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2014

Submission to the Public Sector Commission
**Review of organisations under
the Equal Opportunity Act 1984**



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1.0 Introduction

The Equal Opportunity Act is

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, sexual orientation, family responsibility or family status, race, religious or political conviction, impairment, age, or publication of details on the Fines Enforcement Registrar's website, or involving sexual or racial harassment or, in certain cases, on gender history grounds.¹

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

In this submission to the Public Sector Commission's *Review of organisations under the Equal Opportunity Act 1984*, the Council would like to briefly address a number of matters, including:

- Key principles needed to underpin the Equal Opportunity Commission's work;
- The roles of the Australian Human Rights and Equal Opportunity Commissions;
- The importance of international standards and Australian institutional leadership;
- The role of the Director of Equal Opportunity in Public Employment (DEOPE);
- The role of the community services sector in promoting equal opportunity;
- The contemporary legal and social environment; and
- The link between this Review and the Public Sector Commission's *Review of the Commissioner for Children and Young People Act 2006*;

At the outset, the Council wishes to question whether the focus of this Review's *Terms of Reference* — that is, on the structures of organisations such as the Equal Opportunity Commission, rather than a broader consideration of those organisations' function and roles (as defined in the Act) — is most appropriate. The Council notes that Question 3 in the *Guide to Making a Submission* (to this Review)² asks whether

... the EOC is effective and efficient in promoting the objectives of the EEO Act in the contemporary legal and social environment?

The contemporary legal and social environment has changed considerably since the Equal Opportunity Act was first introduced. As such, the Council considers a broader review — one which encompasses issues such as additional grounds which should be incorporated in the legislation — would have been more appropriate and valuable at this juncture. In addition, WACOSS would argue that “form follows function” — in other words, the structure should come out of the function, not the other way around.

¹ State Law Publisher WA (2014) [Equal Opportunity Act 1984](#), Government of Western Australia.

² Public Sector Commission (2014) [Review of organisations under the Equal Opportunity Act 1984 - a guide to making a submission](#), page 14.



1.1 About WACOSS

The Western Australian Council of Social Service (the Council) is the leading peak organisation for the community services sector in Western Australia, and represents its 300 members and the over 800 organisations involved in the provision of services to individuals, families and children in our community.

The Council's members are organisations that provide services to diverse population groups across areas including:

- health;
- community services and development;
- disability;
- employment and training;
- aged and community care;
- family support;
- children and youth services;
- drug and alcohol assistance;
- indigenous affairs;
- support for culturally and linguistically diverse people;
- housing and crisis accommodation;
- safety and justice; and
- advocacy.

Our members work for, and to support, the most vulnerable members of the Western Australian community — people whose vulnerabilities tend to put them at particular risk of discrimination. As such we see the Equal Opportunity Act, and related organisations such as the Equal Opportunity Commission, as having an important role to play in protecting vulnerable community members from behaviours and decisions which may otherwise unfairly disadvantage them.

2.0 The Equal Opportunity Commission

The Council has been actively engaged with the Equal Opportunity Commission and its work, over many decades. For example, the Council has:

- Both witnessed and actively supported the Commission's public role in both promoting equal opportunity, and opposing discrimination in the community;
- Contributed both formally and informally to inquiries and research into experiences of systemic discrimination undertaken by the Commission; and
- Relied on reports produced by the Commission to initiate and support the Council's own advocacy — in seeking to deliver positive systemic change for vulnerable members of the WA community.



The Council suggests that the inquiry should consider the Objects of the Equal Opportunity Act 1984 and the effectiveness of the EOC and the Commissioner within their historic context. With the introduction of this Act in 1984, Western Australia played a leading role in progressing equal opportunity and human rights reforms at the national level. As a result of this leadership, other jurisdictions adopted similar legislation and developed similar institutions, leading in time to the development of the national Human Rights and Equal Opportunities Commission which then became the Australian Human Rights Commission. While some important reforms have been made to the Act over time, it is fair to say that they have not on the whole been substantial ones. At the same time we have seen other jurisdictions build upon and progress these issues further. The Council believes there are strong grounds to look at updating the Act to reflect the progress in and refinement of concepts of human rights and equal opportunities that have occurred in the intervening decades. Western Australia is now seen as a leader in a number of key areas of reform within government, for instance in the provision of services in partnership with the community sector and the empowerment and choice given to people with disabilities. There is also a strong link between the reforms led by the Premier through the Partnership Forum and the Delivering Community Services in Partnership Policy and the Objects of the EO Act, as discussed further below.

The Council argues that in order for the Equal Opportunity Commissioner to function most effectively, some underlying principles must be maintained:

- Independence
- Empowered by legislation
- Adequately resourced
- Broad jurisdiction
- Wide range of functions
- Accessible
- Based on international standards

A number of these principles are discussed below.

2.1 Independence

The functions of the Equal Opportunity Commission will be best served when the Commission is independent of any State Government agency; thus allowing it to provide the public and objective recommendations as needed to address unlawful discrimination.

While the Council recognises that there are a number of agencies within the state government that could be seen to have some form of investigative or oversight role, the independence of the Commissioner for Equal Opportunity is highly valued by the community sector. The Council urges the Review to recommend that the Commissioner continues to operate with the same level of independence as currently occurs.

We note that the independence of the Commissioner and Commission and hence their ability to take a public advocacy role in critical human rights and equal opportunities is critical to their credibility, reach and effectiveness in public education that is fundamental to effectively achieving the objects of the act and achieving stronger equal opportunity outcomes in the Western Australian community.



2.2 Adequately resourced

It is critical that the Commission be adequately resourced such that it is able to undertake its roles in investigating both individual and systemic discrimination concerns, and promoting understanding of equal opportunity across a broad jurisdiction.

2.3 Broad jurisdiction

The Council supports the Commission having a wide investigative and reporting purview. We do not believe the achievement of the Commission's functions will be better served by limiting their scope of work to any particular sector (ie. state public sector), or to particular vulnerable groups within the community (ie. people with disabilities or people of culturally or linguistically diverse backgrounds). The inquiry might consider whether the EOC has been unduly focused on equal opportunity processes within the public sector (wherein it has achieved very important reforms) at the expense of playing a more constructive and influential role in the private and community sectors. Similarly the inquiry might consider whether it might be timely to move from a focus on structural and systemic change within the public sector to one of cultural change with the aim of securing stronger outcomes, for instance in the employment of people with a disability or Aboriginal people within the public sector.

2.4 Wide range of functions

The Council supports the Commission maintaining its diversity of functions: including the promotion of understanding of the importance of equal opportunity, providing an avenue for redress to individuals who allege unlawful discrimination, and investigating and pursuing systemic change needed to address (actual or potential) unlawful discrimination, as required.

One of the most valuable features of the Equal Opportunity Commission at present is that the Commission's functions (as outlined in the Act) provide for both:

1. Investigation of complaints and redress for **individuals** who allege unlawful discrimination; and
2. Research and inquiries into unlawful discrimination which is alleged to occur as a result of **systems or processes** in place within an industry or organisation.

The Council has been pleased that that through the process of investigating individual complaints, the Commission has, on numerous occasions, been able to identify wider concerns which require systemic response or changes, rather than just responses to or remedies for individual complainants. This dual response is one of the key strengths of the Commission, and the Council would not support the splitting or removal of either of these two functions from its role.

2.5 Accessible

Accessibility can be measured in a number of ways, including both the ability of individuals to be able to make contact with and access the services of the Commission (ie. physical access, online presence and telephone services); as well as the visibility of the organisation in the eyes of the general public. That is, people need to be aware of the organisation and the services they offer, in order for them to want to seek contact with them. For the Commission to achieve its function of promoting equality of opportunity in Western Australia, visibility and public profile are critical.



There are many emerging opportunities for the Commission to increase its accessibility and impact and play a stronger public education role. It can learn from progress in other areas of government and other jurisdictions on making its roles and activities more accessible to the public – for instance by learning from the manner in which the Energy Ombudsman’s office has improved complaints handling processes; by improving its website to make material more accessible and relevant and including decision making tools to aid appropriate referrals; by better engaging with stakeholders in the public service and community sector about appropriate complaint referral processes; by making productive use of social media; and by taking a stronger role as an advocate and expert source of knowledge in critical public debates.

2.6 Based on international standards

It is essential that the work of the Equal Opportunity Commission continues to reflect international standards and conventions relating to the treatment of vulnerable populations, and more widely the need to uphold human rights. Australia was a founding member of the United Nations and participated in the drafting of the Universal Declaration on Human Rights. Adopted in December, 1948, this is generally agreed to be the foundation of international human rights law.

Under article 2(3) of the *International Covenant on Civil and Political Rights (ICCPR)*³ Australia is required to:

- a) enact laws to implement Australia’s obligations under the ICCPR;
- b) provide an effective remedy for individuals whose human rights have been violated; and
- c) institutionally safeguard rights by way of procedural guarantees, the establishment of legal institutions and other positive legislative, administrative, political or judicial measures.

The UN Human Rights Committee has observed that under article 2(3) of the ICCPR, State parties have a general obligation to investigate violations of human rights through independent and impartial bodies. Administrative mechanisms, such as national or state human rights institutions endowed with appropriate powers, can contribute to the fulfilment of that obligation. A failure by a State party to adequately investigate allegations of human rights violations can, in and of itself, give rise to a breach of the ICCPR.⁴

In considering how the Western Australian community might best meet these international obligations, update and progress its human rights and equal opportunity regulations and institutions, and play a constructive or leadership role, the best place to look for guidance and normative standards for national and state human rights bodies is what are known as “The Paris Principles.” These principles have been endorsed by both the UN Commission on Human Rights (now the UN Human Rights Council) and the General Assembly. Importantly, in the context of this review, the Paris Principles state that a human rights institution’s role, powers and mandate should be as broad as possible.⁵

Human rights institutions are said to be more effective in protecting and promoting rights when they:

³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force on 23 March 1976).

⁴ Human Rights Law Resource Centre, Submission to National Human Rights Consultation 2009.

⁵ *Paris Principles*, UN DOC A/RES/48/134 (20 December 1993), Principle 2.



- a) treat human rights issues systematically;
- b) handle individual complaints speedily and effectively;
- c) have a broad and non-restrictive mandate;
- d) have an all-encompassing jurisdiction; and
- e) have the power to monitor compliance with their recommendations and advice.⁶

The Council recommends that the inquiry should consider the framework outlined within the Paris Principles, the manner in which it describes and distinguishes between various human rights and equal opportunity principles, and the manner in which it frames the areas of reform for progressing equal opportunities and human rights within Western Australia.

Australia has played and continues to seek to play a real and significant international leadership role in the area of national human rights institutions within the United Nations and through our foreign affairs activities. The Council is concerned by the prospect that changes within state jurisdictions could undermine our credibility and impact in this important international work.

3.0 The role of the Australian Human Rights Commission

The *Guide to Making a Submission* (to this Review) includes an outline of the role of the Australian Human Rights Commission (AHRC), and notes that there are similarities in the roles of the AHRC and the Equal Opportunity Commission — such as both organisations having a) education and awareness-raising functions and b) complaint handling roles. However, there are important differences between the two bodies, not the least of which are designated Commissioners for particular areas within the AHRC, including the Age Discrimination, Disability Discrimination, and Sex Discrimination Commissioners.

The AHRC is Australia’s independent statutory human rights body at the Federal level.⁷ Currently, the AHRC develops human rights education programs, advises the Australian Government on human rights issues, conducts research into human rights issues, enquires into and conciliates complaints of unlawful discrimination.⁸

Furthermore, the inter-jurisdictional issues which have the potential to emerge as a result of the two organisations’ overlapping responsibilities, have already been addressed through legislation. The result is that states and territories are permitted by the Commonwealth to legislate in this area and States are able to undertake functions on the AHRC’s behalf. Given the location of the Australian Human Rights Commission in Sydney, this is an important consideration for Western Australians, from both visibility and access perspectives. The Council contends that on balance, Western

⁶ International Council on Human Rights Policy, *Assessing the Effectiveness of National Human Rights Institutions* (2005) p7.

⁷ The AHRC was known as the Human Rights and Equal Opportunity Commission (HREOC) until September 2008.

⁸ The AHRC is responsible for administering the following Commonwealth laws: the *Age Discrimination Act 2004*; the *Disability Discrimination Act 1992*; the *Racial Discrimination Act 1975*; the *Sex Discrimination Act 1984* and the *Human Rights and Equal Opportunity Commission Act 1986*. The AHRC also has specific responsibilities under the *Native Title Act 1993* (to report on the exercise and enjoyment of the human rights of Indigenous Australians with regards to native title, a role specifically undertaken by the Aboriginal and Torres Strait Islander Social Justice Commissioner), and the *Workplace Relations Act 1996* (in relation to federal awards and equal pay, a role specifically undertaken by the Sex Discrimination Commissioner).

Source: Human Rights Law Resource Centre, Submission to National Human Rights Consultation 2009, p9.



Australia achieves better outcomes by having the Equal Opportunity Commission independent from the AHRC; but that opportunities for the two organisations to work collaboratively should be undertaken wherever possible to make the most efficient use of resources. We suggest that the inquiry would benefit from actively engaging with the AHRC on the terms of reference of this inquiry to explore how these organisations could work more effectively together and to take advice on where the opportunities are for Western Australia to progress its equal opportunity and human rights regulation and activities and to take on a leadership role with other jurisdictions.

Similarly, the Council also acknowledges the importance of the Equal Opportunity Commission maintaining its awareness of, and cooperation with, the work being undertaken by Equal Opportunity Commissions (or related organisations) in the other states and territories of Australia.

The Council also suggests that given the similarities in the roles of the two organisations, before any changes are made to the role or structure of the Equal Opportunity Commission, it is important that comprehensive inter-organisational *and* community consultations be undertaken.

The aim of such consultations should be to examine, in detail, the respective functions of and relationships between the two organisations. This is critical to ensuring that *if* the Review makes any recommendations regarding changes to the structure or role of the Equal Opportunity Commission, that on balance, Western Australians are not disadvantaged.

In the inquiry is to consider consulting with or seeking input from some expert witnesses in the course of its inquiry, the Council suggests that, along with engaging the views of the Australian Human Rights Commission on the relationship between national and state institutions and roles, the inquiry might consider seeking the views of The Asia Pacific Forum, former Human Rights Commissioner Chris Sidoti (who has extensive expertise in this area) and the Australian Human Rights Law Resource Centre.



4.0 The Director of Equal Opportunity in Public Employment (DEOPE)

One of the issues it has been suggested that respondents to this Review “may like to address” is whether

... the functions of the DEOPE in promoting equal opportunity in public sector employment could be subsumed into the Public Sector Commissioner’s role?

WACOSS suggests that it may be appropriate to reflect on the impact of the current arrangements — whereby DEOPE was moved from being co-located with the Equal Opportunity Commission to being located within the Public Sector Commission — in responding to this question.

From our perspective operating outside the public sector, it is difficult to ascertain a role played by the Director which is distinct from that of other officers within the Public Service Commission, apart from the publication of a separate Annual Report. The current Annual Report provides an overview of representation in public sector employment of women, Indigenous Australians, people from CaLD backgrounds, people with a disability, youth and mature workers, for the last five years, based on reports to DEOPE. However, the figures presented suggest that there are very few areas in public sector employment where significant improvements in the representation of these groups have been achieved, as well as a number of areas where their representation has in fact deteriorated.

It is telling that despite a vision that includes **promotion** of equal opportunity and a mission to **build awareness, knowledge and capability**, that these figures are merely presented — no attempt has been made to analyse the figures, explain any causal factors impacting on those areas where progress has not been made or identify reasons behind any positive changes. This concern is reinforced when one considers that one of the strategic priorities for 2013-14 is new reporting mechanisms — suggesting that reporting products associated with DEOPE functions can be streamlined with other workforce planning and reports produced by the Commission- i.e. a focus on reporting rather than analysis and implementation.

As Appendix A of DEOPE’s 2013 Annual Report explains:

The EO Act positions EEO management plans as the principal accountability instrument for public authorities to ensure an absence of discrimination and positive employment outcomes for diversity groups.

The Act sets out a number of provisions for effective and compliant EEO management plans, including communication strategies, processes for the review of personnel practices, inclusion of goals and targets, evaluation strategies, review processes and the like. As the Annual Report so rightly identifies:

... the challenge is to translate those plans to implementation.

A strategic priority for 2014 has been identified as

... working with public authorities on moving forward with measurable activities to further the diversity agenda.

With all due respect to the Director, these words are fairly meaningless and provide little comfort that there is any active commitment to, or implementation of, strategies to advance equal



opportunity within the public sector (which is a significant source of employment for clients of a range of community sector members, particularly in the disability and CaLD areas). Publically available information suggests that little has been achieved since DEOPE was moved into the Public Sector Commission, and any advantage which may have arisen from the Director's functions being subsumed into the Public Sector Commission are difficult to identify. On the other hand, given that the remit of DEOPE includes local government authorities, public universities and other public authorities- i.e. broader than the Public Sector Commission, consideration should be given to moving the Directorate back to the Equal Opportunity Commission.

The Council notes the opportunities for (and some outstanding achievements with) equal opportunity employment within universities, local government and the community services sector. It is interesting to note that, while many small to medium mission-based not-for-profit service providers may not have in place best-practice HR policies, because of their commitment to social justice arising from their charitable nature they are culturally suited and more likely to consider and pursue equal opportunity initiatives. The Council suggests that it is possible that the WA Government is making a greater indirect contribution to on-the-ground outcomes in equal opportunity employment through its contracting with the community services sector under the *Delivering Community Services in Partnership Policy* than it has achieved through reform of public sector employment processes. It could be that the partnership process with community services in could itself become a driver of cultural change back into the public service where community-based organisations are encouraged and supported to take the lead in this area. The Council notes that the community sector has often in the past provided a training ground for younger staff in social policy areas who move on to successful careers within the public service.

Local government authorities (LGAs) may represent the next opportunity for achieving measurable improvements in equal opportunity employment, noting that the capacity and engagement in social planning and services varies significantly across LGAs, and the most appropriate strategy would be to partner with those leading LGAs who have already shown capacity and interest in this area to develop some demonstration initiatives and build up the knowledge of how to most effectively encourage adoption in other LGAs.

5.0 The role of the community sector in promoting equal opportunity

Another issue respondents to this Review were invited to address, was whether it would be

... desirable for the Equal Opportunity Commissioner to be supported by another government or non-government agency in performing his or her functions.

Through the Partnership Forum, WACOSS and the community sector have worked cooperatively with the State Government to both implement policy reform and to drive cultural change that fosters a collaborative approach as common practice.

Areas such as community education around the elimination of discrimination lend themselves to collaborative work arrangements between both government agencies and the public and community services sectors. **However, the Council notes that without adequate resourcing of collaborative initiatives, the danger is that the effectiveness of the role of the Equal Opportunity Commission is**



likely to be diminished. The Council suggests that further support for collaborative work between the Equal Opportunities Commission and the non-government sector should be treated as an opportunity — through partnership — to maximise the effectiveness of the Commission in achieving its aims, rather than an opportunity to outsource the Commission’s functions to another agency or agencies.

6.0 Contemporary social and legal environment

The Council suggests that if this Review takes into account the contemporary legal and social environment — as identified in one of its suggested questions — it may have been more appropriate to focus on the future, rather than structures. There are both general and more specific challenges in the current landscape.

At a broader level, *Human Rights in Western Australia: A Report Card on developments in 2013*,⁹ was released on March 26, 2014. This is a joint publication by King & Wood Mallesons Human Rights Law Group and the Community Legal Centres Association (WA) and provides a critical analysis of the developments in law and policy (introduced during 2013) that affect the enjoyment of human rights across WA. The core purpose of the report card is to document information from those experiencing disadvantage and to provide material to encourage governments to uphold human rights and take measures to address gaps in the protection of human rights. Specific population groups such as Aboriginal and Torres Strait Islander Australians, people with disabilities, older people and women, as well as issues such as employment and housing are covered. The *Report Card* thus provides a basis for considering the implications of the contemporary environment for the future work of the Commission.

In relation to more specific issues, one of the key policy directions of this Government (supported by the Partnership Forum), for example, is the move towards self-directed or personalised services. The changing nature of service delivery and funding, including measures such as individualised funding packages and a shift from block grants to arrears funding of services has significant implications for both those receiving services (for instance under NDIS or ‘My Way’ or within Aged Care services) and for the employment conditions of those delivering the services (for instance a shift away from Awards to individual contracts, ‘zero hour’ contracts and increased casualization). It is fair to say that our industrial relations system has not kept pace with these reforms and that we may be increasingly seeing recent migrants from CALD backgrounds engaged in the delivery of these services. A key question which potentially could have been raised in the context of this Review is whether there is a role for the Equal Opportunity Commission in ensuring that non-discriminatory outcomes are achieved through this process — both for the consumers of these services and the staff who provide them.

⁹ See http://www.communitylaw.net/images/stories/docpdf/Human_Rights_Report_Card_2012.pdf



7.0 Review of the *Commissioner for Children and Young People Act 2006*

In the context of *this* Review, it is important to acknowledge that in 2013 the Public Sector Commission conducted a review of the operation and effectiveness of the *Commissioner for Children and Young People Act 2006*.

The Council made a submission to that Review¹⁰ and the Council's CEO, Irina Cattalini, was also a part of the seven-member reference group (chaired by Public Sector Commissioner, Mal Wauchope), which was established to guide the Review. The Public Sector Commission's website indicates that the *Review of the Commissioner for Children and Young People Act 2006* was completed on 31 May 2013, but to-date, the Review report remains "under consideration by the Attorney General".¹¹

The Council is concerned that the Review report has yet to be made public. The Council wrote to the Attorney General about this issue in late 2013, and on 21 November, 2013 received a reply indicating that the Attorney General was "currently considering the statutory review and it will be tabled in due course". However, this still has not occurred — almost 10 months after it was completed.

The Attorney General also wrote in his 21 November 2013 correspondence that:

The Public Sector Commission was also asked to undertake further work to augment the review, particularly options available to Government which might better support the effective and efficient operations of the Children and Young People Act 2006.

This leads the Council to raise several questions:

- 1. The documentation about the Equal Opportunity Act Review indicates that the Review report will be provided to the Attorney General by 15 August, 2014. Will that report be made public?**
- 2. Is there any link between the 2 reviews, particularly given the Minister's response in November 2103?**

The answers to these questions are relevant not only for the openness and transparency of the Review process, but also for its credibility. If decisions have already been made in relation to either Commission's role, it would be appropriate to factor them into this review process. There is some speculation in the community sector whether the Government has already determined an alternative to the current structure of an independent Equal Opportunity Commission. It would be preferable to have a genuine discussion with stakeholders and other interested persons about the merits or otherwise of specific scenarios. The potential for support to the Commission from the Commissioner for Children and Young People, the Ombudsman or the Commissioner for Consumer Affairs, currently located in the Department of Commerce, for example, would each raise significantly different considerations.

¹⁰ The Council's submission to the Review of the Commissioner for Children and Young People Act 2006 (published March 2013), is available [online](#).

¹¹ Public Sector Commission (2013) [Review of the Commissioner for Children and Young People Act 2006](#), Accessed: 21 March 2013.



8.0 Conclusion

The Council thanks the Public Sector Commission for the opportunity to provide a submission to the *Review of organisations under the Equal Opportunity Act 1984*. The Council contends that the Equal Opportunity Commission continues to play an important role, and that the Commission's independence is critical to its service to the Western Australian community.

The Council concludes that in order for the Equal Opportunity Commissioner to function most effectively in delivering the Objects of the EOC Act 1984 these underlying principles must be maintained:

- Independence
- Empowered by legislation
- Adequately resourced
- Broad jurisdiction
- Wide range of functions
- Accessible
- Based on international standards

There is a significant opportunity for Western Australia to take this opportunity to take the next step in progressing human rights and equal opportunities reforms, to build on the national leadership it has shown in these areas in the past and is now demonstrating in other aligned areas.

Should the Commission have any questions or concerns about this submission, or should you want any further information, please contact Chris Twomey, Director Social Policy at WACOSS on (08) 9420 7222 or chris@wacoss.org.au.

