

Submission to the Law Reform Commission of Western Australia

Review of the Equal Opportunity Act

19 October 2021

The Western Australian Council of Social Service Inc. (WACOSS) welcomes the opportunity to make a submission to the Law Reform Commission of Western Australia's Review of the *Equal Opportunity Act 1984* (WA).

WACOSS is the peak body for the community services sector in Western Australia and works to create an inclusive, just and equitable society. We advocate for social and economic change to improve the wellbeing of Western Australians, and to strengthen the community services sector that supports them. WACOSS is part of a network consisting of National, State and Territory Councils of Social Service, who advance the interests of people on low incomes and those made vulnerable by the systems that have been put in place.

The *Equal Opportunity Act* is an important statement by the Western Australian Parliament on behalf of the people of WA about the need to eliminate discrimination and promote equal opportunity.

Grounds of Discrimination

Gender history discrimination/ gender identity/ intersex status

WACOSS considers it critical that the Grounds of Discrimination under the Act are expanded to provide protection to all gender diverse people from discrimination. We strongly support the inclusion of 'gender identity' and 'intersex status' in the Act.

A study published earlier this year of the health and wellbeing of gender diverse and nonbinary Australians found widespread discrimination and unemployment, contributing to health inequities and mental health conditions. 33 per cent of study participants reported discrimination related to employment and 26 per cent in relation to accessing health care. The unemployment rate amongst study participants was 19 per cent, despite 47 per cent having tertiary qualifications.¹

In 2013, the National Trans Mental Health Survey found that 62.4 per cent of survey respondents had a gross annual income below \$40,000, compared to then mean Australian income of \$58,000.

¹ I Bretherton, E Thrower, S Zwickl, A Wong, D Chetcuti, M Grossmann, J D Zajac, and A S Cheung. (2021) *The Health and Wellbeing of Transgender Australians: A National Community Survey*, LGBT Health 8, 1, pp. 42-49

Discrimination was found to be highly prevalent, resulting in social isolation, difficulty securing employment and accessing healthcare.²

This continued experience of discrimination has profound consequences on people's wellbeing. As of 2021, transgender people between the ages of 14-25 are fifteen times more likely to attempt suicide, and transgender and gender diverse people aged 16 and over are nearly four times more likely to have experienced sexual violence or coercion.³ Many young trans people have experienced negative situations that affect their mental health such as peer rejection, bullying, issues with school, university or TAFE, and a lack of family support.⁴

For a variety of reasons including, but not limited to, the high cost, most transgender people have not undergone a medical or surgical procedure to change their sexual characteristics. Research from the University of Melbourne has found about 18 per cent of trans women surveyed had undergone genital reconfiguration surgery and about 2 per cent of trans men had.⁵

For this Ground to truly provide a level of protection for transgender and gender diverse people, the requirement that a person must hold a gender recognition certificate must be removed.

Lawful sexual activity

It is the view of WACOSS that Western Australia should follow the example of Queensland, Tasmania and Victoria by including lawful sexual activity as a Ground.

It is clear from the work conducted by Curtin University's School of Public Health that discrimination is not only highly prevalent for people who are engaged in sex work, but that this discrimination is a significant barrier to accessing services and being able to report crimes committed against them. The Western Australian Law and Sex Worker Health Study found that while not all participants in the study reported having experienced direct discrimination due to their work, but all reported not disclosing their work to avoid being discriminated against. The most common source of discrimination was Police Officers, with accommodation the most common setting.⁶

² Z Hyde, M Doherty, PJ M Tilley, K McCaul, R Rooney & J Jancey (2014) *The First Australian National Trans Mental Health Study: Summary of Results*, School of Public Health, Curtin University, Beyond Blue Australia, Western Australian Centre for Health Promotion Research

³ LGBTIQ+ Health Australia (2021) *Snapshot of Mental Health and Suicide Prevention Statistics for LGBTIQ+ People*

⁴ P Strauss, A Cook, S Winter, V Watson, D Wright Toussaint, A Lin (2017). *Trans Pathways: the mental health experiences and care pathways of trans young people. Summary of results*. Telethon Kids Institute, Perth, Australia.

⁵ I Bretherton, E Thrower, S Zwickl, A Wong, D Chetcuti, M Grossmann, J D Zajac, and A S Cheung. (2021) *The Health and Wellbeing of Transgender Australians: A National Community Survey*, LGBT Health 8, 1, pp. 42-49

⁶ L Selvey, J Hallett, R Lobo, K McCausland, J Bates & B Donovan (2017) *Western Australian Law and Sex Worker Health (LASH) Study. A summary report to the Western Australian Department of Health*, School of Public Health, Curtin University

Reported experiences of negative treatment, stigma or discrimination in any particular settings because people knew of the respondents' status as a sex worker

	Once		Multiple times		Unsure	
	No.	%	No.	%	No.	%
Medical (n=290)	23	7.9	30	10.3	19	6.6
Legal (n=286)	12	4.2	13	4.5	27	9.4
Employment (n=284)	15	5.3	19	6.7	27	9.5
Housing (n=281)	6	2.1	18	6.4	16	5.7
Accommodation (n=281)	38	13.5	27	9.6	17	6.0
Educational (n=280)	5	1.8	13	4.6	20	7.1
Financial (n=282)	10	3.6	29	9.3	14	5.0
Insurance Agency (n=208)	2	1.0	14	6.7	10	4.8

Source: WA LASH Study (2017)

Though not mentioned directly in the Discussion Paper, we note that the definition of 'lawful sexual activity' in the Victorian Act as "engaging in, not engaging in or refusing to engage in a sexual activity" is understood to extend to protecting lawful activities such as polyamorous behaviours.⁷ WACOSS considers using a more expansive definition like this that provides that further protection to be necessary and appropriate, as otherwise there is no protection from discrimination for engaging in this behaviour under the Act.

Further, as per *Bunning v Centacare*, Commonwealth Sex Discrimination legislation does not appear to provide any protection for lawful sexual activities like polyamory either.⁸ WACOSS considers the circumstances of that case as clear evidence for the necessity of ensuring this is protected as a Ground.

Employment Status

WACOSS supports the inclusion of employment status in the Act, following the ACT Act definition of "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."

Discrimination and stigma can have profoundly negative impacts on the health and wellbeing of people who are unemployed. Persistent discourse demonising people who are reliant on social security make it harder for people to seek support when they need it, creating a pervasive sense of shame and low self-worth.

"When you are treated like you don't matter by so many people in so many ways it is hard to keep going and not give up. It sometimes seems better to withdraw into some corner somewhere with other people doing it tough like you and hide out from the world"
 – Lived experience participant in the 100 Families WA Project⁹

⁷ B Gaze and B Smith (2017) *Equality and Discrimination Law in Australia*, p 96

⁸ *Bunning v Centacare* (2015) 293 FLR 37

⁹ 100 Families WA (2021) *Insight into hardship and disadvantage in Perth, Western Australia: The 100 Families WA Report*

Subjection to domestic or family violence

Problematic and unacceptable attitudes to family and domestic violence in our society have remained stubborn and pervasive, and our systems and institutions are not immune to harbouring these attitudes. Cultures of victim blaming and denial are still operating systemically, and regularly jeopardise the safety of victims seeking support and services.

For many experiencing or at risk of experiencing FDV, significant barriers still exist to them accessing the service system and the supports they require. These barriers can arise from cultures and attitudes operating in organisations, the police, the judiciary, and statutory systems. Despite the research showing that, if anything, women are more likely to minimise or underreport instances of FDV, there remains a pervasive view that women fabricate accounts and make false allegations.

When societies, institutions, communities or individuals condone, excuse, trivialise or downplay violence against women, levels of such violence are higher. Both women and men who hold such attitudes are less likely to take action to support victims and hold perpetrators to account,¹⁰ and this “bystander” behaviour is unfortunately common in Australia. In a survey conducted by VicHealth fewer than half (47.6 per cent) of respondents who had witnessed violence, sexism or discrimination in social or workplace contexts reported either saying or doing something in response.¹¹ Further, for women from some minority groups, be they ethnic, gender, or occupational such as sex workers, violence against women is more likely to be downplayed in both community attitudes and institutional responses.¹²

International evidence demonstrates that violence against women is significantly and consistently lower in countries where women’s economic, social and political rights are better protected.¹³

WACOSS considers that introducing a new Ground into the Act that expressly protects against discrimination or adverse action on the basis of domestic or family violence would be a positive step forward in providing the legislative and policy support required to better protect women subjected to FDV from discrimination and its potential effects on their economic, legal and social autonomy.

Industrial/trade union activity/employment activity

WACOSS supports the inclusion of industrial/trade union activity/employment activity as a Ground in the Act. Through the activities of delegates, shop stewards and the broader membership, unions are the frontline against injustice in the workplace and provide a direct means for observing, documenting and raising issues of discrimination. It is critical that union members are able to organise and carry out their actions within the workplace without fear of discrimination or disadvantage.

¹⁰ Our Watch, Australia’s National Research Organisation for Women’s Safety (ANROWS) and VicHealth (2015) *Change the story: A shared framework for the primary prevention of violence against women and their children in Australia*, Our Watch, Melbourne, Australia.

¹¹ VicHealth (2012) *More than ready: Bystander action to prevent violence against women in the Victorian community*, Victorian Health Promotion Foundation, Melbourne, p. 31.

¹² Our Watch et al. (2015)

¹³ Ibid.

Other Grounds

WACOSS also, non-exclusively, supports the expansion and inclusion of the following areas raised in the Discussion Paper as Grounds of Discrimination in the Act:

- Assistant or therapeutic animal
- Impairment
- Pregnancy
- Race
- Physical characteristics
- Irrelevant criminal record
- Irrelevant medical record
- Social origin
- Accommodation status
- Immigration status
- Family responsibility and family status

Definitions

Sexual Harassment

WACOSS supports the recommendation made by the Equal Opportunity Commission in the 2007 Review to repeal the current definition of sexual harassment in the Act and replace it with the definition in s28A of the Sex Discrimination Act 1984, whereby:

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.

WACOSS considers it appropriate that the current test for disadvantage be removed to recognise that sexual harassment *in and of itself* is damaging and disadvantageous, with no further test required. It is also the consideration of WACOSS that this should extend to all areas of public life, rather than simply be limited to employment, education and accommodation. This extension should include expressly prohibiting members of Parliament and judicial officers from sexually harassing their staff and those who carry out duties at Parliament and in the courts.

WACOSS further does not consider there to be any sound policy rationale for not extending the sexual harassment protections to unpaid or volunteer workers, either by characterising those workers as employees or creating a separate prohibition.

Racial Harassment

As with sexual harassment, WACOSS recommends the disadvantage test be removed to recognise the inherent disadvantage from racial harassment. Likewise, this protection should extend to all areas under the Act.

Services

WACOSS strongly supports extending the definition of services to include all activities of government agencies, including the regulatory and compliance functions of government. In particular, we consider it essential that the Commission is empowered to investigate where areas like policing, local government and other enforcement powers deny a person a benefit or entitlement on discriminatory grounds.

As was determined in the case of the *Commissioner of Police, NSW Police Service v The Estate of Edward John Russell*, WACOSS would contend that police officers should be considered to be providing a 'service' when dealing with a person who has been arrested and is in police custody, for the purposes of anti-discrimination law. Where the provision of that service could be deemed discriminatory, it would be highly appropriate that the Commission be enabled to investigate the matter.

Employment

WACOSS recommends that the definition of employment in the Act be extended as in the ACT, Queensland and South Australian Acts to include unpaid and voluntary workers, and people doing work under an education, vocational or training arrangement. It is not necessarily the case that those workers are able to exit the work arrangement without financial consequences at all, with students required to complete a certain number of hours at a worksite to graduate being a clear example. Significant power imbalances are still likely to be present in unpaid work arrangements and the consequences of discrimination still harmful.

Exceptions

Charitable Benefits

As the peak body for the community services sector in Western Australia, WACOSS represents over 280 community service organisations and 500 organisations involved in the provision of charitable services to the people of Western Australia.

The nature of these services is exceptionally broad, including aged care, disability services, housing support, income support, financial counselling, mental health and crisis intervention, community legal services, family and domestic violence services, emergency and food relief, health services, reintegration services, and community development activities, amongst others.

When the entire charitable sector is considered and not only community services, this list grows even further, to include areas like arts and culture, religious activities, education and recreation. Analysis by the UWA Not-for-profits Research Group of Australian Charities and Not-for-profits Commission data found the top three main activities reported by WA's charities in 2018 were, in

order, religious activities, primary and secondary education, and emergency relief. In terms of ‘other activities’ that charities reported, the most common was social services.¹⁴

While the organisations that WACOSS represents contain a multitude of different perspectives and beliefs, we consider that the exemption for the conferral of charitable benefits should only apply so far as it is necessary to provide specific support to address substantive equality for a particular group.

WACOSS and its members would be deeply concerned if this exemption was used in any way by services to refuse service or to refuse to employ someone for reasons that were not about achieving substantive equality or addressing systemic disadvantage in some form.

To prevent this occurring, WACOSS considers it would be appropriate to limit the scope of the existing exemption to the specific grounds required to meet a charity’s stated purpose.

Religious Bodies Doctrine Exception

WACOSS considers the current form of section 72(d) of the Act to unacceptably privilege religious interests over the rights and interests of other people in our community. It is our concern that the broad nature of the current subclause, by exempting any act or practice of a body established for religious purposes where the act 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” permits a vast swathe of discrimination, and can result in people being refused services or employment by the significant number of faith-based institutions in our state for utterly inappropriate reasons, including on the basis of religion, race, gender identity or sexual orientation.

We note the comment by one submission to the inquiry that many “community service providers (particularly those that provide emergency relief) are affiliated or run by religious institutions.” It is not apparent to WACOSS, however, that the broad exemption in this subclause is at all necessary for those providers to be able to deliver the vital and essential services that they do. WACOSS supports removing the exemption as set out in s72(d).

Educational institutions established for religious purposes

WACOSS strongly supports reforming section 73 of the Act to remove the ability for religious schools to be able to discriminate against people, whether they be staff or students, on the basis of their sexuality, gender identity or intersex status. We do not consider this to be a justifiable or appropriate exemption, and instead it permits religious schools to inflict significant and lasting harm on people within our community.

Prohibiting Conversion Practices

So called ‘conversion’ practices are dangerous and morally repugnant activities that place LGBTIQ+ Western Australians at great risk. People who have survived these practices have been left with physical injuries and mental health issues, with the availability of the practices itself linked to lowered senses of self-worth and internalised homophobia. Research has identified that these

¹⁴ D Gilchrist and T Emery (2020) [Western Australia’s Not-for-profit Landscape](#)

practices remain a very real and pervasive problem within Australian religious communities, with legislative action needed to bring these practices to an end.¹⁵

“Legislation that categorically outlaws conversion practices sends a clear message that this conduct is ineffective, not based in evidence, unethical and generally harmful.”

– *Preventing Harm, Promoting Justice Report*

Over the past two years, Victoria, Queensland the ACT have all introduced legislation prohibiting conversion practices, with the Victorian legislation providing the greatest level of protections.

Western Australia should follow the recommendations of the Sexual Orientation & Gender Identity Change Efforts Survivor Statement.¹⁶ It is critical that a prohibition is introduced that prevents all practices that seek to change or suppress a person’s sexual orientation or gender identity, including those undertaken in religious settings. This is important, as the *Preventing Harm, Promoting Justice* report makes clear that religious-based conversion practices are the most common.

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If you would like to discuss this submission further, please contact the WACOSS Senior Policy Officer Graham Hansen at graham@wacoss.org.au or 6381 5300.

Yours sincerely,



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¹⁵ T Jones et al (2018) [Preventing Harm, Promoting Justice: Responding to LGBT Conversion Therapy in Australia](#), La Trobe University, GLHV, Human Rights Law Centre

¹⁶ [SOGICE Survivor Statement](#)