



Commissioner for Children and Young People
Western Australia

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The Hon Lindy Jenkins
Chair
Law Reform Commission of Western Australia
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Via email: equalopportunityreview@justice.wa.gov.au

Dear Chair

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

Thank you for the opportunity to contribute to the Law Reform Commission of Western Australia's review of the *Equal Opportunity Act 1984* (WA).

As Commissioner for Children and Young People in Western Australia I have a statutory responsibility under the *Commissioner for Children and Young People Act 2006* (WA) to monitor and review written laws affecting the wellbeing of children and young people under the age of 18 years. In performing this function, I must give priority to Aboriginal and Torres Strait Islander children and young people and those who are vulnerable or disadvantaged for any reason. I must also have regard for the United Nations Convention on the Rights of the Child.

It is within the context of my role as an independent, statutory office and the functions outlined above that I provide the attached submission for consideration by the Law Reform Commission.

If you wish to discuss any of the matters contained within this submission in more detail please do not hesitate to contact me.

Yours sincerely

COLIN PETTIT

Commissioner for Children and Young People WA

2 November 2021

Law Reform Commission of WA review of the *Equal Opportunity Act 1984* Submission from the Commissioner for Children and Young People WA

All children and young people, regardless of their cultural background, sex, religion, or status, are afforded a basic level of civil, political, social and cultural rights through the United Nations Convention on the Rights of the Child (UNCRC). Although it does not relate to all rights set out within the UNCRC, the *Equal Opportunity Act 1984* (the EO Act) provides one of the few legislated complaint mechanisms Western Australian children and young people can turn to when they believe certain rights and freedoms have been breached through acts of discrimination.

While recognising that children and young people under the age of 18 years only comprised 3.9 per cent of the Equal Opportunity Commission's complainants in 2020-21¹, it is important to ensure that the Commission's processes are accessible to children and young people and that the grounds of complaint available under the EO Act are relevant to their contemporary lived experiences of discrimination.

Views of children and young people

Through consultations I have undertaken during my time as Commissioner, including the Speaking Out Surveys conducted in schools during 2019 and 2021² and the convening of advisory committees made up of children and young people³, I have been made aware that a significant number of Western Australia's children and young people feel they have been discriminated against or harassed as a result of their age, sex, gender history, race, sexual orientation, disability and/or religion. A particularly striking example of this was provided by a student who participated the 2021 Speaking Out Survey:

"We live in a growing world and yet society only accepts liking the opposite gender to yourself and 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."

Other children and young people participating in the 2021 Speaking Out Survey told of their experiences of not feeling safe in public because of their race or religion, not being taken seriously because of their age, feeling judged or dismissed because of

¹ Equal Opportunity Commission WA, *Annual Report 2020-21*, p41

² For further information see <https://www.ccyp.wa.gov.au/our-work/projects/speaking-out-survey/>

³ For further information see <https://www.ccyp.wa.gov.au/about-us/advisory-committees/>

their disability, being treated differently because of their sex, and being mocked for their gender history.

The views expressed during both the 2019 and the 2021 Speaking Out Surveys by children and young people identifying as lesbian, gay, bisexual, transgender, queer or intersex (LGBTQI+⁴) aligned with the views of two advisory committees I formed in 2018 whose focus was on the needs and experiences of children and young people from the State's LGBTQI+ community. Committee members reported experiences of systemic discrimination in their access to education, employment, health services and safe housing, as well as discrimination and harassment within the broader community. Of particular concern to committee members was the existence of exemptions within the EO Act allowing religious schools to lawfully discriminate against people on the basis of their sexuality and/or gender history:

"Having the religious exemptions in place gives a message that LGBT people are second class citizens. It makes people feel like a freak – it tells kids they're an outsider and they don't belong there."

"Where I live, the only school that offered ATAR subjects was the religious school, so you had to go there if you wanted to go on to university. This means if you were excluded there, you couldn't go on and continue your education and achieve your goals."

Based on the recommendations provided to me by the 2018 advisory committees in relation to this matter I wrote to a number of cabinet ministers, members of parliament, the WA Equal Opportunity Commissioner and the President of the Australian Human Rights Commission to express my support for the Equal Opportunity (LGBTIQ Anti-Discrimination) Amendment Bill introduced in the Legislative Council by Hon Alison Xamon on 28 June 2018⁵. The Bill proposed to amend section 73 of the EO Act in a manner that would have prevented children and young people from being denied education or pursuit of a faith-based education because they were LGBTQI+. Unfortunately the Bill was not passed, and this particular inequity remains part of the EO Act.

The 2018 advisory committees also raised concerns with me about the harmful impact that "conversion therapy" can have on the mental health of LGBTQI+ people, and that children and young people may be particularly vulnerable to its impact or be placed under pressure to participate in programs labelled as such. Although none of the young people on the committees had direct experience of "conversion therapy", some

⁴ The Commissioner for Children and Young People understands that there are a range of terms and definitions that people use to define their gender or sexuality. The Commissioner uses the term LGBTQI+ to inclusively refer to all people who are lesbian, gay, bisexual, transgender, queer or intersex, as well as to represent other members of the community that use different terms to describe their diverse sexuality and/or gender identity.

⁵ Details of the Bill available at

<https://parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=3A45EE5D6BCC0B86482582B700093749>

were aware of peers who had been exposed to it. Committee members viewed the existence of "conversion therapy" as a threat to them and their identity, and as a direct form of discrimination against them.

One committee member described "conversion therapy" in the following terms:

"Conversion therapy...is a direct act of discrimination aimed to terrorise a person out of their identity."

Specific matters for consideration by the Law Reform Commission

Objects

The objects of the EO Act must align with its operative provisions. Section 3 of the EO Act states that the Acts objects include eliminating, so far as possible, discrimination against persons on the grounds of impairment, sexual orientation, gender history or religion, and promoting recognition and acceptance within the community of the equality of all persons regardless of their impairments, sexual orientation or religious convictions. These objects are undermined by the current section 73 exemption regarding educational institutions established for religious purposes, along with the definitions of impairment, sexual orientation and gender history contained in sections 4 and 35AA respectively.

Sexual orientation and gender identity

Section 4 of the EO Act currently defines sexual orientation in terms of heterosexuality, homosexuality, lesbianism or bisexuality. Section 35AA of the EO Act states 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", and that a gender reassigned person is a person who has undergone a gender reassignment procedure and been issued with a recognition certificate under the *Gender Reassignment Act 2000*.

As a result of these provisions the EO Act does not provide protection to persons with diverse gender identities (such as persons who identify as pansexual, asexual or non-binary), persons who are gender-fluid, persons who may be in the process of gender transition, or to persons who are unable to undergo gender reassignment surgery either because of their age or because of another diverse gender identity.

The current protections of the EO Act must therefore be expanded in recognition that a greater diversity of sexual orientations and gender identities exist in our community than those currently identified in sections 4 and 35AA of the EO Act.

Impairment

Impairment is defined within section 4 of the EO Act in terms of deficit, making specific reference to "defect or disturbance." This is in contrast to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), which recognises in its preamble that disability is "an evolving concept" and "results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in social on an equal basis with others."

I would strongly support amending the current definition of 'impairment' within the EO Act to one that aligns with the UNCRPD definition and recognises disability as the social construct it is rather than the personal deficiency it was viewed as in the past.

Education/educational institutions established for religious purposes

As referenced above, I have previously expressed my support for the EO Act to be amended in a manner that would prevent children and young people from being denied education or pursuit of a faith-based education because they are LGBTQI+. I believe the current review presents an opportunity for this issue to be addressed in a manner similar that that proposed through the Equal Opportunity (LGBTIQ Anti-Discrimination) Amendment Bill 2018.

Equal Employment Opportunity Management Plans

Based on the experience of my own office, I have concerns regarding the effectiveness of Equal Employment Opportunity Management Plans in the context of smaller agencies. Whilst it is recognised that the aspirational targets for identified diversity groups are beneficial to the WA public sector, with 15.5 permanent FTE and low staff turnover like-for-like targets are not necessarily achievable or able to be meaningfully reported for an agency of this size. For example, the WA Public Sector target for Aboriginal and Torres Strait Islander people to comprise 3.7 per cent of the workforce equates to 0.55 FTE in the context of the Commissioner for Children and Young People's current workforce.

I therefore suggest that the Law Reform Commission consider the practical impact of Equal Employment Opportunity Management Plans in the context of smaller agencies, and investigate the potential for the EO Act to facilitate a more effective mechanism for such agencies to contribute to increased diversity and inclusivity within the WA public sector.

Prohibiting conversion practices

"Conversion therapy" has been denounced by leading Australian and international health and human rights bodies, with no empirical support or evidence to suggest that sexual orientation or gender identity can be changed. Nor is there any support or evidence that diverse sexual orientations or gender identities should be classified as any kind of disorder. There is however evidence that the use of these "conversion" practices have a negative impact on a person's mental health and wellbeing in both the short and long term.

I believe that banning "conversion therapy" sends a clear message that all people should be supported, recognised and celebrated for who they are, regardless of their gender identity or sexuality, and that there is no need for them to change.

I strongly encourage that as part of this review the Law Reform Commission recommends comprehensive legislative measures to ensure that no person in Western Australia is exposed to this harmful practice. While such measures may indeed warrant their own separate piece of legislation, their particular location within the statute books

is of less importance than the actual development and passing into law of these protections.