Commission's view, reflective of the significant shift in community expectations in relation to equality and freedom from discrimination which have evolved in the many years since the Act came into operation. The Act serves an important role in ensuring that people are protected from discrimination and needs to reflect contemporary views and expectations.

As discussed earlier, the Commission received a considerable number of submissions in relation to this reference, and several stakeholders took the opportunity to attend a public consultation session to express their views. Clearly, there is considerable community interest and investment in the Act and the objects which it serves. It is equally clear that amongst stakeholders there is no single, universal view on what constitutes equality and how equality might best be achieved in a society comprised of individuals with different values, beliefs, histories and experiences. That being the case, what is ultimately required in many instances, is a balancing of competing rights and interests in an effort to find a position which is fair in all the circumstances. The Commission's recommendations set out in this Report aim to do just that: strike a balance between often competing rights and interests to ultimately achieve a result which will help facilitate equality.

Any balancing exercise is inherently difficult, and this reference is no exception to that. In some cases, the different viewpoints of individuals (or groups of individuals) are not capable of being reconciled without compromise. The Commission acknowledges that in attempting to strike a balance, there are some individuals and groups who will feel that their rights and interests have been compromised. Others will consider that the balance struck does not reflect the value which they ascribe to their rights and interests. The Commission has nonetheless made its recommendations in an effort to ensure that the Act can continue to best serve the purposes for which it was enacted.

When the Act commenced, its long title provided that it was:

An Act to promote equality of opportunity in Western Australia and to provide remedies in respect of discrimination on the grounds of sex, marital status, pregnancy, race, religious or political conviction, or involving sexual harassment.

The core purposes of the Act articulated in that long title remain equally relevant today, as they were at the time of the Act's commencement: to promote equality of opportunity in Western Australia and to provide remedies in respect of discrimination. What has changed are the community's views as to the range of bases upon which discrimination occurs and the range of responses that might be taken to best promote equality of opportunity and eliminate discrimination, including the systemic causes of discrimination.

The Commission once again thanks the many members of the public and organisations who took the time to engage in this important process of law reform.

## APPENDIX A: LIST OF DEFINED TERMS

<b>2007 Review</b>	Equal Opportunity Commission (WA), <i>Review of the Equal Opportunity Act 1984</i> (Report, May 2007)
<b>Act</b>	<i>Equal Opportunity Act 1984</i> (WA)
<b>ACT Act</b>	<i>Discrimination Act 1991</i> (ACT)
<b>AHRCA</b>	<i>Australian Human Rights Commission Act 1986</i> (Cth)
<b>ACT HRC</b>	ACT Human Rights Commission
<b>ADA</b>	<i>Age Discrimination Act 2004</i> (Cth)
<b>ADA (Tas)</b>	<i>Anti-Discrimination Act 1998</i> (Tas)
<b>ADLEG</b>	Australian Discrimination Law Experts Group
<b>AHRC</b>	Australian Human Rights Commission
<b>CEDAW</b>	Convention on the Elimination of all forms of Discrimination against Women
<b>CERD</b>	International Convention on the Elimination of all forms of Racial Discrimination
<b>Commission</b>	Law Reform Commission of Western Australia
<b>Commissioner</b>	Equal Opportunity Commissioner (WA)
<b>CRPD</b>	United Nations Convention on the Rights of Persons with Disabilities
<b>DDA</b>	<i>Disability Discrimination Act 1992</i> (Cth)
<b>Declaration on Religion</b>	Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief
<b>Discussion Paper</b>	The Commission's 'Review of the <i>Equal Opportunity Act 1984</i> (WA) Project 111 Discussion Paper' dated August 2021
<b>EHRC</b>	Equality and Human Rights Commission (UK)
<b>EOC</b>	Equal Opportunity Commission of Western Australia
<b>Equal Opportunity Commissioner</b>	Western Australian Equal Opportunity Commissioner
<b>FW Act</b>	<i>Fair Work Act 2009</i> (Cth)

<b>Gender Reassignment Act</b>	<i>Gender Reassignment Act 2000 (WA)</i>
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>Inquiry into Anti-vilification Protections</b>	Victorian Government, Legislative Assembly Legal and Social Issues Committee Inquiry into Anti-vilification Protections, 2021
<b>IR Act</b>	<i>Industrial Relations Act 1979 (WA)</i>
<b>LGBTIQA+</b>	Lesbian, gay, bisexual, transgender, intersex, queer, asexual and other diverse sexual orientations and gender identities
<b>LRAC</b>	The ACT Law Reform Advisory Council
<b>Northern Territory Act</b>	<i>Anti-Discrimination Act 1992 (NT)</i>
<b>NSW Act</b>	<i>Anti-Discrimination Act 1977 (NSW)</i>
<b>Queensland Act</b>	<i>Anti-Discrimination Act 1991 (Qld)</i>
<b>RDA</b>	<i>Racial Discrimination Act 1975 (Cth)</i>
<b>SAT</b>	State Administrative Tribunal
<b>SCA</b>	<i>Spent Convictions Act 1988 (WA)</i>
<b>SDA</b>	<i>Sex Discrimination Act 1984 (Cth)</i>
<b>South Australian Act</b>	<i>Equal Opportunity Act 1984 (SA)</i>
<b>Tasmanian Act</b>	<i>Anti-Discrimination Act 1998 (Tas)</i>
<b>Terms of Reference</b>	The Terms of Reference set by the Attorney-General for Western Australia in order to set the scope for this project
<b>UNDHR</b>	United Nations <i>Universal Declaration of Human Rights</i>
<b>VCAT</b>	Victorian Civil and Administrative Tribunal
<b>VEOHRC</b>	Victorian Equal Opportunity and Human Rights Commission
<b>Victorian Act</b>	<i>Equal Opportunity Act 2010 (Vic)</i>
<b>Victorian Religious Exceptions Act</b>	<i>Equal Opportunity (Religious Exceptions) Amendment Act 2021 (Vic)</i>



THE LAW REFORM COMMISSION  
*of*  
WESTERN AUSTRALIA

Level 23, David Malcolm Justice Centre  
28 Barrack Street  
PERTH WA 6000  
Australia

Telephone: + 61 8 9264 1600