The Law Society of Western Australia
The voice of the legal profession in Western Australia

28 October 2021

The Honourable Lindy Jenkins
Chair
Law Reform Commission of Western Australia
GPO Box F317
PERTH WA 6841

By email: equalopportunityreview@justice.wa.gov.au

Dear Commissioner Jenkins

PROJECT 111 – REVIEW OF THE EQUAL OPPORTUNITY ACT

Thank you for the opportunity to contribute to this important and timely project of the Law Reform Commission to review Western Australia's *Equal Opportunity Act 1984.*

I enclose a submission responding to those questions of general interest to the legal profession, professional associations and the operation of the legislation posed in the Discussion Paper.

If you have any queries please contact Mary Woodford, General Manager Advocacy and Professional Development on 9324 8646 or mwoodford@lawsocietywa.asn.au.

I look forward to reading the final report of the Law Reform Commission.

Yours sincerely

Jocelyne Boujos
President

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Review of the *Equal Opportunity Act 1984* (WA)

Prepared for:
Law Reform Commission of Western Australia

Prepared by:
Law Society Equal Opportunity Working Group

Date
Wednesday, 27 October 2021

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Introduction

The Law Society of Western Australia (the Law Society) is the peak professional association for lawyers in Western Australia. Established in 1927, the Law Society is a not-for-profit association dedicated to the representation of its members and the enhancement of the legal profession through being a respected leader and advocate on law reform, access to justice and the rule of law.

This submission is made in response to the Law Reform Commission's invitation for written submissions on *Project 111 – Review of the Equal Opportunity Act 1984* (the Discussion Paper).

The Submission addresses particular questions in the Discussion Paper which are of interest to the Law Society. Our Submission does not purport to answer every question.

Terms and Abbreviations used in this Submission

- The Act means the *Equal Opportunity Act 1984* (WA)
- EOC means the Equal Opportunity Commission
- The Victorian Act means Equal Opportunity Act 2010 (Vic)
- SAT means the State Administrative Tribunal
- VCAT means the Victorian Civil and Administrative Tribunal
- SDA means the *Sex Discrimination Act 1984* (Cth)
- RDA means *Racial Discrimination Act 1975* (Cth)

Responses to consultation questions

Definitions

Should the definition of impairment be broadened in the Act and, if so, how?

This Law Society does not take a view on this question however consideration should be given to whether broadening the definition will then capture addictions – as this may lead to complexities or

unintended consequences, e.g. a drug or alcohol addiction in the context of a zero tolerance workplace drug and alcohol policy.

Should the definition of 'services' in the Act be extended to expressly include statutory functions that a State government agency is bound to carry out, or activities of a coercive nature?

Yes, this should be expressly provided for, to avoid any doubt occasioned by the High Court authority in *IW v City of Perth*. [1] Although this decision was in the context of a local government planning application, the legislation should make it clear that corrective services and the police are captured under the definition of 'services'.

Grounds

Should physical features be included as a Ground?

No. As noted in the Discussion Paper, inclusion of physical features as a ground will require both an exhaustive and extensive definition and specific exceptions to be included to allow discrimination in those circumstances. Currently, the physical features of facial hair, the styling, colour and location of hair, and tattoos (all held by VCAT to be captured by the definition of "physical features") are already captured in the grounds of race and religion, if the feature is a characteristic of that race or religion. It is also unclear how this would interact with the recent *Criminal Law (Unlawful Consorting and Prohibited Insignia) Bill 2021* which requires gang tattoos to be covered up.

Should industrial / trade union activity / employment activity be included as a Ground, or are those protections adequately covered by industrial laws?

No, this is adequately covered by industrial laws.

Should employment status be included as a Ground?

No. It seems a little circular to say that you can't discriminate on the ground of employment status, except in employment. Also, further consideration would be required to consider whether there may be circumstances where it is reasonable to discriminate based on employment status, e.g., where the discrimination is based on a person's income in circumstances where casual and temporary employment is more likely accompanied by lower income than other employment statuses.

Should irrelevant criminal record be included as a Ground? Should irrelevant medical record be included as a Ground?

Yes. Both grounds are limited by the word "irrelevant" such that it would not be discriminatory for an employer to refuse to offer a candidate with a relevant criminal/medical record preventing them from fulfilling the selection criteria/inherent requirements of the job but would be discriminatory to refuse to offer a candidate with a criminal / medical record because of a perception about propensity.

Should social origin or profession, trade, occupation or calling be included as a Ground?

Yes, but only social origin, which is also a protected attribute under s.351 of the *Fair Work Act 2009* (Cth).

Should the protections for relatives / associates be extended to relatives / associates of people who have or are assumed to have any protected attribute under the Act?

Yes, if as the Discussion Paper suggests "there is no clearly apparent sound policy reason to limit the protections".

[1] [1997] HCA 30; 191 CLR 1

Should accommodation status be included as a Ground? If so, what exceptions might be reasonable?

This seems to require the same considerations as the question on employment status.

Should protection in the area of sports be extended to further Grounds?

Yes. The Law Society supports the extension of protection in the area of sports to further Grounds, in particular, the grounds of religious or political conviction. This would be broadly consistent with the approach adopted by State and Territory anti-discrimination and equal opportunity legislation in Australia.

Should immigration status be included as a Ground?

Immigration Status should be included as a Ground for the avoidance of doubt as to whether the Race Ground covers the field.

The Ground should be consistent with industrial relations/employment law legislation (right to work etc).

If an exception is included, a general 'reasonableness' exception is appropriate.

Should subjection to domestic or family violence be included as a Ground?

The Law Society acknowledges the importance of financial independence to break the cycle of domestic and family violence. The Law Society supports a new Ground to protect against discrimination on the basis of subjection to domestic or family violence, where there is a potential or actual impact on ability to work or secure employment, or an education (noting the existing protections for accommodation in the *Residential Tenancies Act 1987* (WA).

Should coverage of family responsibility and family status be extended to all areas under the Act?

The Law Society supports an expansion of the Ground to all areas of the Act. This is most relevant for employment and industrial relations settings and provisions must apply equally for males and females.

Should the protections from racial harassment be extended to all areas under the Act? If not, should certain areas remain untouched by the protections?

Protections from racial harassment should extend to all areas under the Act. Circumstances where racial harassment occurs are not limited the employment, education and accommodation arenas. If there are protections from discrimination on the grounds of race in all areas, it seems incongruous for racial harassment protections to be restricted.

Should the meaning of direct discrimination in the Act be amended to remove the comparator test and, if so, what test should be inserted into the Act?

Yes. The comparator test arises from the current definition of direct discrimination requiring treating "the aggrieved person less favourably", and the Discussion Paper suggests that the ACT, NT, Tasmanian and Victorian Acts looks solely at "unfavourable treatment" which is simpler in application.

Should the protections in the Act be expanded beyond the currently defined gender reassigned persons (for example, persons identifying as another sex)? Should there be exceptions? What other legislation is relevant to this provision?

Yes. The Law Society supports more inclusive protection in respect of gender identity. It is not of the view that the restriction should be restricted to 'gender reassigned persons' and 'gender history'. This is because it either does not, or at least does not clearly, capture people who identify as intersex or transgender or another gender. The Law Society therefore submits that the definition of 'gender identity' be broadened to protect gender identity irrespective of a person's gender at birth.

Should the protections for pregnancy be broadened in the Act to potential pregnancy and/or child-bearing capacity?

Yes. The Law Society supports the protections for pregnancy to be broadened to 'potential pregnancy'. This is on the understanding that 'potential pregnancy' is defined as it is in the Australian Capital Territory Equal Opportunity Act, namely that it includes a 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.

Sexual Harassment

Should the definition of sexual harassment remove the requirement that it results, or the harassed person reasonably believes that it will result, in disadvantage and, if so, should a new requirement be introduced?

The Law Society considers that the disadvantage requirement is one of the more problematic sections in the Act which is preventing legitimate claims being brought. The Law Society submits that the sexual harassment definition should be consistent with that found in section 28A of the SDA.

Should the protections from sexual harassment be extended to all areas under the Act? If not, should certain areas remain untouched by the protections?

Sexual Harassment should be extended to all areas under the Act, consistent with the SDA.

Should the Act be amended to expressly prohibit members of Parliament from sexually harassing their staff or those who carry out duties at Parliament House?

Parliamentarians and their staff should be prohibited from sexual harassment as in any other workplace, however the prohibition should not apply 'in relation to anything said or done by a member of Parliament in the course of parliamentary proceedings'.[2] The appropriate authority to investigate misconduct by a parliamentarian would be the Procedures and Privileges Committee of the Parliament.

Should the Act be amended to expressly prohibit judicial officers from sexually harassing their staff or those who carry out duties at the court of which the judicial officer is a member? To what extent should the Act be amended in light of the amendments proposed by the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth)

The Act should be consistent with the *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* Cth) on the assumption that the Bill will become law.
The Law Society supports the establishment of a Federal Judicial Commission and considers such a Commission, or a State Commission, to be the appropriate complaint handling body for judges.

[2] As in the recently amended *Equal Opportunity Act 1984* (SA)

Should the Act be amended to expressly prohibit duty holders from sexually harassing unpaid or volunteer workers?

Yes. This would reflect the nature of modern work and would be consistent with the *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (Cth).

The Law Society has no firm view as to how to achieve the extension to unpaid or volunteer workers however treating these workers as 'employees' for the purposes of the Act is appropriate.

In the event the definition of employment in the Act is not extended, should the sexual harassment provisions extend to apply in relation to unpaid or volunteer workers?

Yes.

Impairment

Does the Act protect against discrimination on the Ground of impairment where the discriminator does not make reasonable accommodation for the impairment? If not, should the current protections in the Act be amended or clarified?

Arguably yes, but consistent with a potential positive duty to eliminate discrimination, the current protections in the Act should be amended/clarified to provide a positive duty to make reasonable adjustments for persons with impairments (with unreasonableness including the imposition of an unjustifiable hardship).

Should the Act include positive obligations to make reasonable adjustments for persons with impairment?

Yes, for the reasons noted in the Discussion Paper.

Should any positive obligations be framed as stand-alone obligations or included within the discrimination definitions?

Included with the discrimination definitions – consistent with a modern drafting style that is easier to follow, replacing the existing drafting style, where various grounds of discrimination are set out in separate divisions, which is repetitive and apt to confuse.

What matters should be included in the Act to determine whether adjustments are 'reasonable' or will impose 'unjustifiable hardship'?

The matters at s.20(3) of the Victorian Act.

What parameters or definitions are required for the scope of any positive obligation or duty?

Further consideration is required to determine if a definition of "adjustment" is required

Burden of Proof

Should the Act be amended to impose an evidential burden on a complainant and a persuasive burden on a respondent?

Yes to an evidential burden on a complainant and a persuasive burden on a respondent, consistent with the reverse onus in the *Fair Work Act*, and for the reasons noted in the Discussion Paper.

Vilification

Should anti-vilification provisions be included in the Act?

Yes, there should not be a separate Racial Vilification Act given the issues identified with the *Racial and Religious Tolerance Act 2001* (Vic).

Should any positive obligations be framed as stand-alone obligations or included within the discrimination definitions?

The Law Society agrees that there should be civil remedies as well as criminal sanctions available to address vilification.

If anti-vilification provisions are included in the Act, should they cover only racial vilification or extend to other types of vilification?

Anti-vilification provisions should be comprehensive and as well as racial vilification cover and other types including sex, disability.

Should or how may vilification provisions address concerns about the impact on other rights and exemptions under the Act?

There should be 'reasonably and in good faith' exemptions (such as in s.18D of the *Race Discrimination Act*) and the burden of proof should fall on the complainant.

The threshold test for unlawful vilification applied under the RDA should also be followed, in that for conduct to amount to vilification, it has to be more than a 'mere slight'.[3]

Would there be any issues in accessing vilification law and reporting vilification under the Act?

As long as provisions allow for complaint to be made to the Equal Opportunity Commissioner and the Commissioner uses their broad powers and is resourced to perform an educative function for the wider community.

Would a different model for reporting vilification assist in protections?

There should be a 'no wrong door' approach where the Equal Opportunity Commissioner, Human Rights Commissioner and the Police can refer reports to each other if appropriate. Positive Duty

Should a positive duty to eliminate discrimination, other than the requirement to make reasonable adjustments, be included in the Act?

In principle, the Law Society supports the inclusion of a positive duty in order to shift the focus away from a complaints-based only system. A positive duty encourages duty holders to be proactive about eliminating discrimination, rather than being reactive and only responding once a complaint is made.

However, a positive duty will inevitably be accompanied by increased compliance costs. Therefore, careful consideration is required to ensure that the positive duty justifies those additional costs. Close attention should be given to the purpose of the duty, its content, who may take enforcement action, and the consequences of failure to comply with the duty.

An ephemeral duty which lacks enforcement measures would not be effective in eliminating discrimination. The Law Society is mindful not to create confusion or increase compliance burdens

[3] *Creek v Cairns Post Pty Ltd* [2001] FCA 1007; (2001) 112 FCR 352 at [16] per Kiefel J: to "offend, insult, humiliate or intimidate" are profound and serious effects, not to be likened to mere slights."

without justification, particularly in already under-resourced organisations. The initial experience of the United Kingdom regarding these matters is instructive.

If a positive duty is included, the model in force in Victoria pursuant to the Victorian Act is also instructive. It provides useful guidance for the content of a positive duty, but also demonstrates the consequences of limited enforcement mechanisms.

If a positive duty is included, what measures must be fulfilled by duty holders that are reasonable and proportionate?

As in the Victorian Act, if the positive duty is to take 'reasonable and proportionate measures' to eliminate discrimination, sexual harassment and victimisation, as far as possible, to determine whether a measure is reasonable and proportionate the following factors should be considered—

a) the size of the person's business or operations;
b) the nature and circumstances of the person's business or operations;
c) the person's resources;
d) the person's business and operational priorities;
e) the practicability and the cost of the measures

There should be clarity and guidance provided to organisations of all sizes by way of detailed and relevant examples. The Equal Opportunity Commissioner should publish detailed guidelines with examples of 'reasonable and proportionate' measures for different industries and sizes of organisations. The information on the website of the Victorian Equal Opportunity & Human Rights Commission provides a useful template for how such information might be conveyed: https://www.humanrights.vic.gov.au/for-organisations/positive-duty/.

If a positive duty is included, should it apply in respect of all Grounds and prohibitions and, if not, what Grounds or prohibitions should be exempt?

Apart from those Grounds or prohibitions already exempt, if a positive duty to eliminate discrimination is created it should apply in all respects.

Should an individual complainant be able to make a complaint for breach of the positive duty by a duty holder, or should powers be limited to investigation at the initiative of the EOC?

To limit the enforcement of the duty to only powers of investigating at the initiative of the EOC would unnecessarily constrain the potential of the positive duty to eliminate discrimination. Regard should be had to the experience under the Victorian Act where this enforcement structure exists (and, apparently, has only be exercised once in 9 years [Discussion Paper, p157]).

Complaints by individuals or reports of a breach of the positive duty, although reactive, should remain an integral recourse by observers and victims of discrimination. It is only by this course will the EOC be truly empowered in encouraging organisations to develop practices to eliminate discrimination.

Consideration should also be given to the consequences (if any) for failure to comply with the positive duty. For example, whether failure to comply should be actionable – either alone or as a relevant factor to be taken into account where a complaint of discrimination is made out.

Should the SAT have the power to hear an application for breach of the positive duty by a duty holder, or should powers be limited to investigation and recommendations by the EOC?

The Law Society considers that the SAT would be an appropriate forum and jurisdiction should be conferred on the SAT to hear an application for a breach of the positive duty.

However, the legislative scheme would need to be structured differently to the Victorian legislation in order to avoid the exclusion of jurisdiction of the SAT in relation to enforcing the positive duty which was identified in the decision of *Collins v Smith* [2015] VCAT.

Should duty holders be required to publish information in relation to their compliance with this duty and, if so, which duty holders?

Information-sharing through publication may be useful for reducing compliance costs and achieving best practice. However, this should be carefully considered if failure to comply with the positive duty is, itself, actionable.

At the outset, the Law Society prefers a model where it is the EOC's responsibility to provide guidance and templates on how organisations may comply with the positive duty, depending on their size, capability and operations.

Miscellaneous

Do the victimisation protections or related provisions in the Act require reform?

The Law Society agrees that the definition in s 5 of the Act should be amended as recommended by the EOC. It is not fair or in the interests of justice to have a higher burden of proof for victimisation than for harassment.

Without having undertaken a review of the effectiveness of the current processes, s 67 of the Act appears to adequately protect those who are, or are threatened to be, victimised as a result of proceedings or acts arising out of the Act.

Should the $40,000 compensation cap be retained, increased or removed?

The compensation cap should be removed. The cap has not been updated since the inception of the Act and prevents many potential claimants from pursuing a remedy under the Act.

The Society notes the recent decision of the Industrial Court of Queensland in *Golding v Sippel and The Laundry Chute Pty Ltd*.[4] In that matter upwards of $160,000 was awarded in compensation for psychological injuries resulting from sexual harassment and discrimination. There is no reason that a Western Australian complainant in similar factual circumstances should be prevented from seeking a similar quantum of relief in this jurisdiction.

Should the exception contained in section 69 (exception for acts done under statutory authority) of the Act be amended, and if so, how?

As the only two exceptions are if there is an order from the Tribunal or a court, it is not considered necessary to amend this section. It would be quite unlikely that either institute would make an order that is discriminatory or harassing in nature. It could also undermine the authority and decisions of the Tribunal or a court if parties were at liberty to not follow orders.

Should the Act be amended to clarify that an order may be made for the payment of interest on compensation amounts?

Yes.

[4] [2021] ICQ 14

Should the Act adopt a modern drafting style that is easier to follow?

Yes. The existing drafting style, where various grounds of discrimination are set out in separate divisions, is repetitive and apt to confuse.

Should the Act include clarification that a complaint may be made by a representative organisation, including lawyers and advocacy bodies, on behalf of more than one person or a group of persons who have the same or similar complaint against a respondent?

Yes.

Should the timeframe for lodging a complaint be increased from the current 12 months?

The Law Society submits that the civil limit of 6 years is appropriate. This is position is consistent with the Law Council of Australia's position on what the limitation period should be in the SDA.

Should the current discretion for the Equal Opportunity Commissioner to accept a complaint made out of time on good cause being shown be changed?

No, the Commissioner's discretion is sufficient.

How can the Act best facilitate the just and efficient disposition of complaints using technology?

The Law Society supports introducing measures to enable the Commissioner to adopt technology in order to allow parties to appear otherwise than in-person (including via telephone or audio and/or video link) and to permit documents to be submitted electronically (whether via email or a secure portal). The benefits of using technology in these ways are described in the Discussion Paper.

However, there remain portions of the community (some of whom are already vulnerable and disadvantaged) who do not have ready access to the internet or who have not yet adapted to using technology.

In modernising its services, the Law Society suggests the EOC adopt a blended approach that does not assume that there is equal or universal access to, or ease with, technology.

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