Review of the Equal Opportunity Act 1984 (WA)

Submission to the Law Reform Commission of Western Australia

29 OCTOBER 2021

ABOUT AMMA

AMMA is Australia's resources and energy industry group and has provided a unified voice for employers on workforce and other industry matters for more than 102 years.

AMMA's membership spans the entire resources and energy industry supply chain, including exploration, construction, commercial blasting, mining, hydrocarbons, maritime, smelting and refining, transport and energy, as well as suppliers to these sectors.

AMMA works to ensure Australia's resources and energy industry is an attractive and competitive place to invest and do business, employ people and contribute to our national well-being and living standards.

AMMA members across the resources and energy industry are responsible for a significant level of Australian employment, with an estimated 10% of our national workforce, or 1.1 million Australians, employed directly and indirectly as a result of the resources industry.

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1. Introduction

1. Australian Resources and Energy Group AMMA provides the following submission to the Law Reform Commission of Western Australia in relation to the review of the *Equal Opportunity Act* 1984 *(WA)* (EO Act).

2. AMMA supports the review and believes it is extremely important to address discrimination and inequality in all Australian workplaces. AMMA is deeply involved in improving diversity, inclusion and equity in the resources and energy sector and assisting its members in becoming employers of choice. A summary of AMMA's initiatives and programs in this area is included within Appendix A.

3. AMMA therefore welcomes the Law Reform Commission reviewing and, in consultation with employers and other social partners, updating the EO Act to promote safe, diverse, inclusive and discrimination-free workplaces in all Western Australian businesses including in the resources and energy industry.

4. This submission outlines AMMA's positions on matters of equal opportunity, diversity and inclusion in the resources and energy industry, insofar as they relate to the specific questions and considerations raised in the Law Reform Commission's discussion paper.

5. For 102 years AMMA has been the industrial relations specialist representative group for the Australian resources and energy industry. AMMA's responses to the Law Reform Commission's discussion paper therefore appropriately focus on the EO Act's functions in regulating employment and ensuring safe and inclusive workplaces, free from discrimination, vilification, harassment and other unacceptable behaviours and outcomes.

6. AMMA notes the discussion paper raises questions for feedback but does not propose specific legislative amendments at this stage. To provide for sufficient engagement with all relevant stakeholders, AMMA suggests modifying the drafting schedule to allow for a preliminary report to be published and reviewed through a secondary submission process, before producing a final report for the consideration of Parliament.

7. AMMA also notes that it has collaborated with and reviewed the submission of the Chamber of Commerce and Industry Western Australia (CCIWA). AMMA draws from or endorses the policy positions and recommendations of the state's peak business representative organisation throughout this submission.

2. Objects, Scope and Interpretation Provision of the Act

2.1. Objects and Scope of the Act

Discussion paper page 104: *Should the scope and objects of the Act be broadened?*

8. AMMA supports the advancement of an inclusive, diverse, equitable and safe society as well as the elimination of systemic discrimination.

9. In considering how the EO Act can best promote the above objectives it is firstly worth remembering that regulation is just one part of the equation. To create meaningful change in attitudes and outcomes, both in workplaces and at the broader societal level, mass campaigns and initiatives to influence cultural shifts are far more effective than legislation.

10. In the resources and energy industry, AMMA submits that amongst its members there are countless proactive policies, procedures, measures and initiatives in place to tackle

discrimination and inequality in the workplace, especially FIFO workplaces where unique challenges particularly exist with respect to female employment. Further, unions can support the creation of positive behaviours by leading and educating their members about diversity, equity and inclusion.

11. On the regulation front, currently WA firms must comply with a plethora of state and federal laws aimed at preventing unlawful discrimination and harassment. This includes federal and state industrial relations laws, human rights laws and conventions, general discrimination law and more.

12. Employers often find it challenging to grasp the many grounds created under various relevant laws, as well as the intricacies within overlapping definitions, in order to identify the nature of the safeguards applicable to their organisations. As a result, companies expend significant time and resources identifying the scope of their legal requirements, often at the expense of time and resources that could be spent on furthering proactive cultural initiatives to build more inclusive workplaces.

13. For this reason, there is an onus on legislators to establish a firm case that legislative changes and new regulatory approaches are necessary, and would supplement and not detract from cultural initiatives, before placing any additional regulatory burdens on business, employers and employees.

14. To this end, AMMA supports harmonisation of the EO Act and the development of nationally consistent anti-discrimination legislation.

15. With respect to the potential broadening of the scope and objects of the EO Act, in addition to the above, careful consideration must also be given to ensuring any changes to the objects of the Act avoid unintended detrimental effects, such as unequitable protection of the rights of some individuals over others.

2.2. Interpretation of the Act

Discussion Paper page 106: *Would the Act benefit from an interpretation provision? If so, what type of interpretative provision should be included?*

16. AMMA acknowledges the importance of recognising human rights and aligning and complying with the International Covenant on Civil and Political Rights (ICCPR) and the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR.

17. Any interpretation provision added to the EO Act needs to be carefully scrutinised to ensure equitable protection of the rights of all individuals. Thorough consideration is required to ensure careful balancing of human rights. For instance, it is important to balance the right of freedom from discrimination with inferred rights to freedom of opinion and expression.

3. Grounds for Discrimination

3.1. Assistance or Therapeutic Animals

Discussion Paper page 107: *Should the protections in the Act relating to guide or hearing dogs be extended to any assistance or therapeutic animal certified by a medical practitioner or regulation?*

18. AMMA acknowledges the importance of facilitating the use of assistance or therapeutic animals where required. AMMA also acknowledges that the range of disabilities where such animals are employed has broadened significantly. As such it would be compassionate and appropriate to extend the definition.

19. Clarity on the definition and appropriate regulations for the training and accreditations of such assistance and therapeutic animals is required.

20. Moreover, where assistance and therapeutic animals are required at workplaces, it is important to consider the potential implications on employee safety and wellbeing, as well as the wellbeing of the animal. For example, in the resources and energy industry there are many conceivable circumstances where the presence of animals on-site may be inappropriate or simply not possible to accommodate.

21. This would include remote mines and offshore hydrocarbons platforms where the environments and facilities are not suitable to host any type of domestic animal and / or may present significant work health and safety risks. Therefore, protections against discrimination on the basis of requiring an assistance or therapeutic animal must be balanced with workplace health and safety considerations and the practical realities of unique workplaces.

3.2. Gender History Discrimination/Identity, Intersex Status

Discussion Paper page 109: *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?*

22. AMMA firmly believes that LGBTIQA+ people should not face discrimination of any kind in the workplace and that it is necessary for the definitions of gender discrimination to reflect that position. Therefore, AMMA supports strengthening of protective provisions to achieve this.

23. Changes to the protections in the EO Act should, however, be considered carefully so as not to encroach on spaces and initiatives set up for the protection and/or general benefit of women.

24. This is particularly important for the resources and energy industry where women are a significant minority within on-site operational workforces and where enormous efforts are underway to eradicate any actual or perceived threat of workplace sexual harassment against women, and where cultural initiatives and designated on-site facilities are being heavily invested in to create a safe and comfortable working environment for females.

3.3. Impairment

Discussion Paper page 111: *Should the definition of impairment be broadened in the Act and, if so, how?*

25. AMMA recognises the importance of not discriminating against people with any type of impairment and therefore supports the broadening of the definition of impairment to include 'behaviour that is a symptom or manifestation of a disability', cognitive impairment, frailty and potential future impairment (i.e., someone with a genetic predisposition to develop impairment).

26. Broadening the definition in such a way, however, raises questions as to the definition and management if a complaint is brought on that basis.

27. If the need for a medical diagnosis is removed and replaced with ‘behaviour’ indicative of an impairment, then it needs to be considered how the presence of impairment as per such a broadened definition could be ascertained. This is as much a requirement for discrimination as it is for employers to discharge their workplace health and safety responsibilities.

28. Moreover, there may be a need for exemptions to exist where it would be potentially lawful for an employer to determine the suitability of an individual to perform a certain role to ensure health and safety in the workplace. As an example, an employer should be able to deem an individual who has serious chronic fatigue syndrome unfit to operate mining machinery for long hours at a mining project.

3.4. Religious or Political Conviction

Discussion Paper page 114:

Should the protections for religious or political conviction be defined or clarified?

Should the protections for religious or political conviction expressly include religious and political beliefs and activities?

Should the protections for religious or political conviction expressly include religious appearance or dress?

Should the protections for religious or political conviction be extended to relatives or associates of a person protected by the Ground?

Should the protections for religious or political conviction be extended to all areas covered by the Act?

29. AMMA agrees that religious and political freedom are important democratic values and must, so far as practical, be grounds for protection against discrimination.

30. It is a reality that some work may make it difficult for employers to accommodate certain beliefs and practices, should those beliefs or practices be especially uncommon or disruptive.

31. For example, a mining employer would find it difficult to accommodate a dump truck driver or dragline operator requesting to interrupt work for prayer outside of designated break times and/or unreasonably frequently, with multiple other functions in the supply chain reliant on that employee performing their duties. For such cases, options need to be considered to accommodate situations where religious practices become excessive and unreasonably infringe on work time and production processes.

32. Health and safety concerns is another area where an employer should have the ability to make directions lawfully in regard to a person's religious attire. For example, a religious dress or garment may pose a danger of becoming entangled in machinery in some situations.

33. As for most of the areas of the EO Act, provisions for exemptions based on practical common sense and work health and safety requirements need to be made.

3.5. Pregnancy

Discussion Paper page 116:

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

Should the requirement that pregnancy discrimination is 'not reasonable in the circumstances' be removed?

Should express exceptions to the protections for pregnancy be incorporated and, if so, what exceptions should be incorporated?

34. AMMA supports broadening the prohibition of discrimination on the grounds of pregnancy to include potential pregnancy, in line with the *Sex Discrimination Act 1984 (Cth)* (SD Act) that explicitly prohibits discrimination on the grounds of both pregnancy and potential pregnancy.

35. It is important to allow room for some exceptions to allow employers to ensure workplace health, safety and wellbeing, such as requiring doctor's clearance for a pregnant person to be able to perform certain work duties if the employer deems such duties to be physically onerous or involved work with chemicals, gases, odours etc.

3.6. Race

Discussion Paper page 117: *Should the protections for race discrimination be broadened in the Act and, if so, how?*

36. AMMA firmly agrees there is no place for discrimination against an individual on the grounds of their ethno-religious, immigrant or language-based background.

37. The definition under the EO Act is essentially compatible with the *Racial Discrimination Act 1975 (Cth)* (RD Act); and, as the discussion paper highlights, relevant tribunals and courts have liberally construed the meaning of race based on this.

38. Care needs to be taken to not prevent employers from ensuring job applicants have a sufficient level of written and spoken English to fulfil the requirements of the job, in particular with regards to the ability to understand and relay communications affecting workplace health and safety requirements.

39. Any potential lack of understanding in the community that not discriminating on the grounds of race also includes not to discriminate on the grounds of ethno-religious background etc. could be approached with education and communication efforts.

3.7. Physical Features

Discussion Paper page 118: *Should physical features be included as a Ground?*

40. Given the difficulty in arriving at a definition of physical features that is sufficiently inclusive, equitable and fair without significantly increasing complexity; the problems noted in other jurisdictions in this regard; and insufficient proof that reforms are required, AMMA believes that a new ground based on physical appearance should not be introduced.

41. AMMA wishes to emphasise that any changes to the EO Act in regard to the definition of grounds for discrimination must not infringe on an employer's ability to ensure a safe and healthy workplace and mitigate risks to health, safety and wellbeing. In the resources sector there are many foreseeable circumstances where, for example, long hair, large piercings etc. may constitute an inherent safety risk and where discrimination on those physical traits is reasonably necessary to protect the health or safety, or property, of any person or of the public generally.

3.8. Industrial and Trade Union Activity

Discussion Paper page 119: *Should industrial / trade union activity / employment activity be included as a Ground, or are those protections adequately covered by industrial laws?*

42. Discrimination based on industrial / trade union involvement is already prohibited under the *Industrial Relations Act 1979 (WA)* (IR Act) and the *Fair Work Act 2009 (Cth)* (FW Act), as stated in the discussion paper. This is an industrial relations matter that should be dealt with by industrial relations law.

43. The present industrial relations laws are comprehensive and already heavily skewed in favour of employees. Most notably, the FW Act's general protections provisions controversially allow for an employee to make a claim that they were discriminated against on the basis of exercising a workplace right or engaging in lawful industrial activities (alongside an almost endless list of personal attributes) up to six years from when the alleged discrimination took place.

44. Adding to the controversy of the six-year time period in which to bring about a claim, the FW Act's general protections also place a reverse onus of proof on employers to prove the discrimination did not occur – a near impossible burden for employers given the potential timeframes, especially those within smaller businesses with unsophisticated record keeping.

45. With such broad and significant protections against discrimination on the basis of engaging in industrial and trade union activity contained within IR laws, the addition of this area of protection into the EO Act is unnecessary and would only add additional complexity and a new forum in which unmeritorious claims might be pursued.

3.9. Employment Status

Discussion Paper page 120: *Should employment status be included as a Ground?*

46. A person's employment status and work history are essential factors that impact hiring decisions.

47. AMMA is concerned that inserting employment status as a new ground for discrimination may encourage failed candidates to file lawsuits alleging that a decision not to hire them was made unfairly based on their job history. The ability for potential workers to make such a claim would generate uncertainty and significant risk for organisations looking to hire new personnel and ultimately dampen the creation of new jobs.

48. Therefore, AMMA submits that employment status should not be included as a ground.

49. It is AMMA's view that a better path towards employment-based equality is through strengthening the economy and improving education and assistance for disadvantage people.

3.10. Irrelevant Criminal Record

Discussion Paper page 121: *Should irrelevant criminal record be included as a Ground?*

50. Ex-offenders are frequently disadvantaged in seeking jobs upon their release from jail due to a variety of issues. Significant emphasis has been placed on the need to assist ex-offenders to reintegrate into society.

51. Nonetheless, a person's criminal history is frequently an important factor in determining their appropriateness for work. The nature of a person's criminal record frequently raises concerns about their ability to achieve basic standards of reliability and trustworthiness.

52. AMMA's firm view is that it should be the prerogative of the employer to assess whether an applicant's criminal history is relevant to their suitability for employment within their particular business.

53. AMMA believes that any remaining concerns in this area are better addressed through a review of the *Spent Convictions Act 1988 (WA).*

3.11. Irrelevant Medical Record

Discussion Paper page 122: *Should irrelevant medical record be included as a Ground? Should this also extend to a person's workers' compensation history?*

54. AMMA's view is that there is no need to include irrelevant medical record as an additional ground. This would only introduce unnecessary complexity and duplication, given the overlap with the ground of impairment as pointed out in the discussion paper.

55. Concerns related to previous workers' compensation claims noted by the EO Commission are more appropriately addressed within the *Workers Compensation and Injury Management Bill 2021* which is currently under public consultation and contains a new provision restricting the publication of workers' compensation claim information.

3.12. Social Origin, Professional Trade, Occupation and/or Calling

Discussion Paper page 123: *Should social origin or profession, trade, occupation or calling be included as a Ground?*

56. AMMA strongly supports that people should not be discriminated against based on their socioeconomic background (e.g., their having grown up in a poor neighbourhood etc.). However, socio-economic background (aka 'social origin') should not be conflated with job qualifications and professional experience.

57. Assessing the compatibility of a person's professional credentials, education and work experience for a particular job opening is a crucial part of the hiring process. Prohibiting discrimination on these grounds is not a logical pursuit.

58. AMMA's view is that this whole section is fraught with danger. Professional or trade qualifications, education and previous work experience are most important factors in making employment decisions.

59. Any amendments in relation to this proposed ground must be confined to social origin in the context of socio-economic background, and not include professional trade, occupation and/or calling. With respect to the latter, it is unclear what problem the Law Reform Commission is proposing to address with this new ground.

3.13. Lawful Sexual Activity

Discussion Paper page 124: *Should lawful sexual activity be included as a Ground? If so, what exceptions might apply?*

60. In light of the recent review into sexual harassment in the resources sector, attempts are underway to instigate widespread changes in the industry.

61. The resources industry has clear reasons for prohibiting any sexual activity on site. Not only may companies prohibit the presence of sex workers on site (and almost all do where such services could viably be sought), but there may also be prohibitions against fraternisation or conduct of a sexual nature in on-site accommodation.

62. It's important to protect the ability of an employer to enforce policies prohibiting sexual conduct. This is an important part of preventing sexual harassment and the attendant potential psychosocial harm.

3.14. Spouse or Domestic Partner Identity

Discussion Paper page 124: *Should spouse or domestic partner identity be included as a Ground?*

63. This section is of low relevance to the resources sector and AMMA's members, as illustrated by the example in the discussion paper about concerns related to partners of politicians, which is not relevant to the resources sector.

64. AMMA agrees in principle that a person in the workplace should not be discriminated against based upon their domestic partner or spouse.

65. Provision for some exemptions should apply in relation to conflict of interest and competition concerns, for example if an applicant to an executive management position is the spouse or domestic partner of an executive manager of the firm's close competitor.

3.15. Relative of / Association with a Protected Person

Discussion Paper page 125: *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?*

66. Insofar as the proposal relates to prohibiting discrimination based upon an individual being a relative of, or have association, with someone who has, or is assumed to have, a specific protected attribute, AMMA agrees in principle this protection should exist. However, the likelihood of such a scenario arising within the resources and energy sector is quite low.

67. Moreover, as pointed out in the discussion paper, the EO Act, the SD Act and the FW Act already provide safeguards based on race, disability, age, or sexual orientation. Therefore, introducing a new ground on this basis may needlessly introduce complexity and duplication to the legislation.

3.16. Accommodation Status

Discussion Paper page 126: *Should accommodation status be included as a Ground? If so, what exceptions might be reasonable?*

68. This area is of relatively little concern to the resources industry and AMMA's members. Amongst FIFO workers it is not unheard of to use forwarding services in lieu of home

addresses. Moreover, most job-related communication nowadays is in electronic form. Hence this appears to be a low-risk area.

69. Regarding the concerns noted by the Commission regarding homeless people, AMMA believes in principle, if someone's homelessness was the sole determining factor in not being offered employment – with all other attributes being suitable, including qualifications, safety record, availability for work, reference checks, cultural fit etc. – this might justify a protection on the ground of discrimination. In practice, especially in the resources sector, there is a very low probability this scenario would arise.

3.17. Immigration Status

Discussion Paper page 127: *Should immigration status be included as a Ground?*

70. It would be prudent to harmonise the concept of immigration as a protected ground in accordance with the RD Act, which protects workers and future employees from being discriminated against because they are or have been immigrants.

71. There are situations when a person's immigration status may impose constraints on whether they may work, where they can work, how many hours they can work, and the job circumstances under which they can work.

72. Exclusions are necessary when visa requirements are incompatible with the requirements of a post as well as for activities taken in accordance with the *Migration Act 1958 (Cth)*, for instance complying with restrictions regarding the allowable workhours for certain visa.

3.18. Subjection to Domestic or Family Violence

Discussion Paper page 128: *Should subjection to domestic or family violence be included as a Ground?*

73. AMMA acknowledges that domestic or family violence is a significant community concern and cause for considerable hardship and suffering.

74. Many workplaces in the resources sector have programs in place to support victims of domestic and family violence either directly, via measures like paid personal leave, or indirectly, by assisting with the resulting trauma through employee assistance programs or industry counselling.

75. As noted in the discussion paper, employees affected by domestic violence are entitled to a variety of benefits and safeguards under other legislation, like the FW Act and the *Residential Tenancies Act 1987 (WA)*.

76. In light of the above, we do not agree that there is a need to introduce a new ground for domestic or family violence, as it would only introduce further complexity to the legislation.

3.19. Family Responsibility and Family Status

Discussion Paper page 129: *Should coverage of family responsibility and family status be extended to all areas under the Act?*

77. Family responsibility and family status are already protected in areas of employment and education, but beyond these areas the subject is of little concern to the resources industry and AMMA's members.

78. Where harmonisation could remove complexity and simplify the legislation, this should be considered.

4. Key Definitions

4.1 General Legal Definitions

Discussion paper page 131—139:

Should a definition of discrimination be inserted into the Act?

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?

Should it be sufficient to prove indirect discrimination that the aggrieved person has a characteristic which pertains to people who have a protected attribute; as opposed to that the complainant have the protected attribute?

Should the meaning of indirect discrimination be amended to remove the proportionality test?

Should the meaning of indirect discrimination be amended to shift the onus of proof from the complainant to the alleged discriminator?

Should the meaning of indirect discrimination be amended to remove the requirement that the complainant does not or is not able to comply with the requirement or condition?

Should the meaning of indirect discrimination be amended to specify that it is not necessary for the discriminator to be aware of the indirect discrimination?

79. AMMA is highly concerned that changes implied by the above questions would shift the burden of proof currently shouldered by the complainant fully or partially to the respondent.

80. This would be a highly inequitable outcome and contrary to the fundamental principles of Australia's judicial system ('innocent until proven guilty'). Where reverse onus of proof exists in other areas of law – such as the general protections provisions within the FW Act – this has been highly controversial and may be subject to future review and revision.

81. AMMA's concerns about reverse onus of proof are further detailed in section 8.

4.2 Sexual Harassment

Discussion paper page 140—143:

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?

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

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?

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)?

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

82. AMMA's position is that all forms of sexual harassment and related behaviours are abhorrent and must be eradicated from all workplaces. Supporting this, AMMA recently provided a submission to the WA Inquiry into FIFO sexual harassment and refers the Law Reform Commission of WA to that document for AMMA's comprehensive position on sexual harassment.

83. For the purposes of this submission, AMMA recognises the Australian Human Rights Commission's (AHRC) definition of sexual harassment, including that it is "any unwanted or unwelcome sexual behaviour where a reasonable person would have anticipated the possibility that the person harassed would feel offended, humiliated or intimidated"[1].

84. Regarding the first question, AMMA agrees to remove the requirement that the behaviour results in disadvantage. This requirement fails to account for the wide range of situations in which sexual and racial harassment can occur, notably the fact that such behaviour frequently happens between workers of equal status, making the test of real or perceived disadvantage difficult to demonstrate and generally irrelevant. As a result, employers' capacity to take substantial disciplinary action against workers who engage in such behaviour should not be limited by whether the victim is disadvantaged in some way.

85. AMMA supports the abolition of this provision, as it confers an unnecessary and irrelevant consideration on employers who strive to combat sexual harassment in their organisations and take action based on the behaviour and actions of perpetrators, not the net result of their actions on victims.

86. AMMA also supports the matching of the EO Act's definitions with those of the SD Act and the extension to all areas under the Act.

87. There is no reason why employees working with members of Parliament and judicial officials should not have the same safeguards as the rest of the workforce. Although, this is not especially relevant to the resources sector, AMMA strongly agrees that there is no place for sexual harassment in any setting, including those of Parliamentary or judicial nature.

4.3 Racial Harassment

Discussion Paper page 143:

Should the definition of racial harassment be amended to 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?

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

88. In this context AMMA notes that "racial harassment" is very different to discrimination against an employee or prospective employee based upon their race.

89. With respect to the latter, should an employee or prospective employee claim they have been racially discrimination against in the workplace or a job application process, AMMA's firm position is that it should be incumbent on that individual to provide credible evidence demonstrating that the discrimination occurred. The requirement to demonstrate some form of

[1] Full definition available at https://humanrights.gov.au/quick-guide/12096

disadvantage as a result of the claimed discrimination would likely be central to the credibility or otherwise of the claim.

90. In relation to “racial harassment”, this may take the form of bullying, vilification or general harassing behaviours. Such behaviours are similarly abhorrent as sexual harassment and should not be tolerated in any form. In this context, demonstrating an employment-related disadvantage should not be a requirement for seeking recourse.

91. AMMA cautions the Law Reform Commission to not conflate harassment / bullying with specific employment-related disadvantage based on a protected attribute.

4.4 Requirement to Make Reasonable Adjustments for Persons with an Impairment

Discussion Paper page 143—147:

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?

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

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

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

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

92. AMMA agrees that discrimination on the basis of impairment, where that impairment does not present an inherent safety risk to an employee and others, is not acceptable. Unless there is an inherent safety risk and/or fitness for work concerns, nobody should be discriminated against on the grounds of impairment.

93. With respect to the specific questions raised in the discussion paper, AMMA has concerns that in practice these changes would create unrealistic expectations for an employer to foresee and mitigate discrimination for unusual or hard to ascertain impairments.

94. Medical matters, including impairment and disability, are extraordinarily complex and individualistic. Employers are generally not medical experts (hence the role for doctors in making employment related assessments) and cannot be reasonably expected to have the expertise or foresight to proactively plan for and accommodate any special physical requirement that may be necessary to accommodate any possible impairment of current or prospective employees.

95. Rather, employers can be reasonably expected to accommodate physical needs for employees with impairments in response to being notified of those physical needs by the employee and / or their physician.

96. To achieve this, AMMA submits that a better approach than that proposed by the discussion paper would be to align the EO Act with the federal *Disability Discrimination Act 1992 (Cth)*.

97. AMMA has broader concerns about positive duties which are outlined in Section 6 of this submission.

4.5 Victimisation

Discussion Paper page 148: *Do the victimisation protections or related provisions in the Act require reform?*

98. AMMA agrees that jobseekers from all walks of life regardless of race, gender, impairment, etc. should have equal opportunities in WA.

99. Victimisation is a very serious matter that should not be tolerated or accepted in any workplace. This area is, however, more complex and (arguably) a more serious allegation to bring upon an alleged perpetrator than discrimination. In some cases, discrimination, whilst unacceptable, can occur accidentally (for example as a result of unconscious bias) and/or without malice intended. Of course, in many cases discrimination may be intentional and with malice.

100. Victimisation, by contrast, is a serious matter that would almost always be intentional, with malice and by its nature the result of either a particularly harmful single event or a prolonged series of events.

101. For this reason, in AMMA's view it is not unreasonable to expect that claims of victimisation should be held to a higher burden of proof than claims of discrimination. AMMA therefore does not support the amendment to the definition of victimisation first proposed in 2007 by the Equal Opportunity Commission (EOC).

102. As a general principle, caution should be employed when considering any changes that may lead to an overly litigious framework, the result of which may lead to a flood of vexatious litigation.

4.6 Services

Discussion Paper page 148:

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?

103. Whilst this section is not particularly relevant to the resources sector and AMMA's members, it is reasonable that activities by the State Government and its agencies, including any activities of a coercive nature, such as related to penitentiaries or closed mental health institutions, should be constrained by the same protections as any other activities.

4.7 Employment

Discussion Paper page 149:

Should the definition of employment in the Act be extended to include unpaid and voluntary workers?

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?

104. Whilst this section is not highly relevant to the resources industry, AMMA agrees in principle that volunteer workers, such as unpaid vacation students or work experience participants, should be afforded the same protections under the EO Act as paid workers.

5. Vilification

Discussion Paper page 151—154:

Should anti-vilification provisions be included in the Act?

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

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

Should or how may vilification provisions address concerns around the loss of freedom of speech?

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

Would a different model for reporting vilification assist in protections?

105. AMMA agrees in principle that vilification is an abhorrent behaviour and must not be tolerated.

106. Employers are obligated under the *Occupational Safety and Health Act 1984 (WA)* (OSH Act) to take all reasonable precautions to create a safe workplace, including minimising risk associated with psychosocial hazards.

107. Notably, psychosocial risk management as per the requirements of the OSH Act includes protections from vilifications, bullying, harassment and related behaviours, which WorkSafe can enforce.

108. In addition, employees can use the FW Act's anti-bullying provisions to obtain an injunction to prohibit such behaviour from occurring.

109. Accordingly, in AMMA's view it is not necessary to introduce additional anti-vilification provisions in the EO Act. By its very nature the EO Act is intended to ensure individuals are not subject to unequal employment opportunities due to a ground that is protected in the legislation. The EO Act is not intended to provide recourse for vilification; this is covered for in other parts of law. AMMA cautions against creating unnecessary duplication and complexity.

6. Positive Duty

Discussion paper page 158—159:

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

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

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?

Should an individual complainant have the ability 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?

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?

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

110. The resources and energy sector is very proactive in conducting numerous initiatives to further equal opportunity in the workplace. As exemplified by some of the recent initiatives set out in Appendix A to this document, AMMA is strongly committed to enhancing diversity, inclusion

and equity in the resources and energy industry, as well as assisting our members in becoming preferred employers.

111. Employers have an obligation under the OSH Act to take all reasonable steps to provide a safe workplace and to reduce risk of being vicariously liable for claims under relevant discrimination provisions. This involves taking precautions to reduce psychosocial risks, such as harassment and discrimination, and is enforceable by WorkSafe.

112. Further, the nature of the EO Act is that it provides protections for people who believe that they have been subject to an unequal outcome in their employment or prospective employment based upon a protected ground within the legislation. AMMA acknowledges that a secondary related outcome of this legislation is to provide guidance to employers for taking steps to proactively ensure their organisation, including managers, supervisors and hiring managers, do not breach its protections.

113. However, a legislated positive duty in this area of law would be a step too far. It risks changing the nature of the legislation away from providing recourse for individuals who have been discriminated against to a new set of regulatory obligations on employers to demonstrate that such a scenario could not occur within their workplaces.

114. For the reasons above AMMA does not support the introduction of any new positive duties into the EO Act. Positive duties should exist solely in workplace health and safety laws, which AMMA notes consider psychosocial hazards alongside physical hazards.

115. As a sidenote, AMMA acknowledges that the appropriateness or otherwise of inserting a new positive duty relating to workplace sexual harassment was a key focus of a recent federal senate inquiry into (now legislated) changes to the SD Act and FW Act in relation to sexual harassment. The conclusion of that senate inquiry was that positive duties are best left to WHS laws which contain the overarching responsibility of employers to ensure safe workplaces, which includes ensuring freedom from bullying, harassment, discrimination and other psychosocial hazards.

7. Exceptions

Discussion paper page 159—175:

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

Should the exception contained in section 66ZS (exception for acts done under statutory authority) of the Act be amended, and if so, how?

Should the scope of the exception contained in section 70 of the Act (exception for charities) be amended, and if so, how?

Should a statutory definition of 'charity' be inserted into the Act, and if so, how should 'charity' be defined?

Should the scope of the exception contained in section 71 of the Act (exception for voluntary bodies) be amended, and if so, how?

Should the scope of the exception contained in section 72(a)-(c) of the Act (exception for religious personnel) be amended, and if so, how?

Should the exception contained in section 72(d) of the Act (exception for religious bodies) be removed or retained?

Should the scope of the exception contained in section 72(d) of the Act (exception for religious bodies) be amended, and if so, how?

Should the exception contained in section 73(1)-(2) of the Act (exception for educational institutions established for religious purposes re employment) be retained or removed?

If the exception contained in section 73(1)-(2) of the Act is retained, should it be narrowed and if so, how?

If the exception contained in section 73(1)-(2) of the Act is narrowed, should it be narrowed such that it only operates in relation to the employment of specific categories of employees or relates to only some of the Grounds?

Should religious educational organisations be required to maintain a publicly available policy outlining their positions in relation to the employment of staff?

Should the exception contained in section 73(3) of the Act (exception for educational institutions established for religious purposes re provision of education) be retained or removed?

If the exception contained in section 73(3) of the Act is retained, should it be narrowed and if so, how?

Should section 74 of the Act (exception for establishments providing housing accommodation for aged persons) be retained or removed?

Should providers of housing accommodation for aged persons who rely on the exception in section 74 of the Act be permitted to instead apply for an exception from the provisions of the Act pursuant to section 135 of the Act?

Should the Act stipulate specific criteria to be considered when determining whether to grant an exception from the provisions of the Act to providers of housing accommodation for aged persons?

Should an exception allowing individuals or businesses to discriminate in the provision of goods or services on certain Grounds be introduced into the Act?

Should any additional general exceptions be included in Part VI of the Act?

Should section 135 of the Act be amended, for example by specifying criteria that must be satisfied before an exemption may be granted?

116. Although the exemptions discussed in this section of the discussion paper are not especially relevant to the resources sector or AMMA's members, it would be equitable that the actions of all participants in our society should be subject to the same safeguards. This includes activities performed under statutory responsibility by the State Government and its agencies as well as actions by charitable, religious and educational organisations.

117. Simplification of the legislation to remove unnecessary exemptions, and thereby complexity, would be a sound approach. Exemptions would only be reasonable where the charter of organisations clearly states that their aim is to concentrate on providing services for a particular segment of society and not others.

8. Burden and Standard of Proof

Discussion paper page 177:

Should the Act place the burden of proof on the alleged discriminator to provide that no discrimination occurred and, if so, in what circumstances?

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

118. The discussion paper contains various proposals and arguments to amend the EO Act by reversing the onus of proof onto the respondent to a complaint.

119. AMMA is very concerned by these proposals. In any context, reversing the onus of proof is contradictory to how our judicial system is intended to function. The onus needs to remain firmly on the accuser to prove that their accusation has merit.

120. It is suggested in the discussion paper that placing the onus of proof solely on the respondent might “even out” the disparity often present in legal resources between employer and employee.

121. AMMA firmly disagrees with the notion that an employer's legal resources outweigh that of a complainant to the extent that it affects the legitimacy or outcome of a claim. Further, in most forums whereby claims are often first addressed – such as industrial relations tribunals, employers are typically restricted from legal representation, with evidence often coming from a human resources manager or frontline supervisors / colleagues.

122. AMMA agrees with the suggestion noted in the discussion paper that reversing the onus of proof would give rise to potentially punitive vexatious claims. This has certainly been the experience of employers in relation to the FW Act's general protections provisions, which saw a significant rise in applications in comparison to the unfair dismissal protections of the act – the traditional avenue for an employee to seek to rectify a wrongdoing against them.

123. In general, the reverse onus of proof onto respondents within the FW Act's general protections provisions have been highly controversial and key point of contention within multiple review of Australia's employment laws.

124. AMMA firmly recommends the Law Reform Commission avoid creating similar controversy within the EO Act by reversing the onus of proof on to the respondent to claims.

125. Outside of the offence this would cause to the accepted principle of justice, it is also important to avoid situations where employers are tentative to deal with significant misbehaviour amongst their workforce (such as harassment, bullying etc.) out of fear of being subject to a vexatious claim of discrimination.

9. Functions and Investigative Powers of the Equal Opportunity Commissioner

Discussion paper page 180—185:

Should the investigative powers of the Equal Opportunity Commissioner or complaints handling process under the Act be updated or expanded and, if so, how?

Should the dismissal powers of the Equal Opportunity Commissioner be amended and expanded?

Should the Equal Opportunity Commissioner's assistance function be amended and expanded?

Are management plans effective? Should the process be amended to make it more effective?

Should Part IX be moved from the Act into the Public Sector Management Act 1994 (WA)?

Should the statutory framework be changed to require the EOC to play a greater role in monitoring and regulating compliance with anti-discrimination legislation or preventing discrimination?

126. AMMA is deeply invested in improving equal opportunity in the workplace and sees no obvious argument against empowering the Equal Opportunity Commissioner to conduct the necessary monitoring and investigations to bring about meaningful improvements.

10. Other

10.1 Referrals and Interaction With Other Law

Discussion paper page 185—187:

Should the complainant's option to request the Equal Opportunity Commissioner to refer a dismissed complaint to the SAT be retained?

Should the Act be amended to enlarge the SAT's powers to enforce the obligations of the parties during the investigation and conciliation phase of a complaint?

Should the Act be amended to provide the SAT with the power to order that costs follow the event or order costs in a broader range of circumstances than currently?

Should the Act be amended to clarify that a person is prevented from lodging a claim under the Act if they have already made a complaint under Commonwealth anti-discrimination legislation in relation to the same conduct?

127. As noted in the discussion paper, the goal of granting the EO Commissioner the ability to dismiss claims is to prevent frivolous or unjustified claims. The alternative would be to give the SAT more discretion in awarding cost orders in accordance with other civil jurisdictions. This would also discourage responders from defending applications that have little chance of success.

128. This review of the EO Act offers opportunities for the WA Government to harmonise the Act with relevant Federal legislation. This would decrease the amount of complexity and allow companies to focus more on promoting diversity and inclusion.

10.2 Compensation Cap

Discussion paper page 188:

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

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

129. This area of potential amendments determines the financial impact from litigation as well as provisions for such. A high compensation cap may result in the EO Act becoming another avenue for “forum shopping” for vexatious claims. AMMA supports retaining the existing compensation cap.

10.3 Multidimensional Complaints

Discussion paper page 190: *Should the Act be amended to make discrimination based on two or more overlapping Grounds unlawful?*

130. AMMA is committed to combatting discrimination in all its forms, including discrimination on multiple grounds at the same time.

131. Part of enabling efficient action against discrimination is making legislation appropriate and reasonably easy to use. Once all the issues raised so far have been dealt with fairly and efficiently, there will be sufficient protection for all express grounds.

132. Introducing provisions for treating multidimensional complaints in a more complex manner than just as sequential complaints would introduce unnecessary difficulty to an already complex area.

10.4 Further Issues

Discussion paper page 190—194:

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

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?

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

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

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

Should prohibitions on conversion practices be included in the Act?

133. Although there may be instances of systematic discrimination, each case is deeply personal and individual. Therefore, it is highly doubtful that it would be appropriate to run discrimination complaints in a manner similar to class action suits – which complaints by a representative organisation on behalf of more than one person would amount to.

134. The present 12-month deadline for filing complaints makes it difficult for businesses to aggressively respond to and fight against charges of discrimination. The usual deadline for filing complaints about termination is between 21 and 28 days. Regarding fear that people may be unable to file claims within this deadline, it is important to investigate what those barriers are and how individuals might be better assisted to file applications on time.

135. AMMA commends the suggestion to make better use of technology, including video links and electronic document exchange. This has the potentially positive impact of simplifying some aspects of litigation and bringing about justice to victims of discrimination with less effort and cost.

Appendix A - AMMA's Work in Equity, Diversity and Inclusion

136. AMMA is deeply involved in improving diversity, inclusion and equity in the resources and energy sector and helping our members become employers of choice.

137. One of the leading national initiatives working to support increased female representation in the resources and energy industry is the Australian Women in Resources Alliance (AWRA).

138. AWRA was formed by AMMA in 2011, bringing together leading experts and practitioners from across the sector. Its charter is to assist employers on their gender diversity journey, with the overarching goal to increase women's participation in the resources, allied and related construction sectors. Over time this charter has expanded to include diversity campaigns in relation to other demographics including employees from the LGBTQIA+ community.

139. AWRA facilitates programs and provides support and guidance materials that help employers attract, retain and develop female talent, build their gender diversity capability, become an employer of choice for women and realise the advantages of a diverse and inclusive workforce.

140. Examples of these programs and support initiatives include:

    a) Release of a comprehensive report into workplace gender diversity, *Gender Diversity in the Australian Resources Industry – Leading, Lagging or Losing Out?*[2] The report covers the five main areas of gender diversity as they relate to employers: workforce participation, cultural change, women in leadership, pay equity and workplace flexibility.

    All aspects of the report are critical to improving female representation, however the area of 'cultural change' is most directly relevant in the context of workplace sexual harassment.

    b) Delivery of the Bright Future STEM Primary Schools Program – a national program that engages 9-12 year-old schoolkids in STEM energy and resource industry experiences.

    The program provides exposure to female STEM professionals, encourages an interest in STEM careers and gives insights into future STEM employment in the Australian resources and energy industry.

    c) Monthly diversity and inclusion webinars, featuring guest speakers from within the industry. These webinars are catered to executive leaders, human resources managers and diversity and inclusion practitioners, with learning including how to foster more diverse and inclusive workplaces and how to tap into new talent pools.

    d) Publication of other resources, such as the *AWRA Guide to Flexible Work*, in addition to case studies, strategy documents and guides for employee engagement and cultural change.

    e) Delivery of Inclusive Safety Audits in member workplaces.

    f) Delivery of "Appropriate Workplace Behaviours" training in member workplaces.

141. More information on initiatives (e) and (f) is provided further below.

142. The suite of projects and initiatives delivered under the AWRA banner are developed and guided by the "AWRA Advisory Board" – a dedicated committee comprising senior and experienced human resources practitioners drawn from AMMA member and non-member organisations in diverse sectors of the resource and energy industry.

143. More generally, employers are increasingly aware of the correlation between an inclusive culture and attracting and retaining more women. As part of this cultural change, many

[2] https://www.amma.org.au/wp-content/uploads/2020/07/AWRA_Gender_Diversity_Leading_lagging_losing2.pdf

employers have invested significantly in education and awareness campaigns which identify sexual harassment in the workplace as a key focus area.

Inclusive Safety Audits

144. In order to mitigate risk of sexual harassment and other forms of harassment, bullying and vilification arising within their unique environments, a number of resources and energy organisations have undertaken inclusive safety audits of their workplaces.

145. The purpose of conducting an inclusive safety audit is to examine the actual and perceived physical and psychological safety of employees, whether it is all employees, employees from a specific work location or employees in a minority group such as female employees.

146. The design of the audit considers the range and variety of work practices and locations in the resources and energy industry to accommodate a range of employer-specific purposes to conduct components or the full audit. These audits are completed by independent assessors / workplace inspectors with special expertise in this field.

147. AMMA is one such independent provider of inclusive safety audits, with its unique offering constantly evolving and improving under the guidance of the AWRA Advisory Board.

148. Typically, the audits of workplace facilities, policies and practices are accompanied by a survey completed anonymously by employees. The survey asks if employees feel safe in certain areas, raising a number of practical matters including workplace cultures, reporting processes, alcohol consumption, social areas and activities, lighting and other facilities considerations.

149. This approach allows organisations to have a better understanding of the issues facing their employees on-site and subsequently to create safer working environments. It also provides an avenue for employees to anonymously provide information about their work environment without feeling intimidated or pressured to not speak out.

Appropriate Workplace Behaviours Training

150. Additionally, many organisations undertake significant training to educate and raise awareness amongst executive leaders, managers, supervisors and all other employees of appropriate workplace behaviours.

151. AMMA provides one such specialist training program – *Appropriate Workplace Behaviours*. This course, which is growing strongly in demand, is designed to educate employees on the legislative and policy requirements relating to appropriate workplace behaviour and the steps to take if they are victim to or become aware of inappropriate behaviour. Managers and leaders are also provided with the knowledge relevant to preventing inappropriate behaviour and managing any breaches that may occur.

152. The course also provides employers with the tools to identify clear deficiencies in their organisation's practices in regard to appropriate workplace behaviour, and to rectify those issues.

153. Another common example is *Active Bystander Training*, which is widely implemented in the industry and provides skills for bystanders to intervene when they see behaviour that is not acceptable. Such programs further educate employees on what constitutes sexual harassment or has the potential to lead to sexual harassment.

154. More generally, some organisations report employees undertake a comprehensive Equal Employment Opportunity (EEO) training module every two years. Other organisations similarly conduct Code of Conduct training on a yearly or quarterly basis, outlining procedures within the organisation designed to prevent sexual harassment.