

Review of the *Equal Opportunity Act 1984 (WA)* – Response to Project 111 Discussion Paper

Submission to the Law Reform Commission
of Western Australia

6 December 2021

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

1. The ALA welcomes the opportunity to have input into the review of *the Equal Opportunity Act 1984* (WA) being conducted by the Law Reform Commission of Western Australia.
2. The ALA is part of the WA for a Human Rights Act Coalition and has had the opportunity to consider the submission from that coalition.
3. The ALA hereby endorses the submission from the WA for a Human Rights Act Coalition.



Neil Morrissey
Western Australia President
Australian Lawyers Alliance

**SUBMISSION TO THE LAW REFORM COMMISSION OF
WESTERN AUSTRALIA'S REVIEW OF THE *EQUAL
OPPORTUNITY ACT 1984 (WA)***

RESPONSE TO PROJECT 111 DISCUSSION PAPER

29 NOVEMBER 2021

WA for Human Rights Act

WA for a Human Rights Act Coalition

1. Introduction

- 1.1 The Western Australia for a Human Rights Act Coalition (**WA4HRA Coalition**) is grateful for the opportunity to provide this submission to the Law Reform Commission of Western Australia's Review of the *Equal Opportunity Act 1984* (WA).
- 1.2 The WA4HRA Coalition was formed to advocate for the introduction of a Western Australian Human Rights Act. The objects of the Act will be to:
- (a) Articulate, protect and promote the human rights of everyone in WA.
 - (b) Require the WA Government and WA public authorities to consider how human rights are protected when creating legislation, or when making decisions or delivering services to people in WA.
 - (c) Provide people whose human rights have been breached with accessible remedies.
 - (d) Promote a culture where everyone's fundamental rights and freedoms are equally valued.
- 1.3 The WA4HRA Coalition is led by a steering committee and coalition of organisations including:
- (a) Aboriginal Legal Service of WA Ltd;
 - (b) Australian Lawyers for Human Rights;
 - (c) Western Australian Council of Social Services;
 - (d) Curtin University Law School;
 - (e) SCALES Community Legal Centre;
 - (f) Charter of Rights Campaign;
 - (g) Human Rights Law Centre;
 - (h) Amnesty International; and
 - (i) Australian Lawyers Alliance.

2. Scope of this Submission

- 2.1 This submission focuses on why the *Equal Opportunities Act 1984* (WA) (**EOA**) does not currently provide people in WA with sufficient protection of their fundamental, inalienable, indivisible and interdependent human rights at international law and why it should be expanded to include the mechanisms and frameworks for human rights protections such as those contained in the *Human Rights Act 2004* (ACT), *Victorian Charter of Rights and Responsibilities 2006* (VIC) and the *Human Rights Act 2019* (QLD) (together, the **Human Rights Acts**).
- 2.2 This submission address three sub-questions:
- (a) why the EOA is insufficient to protect human rights;
 - (b) why there should be protection of human rights in WA through mechanisms such as those contained in the Human Rights Acts; and

- (c) why there is a benefit to including mechanisms such as those contained in the Human Rights Acts in a consolidated Human Rights and Equal Opportunity Act.

2.3 The WA4HRA Coalition notes that its overarching objective is to ensure human rights legislation is enacted in WA. Expanding the EOA to include human rights protections in a consolidated law is one option for how this can be legislated and we will be discussing the advantages of this option in these submissions. WA4HRA is also supportive of other options for introducing a Human Rights Act for WA, including through separate legislation.

3. Why the EOA is insufficient to protect human rights

3.1 The EOA currently provides only *partial* protection of the fundamental right to equality and non-discrimination and does not include protection for the exercise and enjoyment of other fundamental rights recognised under the core United Nations human rights treaties Australia has agreed to uphold. Unlike the Human Rights Acts, it also does not contain additional mechanisms for the protection of human rights by Parliament, Courts and public authorities. Yet, it is the core instrument for human rights protection in WA with broad objects to promote equality and to eliminate discrimination and harassment in public life.

3.2 The right to equality and non-discrimination is of fundamental importance to individuals, society and democracy, and is an aspect of the rule of law.¹ The right to equality and non-discrimination is a central commitment of human rights law and a core right enumerated in binding international human rights treaties to which Australia is a party.² It is well-established that the protection of the right to equality and non-discrimination is both an independent, substantive obligation and a cross-cutting obligation essential to the exercise and enjoyment of other human rights including but not limited to the rights expressed in the ICCPR and ICESCR.³

3.3 The purpose of the EOA is to promote equality and to eliminate discrimination and harassment on *specific* grounds in *specific* areas of public life. State and territory anti-discrimination legislation provide similar protections.⁴ Federal anti-discrimination legislation provides overlapping protection of the right to equality and non-discrimination specifically on the grounds of race, sex, disability and age.⁵ The Human Rights Acts provide a broad right to equality and non-discrimination including equality before the law and equal protection of the law derived from Article 26 of the *International Covenant on Civil and Political Rights*.⁶

¹ *Re Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869.

² For example, ICCPR, ICESCR, ICERD, CEDAW, CRPD.

³ *Re Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869.

⁴ *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1992* (NT); *Anti-Discrimination Act 1991* (QLD); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (VIC).

⁵ *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).

⁶ *Charter of Human Rights and Responsibilities Act 2006* s 8(3); *Human Rights Act 2004* (ACT) s 8(3); *Human Rights Act 2019* (QLD) s 15(3); s 10 of the RDA also provides for equality before the law.

3.4 The EOA is therefore part of the patchwork of limited and fragmented legislative protection of human rights in Australia.⁷ Specifically, the EOA was enacted with the intent of meeting Australia's obligations under the various international human rights treaties to which it is a party, including:

- (a) *The International Covenant on Civil and Political Rights.*
- (b) *The International Convention on the Elimination of all forms of Racial Discrimination.*
- (c) *The International Convention on the Elimination of all forms of Discrimination against Women.*
- (d) *The ILO Convention concerning Discrimination in Employment and Occupation.*
- (e) *The ILO Convention on Workers with Family Responsibilities.*⁸

3.5 The objects of the EOA are to:

- (a) promote recognition and acceptance in the community of the equality of men and women, all races, and all persons regardless of their sexual orientation, religious or political convictions or their impairments or ages;
- (b) eliminate discrimination against persons on the Grounds of Discrimination (defined below); and
- (c) eliminate sexual harassment and racial harassment in the workplace and in educational institutions and sexual harassment and racial harassment related to accommodation.

3.6 The Long Title to the EOA provides that it is an Act to promote equality of opportunity in WA and to provide remedies in respect of discrimination on the Grounds of Discrimination (defined below). The EOA contains provisions proscribing specific forms of discrimination in work, accommodation, education, the provision of goods, facilities and services, and the activities of clubs (**Areas of Public Life**) on the grounds of sex, marital status, pregnancy or breast feeding, gender history grounds in certain cases, family responsibility or family status, sexual orientation, race, religious or political conviction, impairment, age and publication of relevant details of persons on Fines Enforcement Registrar's website (**Grounds of Discrimination**).

3.7 There are three key limitations in respect of the protection of the right to equality and non-discrimination under the EOA. *Firstly*, discrimination is only prohibited in relation to *specific* grounds (see above the Grounds of Discrimination). Under the ICCPR and ICESCR Australia is obliged to guarantee the rights contained therein including the right to equality and non-discrimination on the

⁷ See Andrew Byrnes, Hilary Charlesworth, Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (University of New South Wales Press, 2009).

⁸ Equal Opportunity Commission, *Review of Equal Opportunity 1984* (Report, May 2007) 1; *The International Covenant on Civil and Political Rights; The International Convention on the Elimination of all forms of Racial Discrimination; The International Convention on the Elimination of all forms of Discrimination against Women; The ILO Convention concerning Discrimination in Employment and Occupation; The ILO Convention on Workers with Family Responsibilities.*

ground of "other status".⁹ The grounds of discrimination are not closed and could, for example, include socio-economic disadvantage.¹⁰

3.8 *Secondly*, there is no reason in principle for the EOA to prohibit discrimination only in *specific* areas of public life, namely, work, accommodation, education, the provision of goods, facilities and services, and the activities of clubs. In contrast, the prohibition of discrimination is not limited to *specific* areas of public life under the ICCPR and ICESCR.

3.9 *Thirdly*, whilst the broad objects of the EOA include the promotion of equality and the elimination of discrimination, the right to equality and non-discrimination as expressed in the EOA does not include a right to equality before the law and equal protection of the law. The claim to equality before the law has been said to be the most fundamental right and the starting point of all other liberties and a fundamental aspect of the rule of law.¹¹ However, a person in WA cannot bring a direct claim of discrimination by reason of the purpose or effect of a WA law or regulation under the EOA. This is a significant impediment to the exercise and enjoyment of the right to equality and non-discrimination in WA and undermines the rule of law. If the EOA is to achieve its broad objects and is intended to operate as the core legislative instrument for the protection of the right to equality and non-discrimination in WA, it must include some protection of the right to equality before the law as a remedy. One of the ways this can be achieved is to incorporate the right to equality and non-discrimination as expressed in the Human Rights Acts into the EOA, along with the protection of other fundamental rights, and the inclusion of further mechanisms for the protection of human rights in WA.

4. Why there should be protection of human rights in WA mechanisms such as those contained in the Human Rights Acts

4.1 The WA4HRA Coalition recognises that human rights are safeguarded to some limited extent in WA through legislative and common law protections.¹² It has long been recognised however that the legal protection of human rights in WA is insufficient.¹³ As discussed, there are shortcomings with the protection of human rights in the EOA. Few other laws provide direct protection of human rights. WA is obliged to ensure formal protection of human rights law so that all people are recognised as equally deserving of concern, respect and consideration. The Commonwealth, States and Territories have undertaken binding legal obligations to respect, protect and promote human rights, including implementing those obligations through the enactment of domestic legislation.¹⁴ The wide-ranging community consultation in respect of a WA Human Rights Act in

⁹ ICESCR art 2(2).

¹⁰ *General Comment No. 20 Non-Discrimination in Economic, Social and Cultural Rights* UN Doc E/C.12/GC/20 (10 June 2009).

¹¹ Sir Hersch Lauterpacht, *An International Bill of the Rights of Man* (1945) 115 cited in *A v Secretary of State for the Home Department* [2005] 2 AC 68, [46] per Lord Bingham; *Gerhardy v Brown* (1985) 159 CLR 70, 128 per Brennan J; *South West Africa Cases (Second Phase)* [1966] ICJR 6, 304 per Judge Tanaka.

¹² See for example, laws containing provisions dealing with specific human rights in specific contexts include: *Criminal Procedure Act 2004* (WA), *Bail Act 1982* (WA), *Criminal Investigation (Identifying People) Act 2002* (WA), *Evidence Act 1906* (WA) and *Freedom of Information Act 1992* (WA).

¹³ Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act: A Report of the Consultation Committee for a Proposed Human Rights Act* (2007).

¹⁴ ICCPR art 2(1), ICESCR art 2(1).

2007 by a Committee led by Fred Chaney AO revealed majority support for a Human Rights Act.¹⁵ A survey commissioned by the Committee also showed strong support, with 89 percent of respondents agreeing that WA should have a Human Rights Act.¹⁶

4.2 As discussed, protection of the right to equality and non-discrimination is also a cross-cutting obligation which requires Australia to guarantee the exercise and enjoyment of civil, political, social, economic and cultural rights.¹⁷ Given the interface between the right to equality and non-discrimination and the exercise and enjoyment of other rights, it follows that there is no reason in principle why the EOA should be limited to the *partial* protection of the right to equality and non-discrimination. The EOA should be amended to include, as a minimum, substantive protection of the civil, political, social, economic and cultural rights such as those contained in the Human Rights Acts in the Australian Capital Territory (**ACT**), Victoria, and Queensland.

4.3 Further, mechanisms for the protection of rights under the Human Rights Acts should be incorporated into the EOA to ensure robust protection of human rights following the dialogue model enshrined in the Human Rights Acts. The mechanisms under the Human Rights Acts applicable to different arms of government include:

- (a) the right for claims to be brought in Court for breaches of human rights by public authorities;
- (b) a requirement for compatibility statements from Parliament explaining whether proposed laws are consistent with human rights;
- (c) a requirement for public authorities to comply with human rights and to make decisions consistently with human rights;
- (d) a requirement for Courts to interpret legislation consistently with human rights; and
- (e) for declarations to be issued by Courts where legislation is incompatible or inconsistent with human rights.¹⁸

4.4 The Reviews of the ACT Human Rights Act, the Victorian Charter have demonstrated the benefits of a Human Rights Act in practice.¹⁹ A few examples of the operation of each of the mechanisms in the Human Rights Acts and the gaps in WA are discussed in turn below. These examples cover

¹⁵ Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act: A Report of the Consultation Committee for a Proposed Human Rights Act* (2007).

¹⁶ Andrew Byrnes, Hilary Charlesworth, Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (University of New South Wales Press, 2009) 142-3.

¹⁷ *General Comment No. 20 Non-Discrimination in Economic, Social and Cultural Rights* UN Doc E/C.12/GC/20 (10 June 2009) paragraph 7, Article 2(2).

¹⁸ See the *Human Rights Act 2004* (ACT) ss 28(4), 31, 33(3) 39, 40, 40A, 40C; *Victorian Charter of Rights and Responsibilities 2006* (Vic) ss 4, 28, 29, 31(7), 31(9), 32, 37, 39; *Human Rights Act* (Qld) ss 9, 10, 38(4), 42, 45(2), 47, 48, 56(b), 58, 59.

¹⁹ See ACT Human Rights Commission, *Looks who's talking: A Snapshot of Ten Years of Dialogue under the Human Rights Act 2004* (2014); Victorian Equal Opportunity and Human Rights Commission, *2018 report on the operation of the Charter of Human Rights and Responsibilities* (2019); as to the early achievements of the Victorian Charter see Andrew Byrnes, Hilary Charlesworth, Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (University of New South Wales Press, 2009).

four aspects of the Human Rights Acts enacted in other jurisdictions: causes of action, parliamentary scrutiny, decisions of public authorities and statutory interpretation.

Legal claims (causes of action)

- 4.5 In 2017, proceedings were brought by teenagers against the Victorian government for breaches of the Victorian Charter in relation to their detention at an adult prison.²⁰ The teenagers were frequently isolated for up to 23 hours a day in cells that were designed for adult men, regularly handcuffed for routine activities, capsicum sprayed during a prison disturbance, developed risks of depression, anxiety, cognitive problems, hypersensitivity and paranoia, or exacerbation of existing mental health problems.²¹ The Court held that there were breaches of the rights of the child to protection in their best interests and rights of persons deprived of liberty to be treated with humanity and respect for the inherent dignity of the human person.²² The Court further held that the limitation on the human rights imposed on the teenagers was not demonstrably justified in a free and democratic society based on human dignity, equality and freedom.²³
- 4.6 By contrast, in a WA case in 2013, the human rights of teenagers transferred to an adult prison were not directly actionable without a Human Rights Act.²⁴ In similar circumstances to the Victorian case, the teenagers were locked down for 23 hours each day, were subject to extensive use of physical restraints (flexible handcuffs) and strip searched regularly for several weeks. Without a Human Rights Act, no claim could be brought in respect of breaches of any human rights.

Compatibility statements (parliamentary scrutiny)

- 4.7 The Explanatory Statement to the *Mental Health Bill 2015* (ACT), which introduced involuntary mental health treatment, included a compatibility statement from Parliament that involved lengthy and detailed scrutiny on whether and why the Bill was compatible with human rights including the right to liberty and self-determination using the Human Rights Acts as a framework.²⁵ Consideration of the significant human rights issues raised by involuntary mental health treatment was a significant step forward in protecting the rights of people with psycho-social disabilities.
- 4.8 By contrast, the introduction of the *High Risk Serious Offenders Act 2020* (WA) has raised significant human rights concerns.²⁶ The law provides for continuing detention orders for offenders convicted of a wide range of offences including robbery and grievous bodily harm after completion of their sentence.²⁷ Without a Human Rights Act, the WA Parliament was not required to, and did

²⁰ *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 251 (11 May 2017).

²¹ Ibid.

²² *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 251 (11 May 2017).

²³ Ibid.

²⁴ *Wilson v Joseph Michael Francis, Minister for Corrective Services for the State of Western Australia* [2013] WASC 157.

²⁵ See the extensive consideration of human rights in the Explanatory Statement, *Mental Health Bill 2015* (ACT), see also the ACT Human Rights Commission, *Looks who's talking: A Snapshot of Ten Years of Dialogue under the Human Rights Act 2004* (2014) 23.

²⁶ *High Risk Serious Offenders Act 2020* (WA).

²⁷ Ibid.

not, consider the compatibility of the law with human rights, or articulate why the law was a necessary, legitimate and proportionate limitation on human rights.²⁸

Decision-making of public authorities

- 4.9 In the ACT, Victoria and Queensland, human rights have become part of the everyday business of government incorporated into key policies, guidelines and initiatives to guide the decision-making of public authorities.
- 4.10 For example, the Victorian Department of Health and Human Services' public housing policy and manuals include information about Charter obligations to guide decision-makers to consider human rights in the delivery of housing services.²⁹ Corrections Victoria have introduced a guideline on anti-discrimination with respect to prisoners which was influenced by human rights under the Charter.³⁰ It outlines Corrections Victoria's obligations under anti-discrimination legislation and the Victorian Charter and provides guidelines for satisfying these obligations. Corrections Victoria must ensure that all persons in prison, including prisoners, staff, contractors and visitors, are not discriminated against as a result of a characteristic or attribute as defined by anti-discrimination legislation and the Victorian Charter.³¹
- 4.11 In WA, the death in custody of Ms Dhu and the death of seven year old Aishwarya Aswath due to a lack of care at a hospital have exposed the quality of decision-making of public authorities and the absence of human rights considerations. WA public services could greatly benefit from the adoption of guidelines and policies which oblige public authorities to specifically consider human rights in the delivery of public services including the right to equality and non-discrimination, the right to health, and the rights of the child.

Interpretation of legislation

- 4.12 In 2010, the ACT Supreme Court declared that section 9C of the *Bail Act 1992* (ACT) (**Bail Act**) was inconsistent with the right to liberty under s 18 of the ACT Human Rights Act. Section 9C of the Bail Act requires those accused of murder, certain drug offences and ancillary offences, to show "exceptional circumstances" before having a normal assessment for bail undertaken.³² The Court found that this requirement was inconsistent with the right that a person awaiting trial not be detained in custody as a "general rule".³³
- 4.13 At present, WA has no mechanism for dialogue between the legislature and judiciary on the compatibility of legislation with human rights. For example, there have been many criticisms of the mandatory sentencing regime in WA over a number of years.³⁴ A Human Rights Act would provide

²⁸ See the Explanatory Memorandum, *High Risk Offenders Bill 2019* (WA).

²⁹ See the Victorian Department of Health and Human Services' public housing policy and manuals.

³⁰ See Corrections Victoria, *Anti-Discrimination with Respect to Prisoners* (October 2020).

³¹ *Ibid.*

³² *In the matter of an application for Bail by Isa Islam* [2010] ACTSC 146 (19 November 2010).

³³ *Ibid.*

³⁴ See the Law Society of WA's Briefing Paper on Mandatory Sentencing at <<https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/Law-Society-Briefing-Papers-Mandatory-Sentencing.pdf>>. See the *Criminal Law Amendment (Home Burglary and other Offences) Act 2015* (WA).

a mechanism for dialogue between the legislature and the judiciary on the compatibility of mandatory sentencing laws with human rights.

4.14 In summary:

- (a) Causes of action for redressing human rights wrongs ensures that significant issues such as rights to be free from torture are justiciable in WA.
- (b) Parliamentary scrutiny of bills for human rights compatibility in WA will benefit all of us by improving the quality of law-making.
- (c) Decisions and actions of public authorities should be guided by human rights so that we are all treated with equality, dignity and respect.
- (d) Dialogue between the courts and legislature could provide an important check and balance on the exercise of government power and can exert a normative influence on law-making.

5. Why there is a benefit to including mechanisms such as those contained in the Human Rights Acts in a consolidated Human Rights and Equal Opportunity Act

5.1 There are clear benefits to amending the EOA to include the mechanisms for human rights protections contained in the Human Rights Acts including the promotion of certainty, clarity, consistency and efficiency, especially in respect of access and enforcement by disadvantaged, vulnerable and marginalised peoples, and fostering compliance by duty holders. There has been majority support for similar types of reforms including the efforts to consolidate federal anti-discrimination legislation and amendments to State and Territory anti-discrimination legislation with reference to human rights, and where applicable, in alignment with the Human Rights Acts.³⁵ The same drivers apply to the potential consolidation of the EOA with human rights protections, which are addressed in turn below.

5.2 *Firstly*, an EOA which includes the rights protected by the Human Rights Acts in the ACT, Victoria and Queensland would consolidate the partial, fragmentary and overlapping protection of human rights in WA. As discussed, there is no reason in principle why the EOA could not include substantive protection of other human rights WA is obliged to protect alongside the substantive and cross-cutting obligation to protect the right to equality and non-discrimination. The inclusion of other human rights would ensure compliance by WA with its binding human rights obligations in a single, overarching and consolidated law.

5.3 *Secondly*, the current EOA contains a myriad of complex, inconsistent and confusing clauses which prohibit discrimination on *specific* grounds in *specific* areas of public life, including a number of separate exemption clauses. It is unnecessarily burdensome and confusing for disadvantaged, vulnerable and marginalised peoples to understand and enforce different statutory tests,

³⁵ See the *Human Rights and Anti-Discrimination Bill 2012* (Cth); Commonwealth Attorney-General Department's, *Human Rights and Anti-Discrimination Bill 2012 Explanatory Statement*.; *An Equality Act for a Fairer Victoria: Equal Opportunity Review: Final Report*, Victorian Department of Justice (2008); ACT Law Reform Advisory Council: *Review of the Discrimination Act 1991 (ACT) Final Report* (2015).

exemptions and remedies.³⁶ There is also a lack of clarity about what is required to ensure compliance with the various obligations imposed on public authorities, employers, schools, club and accommodation providers which may undermine the capacity of the EOA to achieve equality and eliminate discrimination.³⁷ In jurisdictions where Human Rights Acts have not been combined with existing EOC legislation, for example, in Victoria and the ACT, different exemption clauses apply under EOC legislation, while the Human Rights Acts contain a general limitations clause. While there have been proposals recommending that EOC legislation include the same general limitations clause as the Human Rights Acts, the differences have yet to be reconciled.³⁸ These differences create inconsistency and uncertainty in respect of when rights may be justifiably limited (for example for the enjoyment of another right), which is a key question in human rights adjudication. This may be avoided if the general limitations clause in the Human Rights Acts were included in the EOA for example, which is derived from, and generally consistent with, the approaches of UN Committees under the international treaties to which Australia is a party.³⁹

- 5.4 *Thirdly*, a consolidated law would also promote the efficient use of public resources. Fewer government funds and resources will be required for audits, reviews, compliance and monitoring of both the EOA and a Human Rights Act by potentially two different commissions and other government agencies. Significant public resources will be required to consider the alignment of the EOA and a Human Rights Act, as experienced in Victoria and the ACT, after this wide-ranging and comprehensive review of the EOA has already been completed. Consequential amendments would likely be required to align the EOA and a Human Rights Act. As such, it would be prescient for the government to consider the consolidation of the EOA with the human protections contained in the Human Rights Acts in this review given the trend for the enactment of Human Rights Acts in Australia (most recently in Queensland in 2019) and the community-based campaigns on foot in WA, at the Federal level, and in the other States.
- 5.5 Lastly, the WA4HRA Coalition does not overlook the fact that anti-discrimination laws and Human Rights Acts apply differently and have distinct mechanisms. For example, anti-discrimination laws impose obligations on persons and Human Rights Acts on public authorities only. Whether a consolidated Human Rights and Equal Opportunity Act should apply to all persons, or whether some delineation will be required between its application to persons and public authorities, or how other the elements of the EOA (such as provision for reasonable adjustments) could be harmonised within a consolidated Human Rights and Equal Opportunity Act should be subject to further public discussion. The need to consider these issues is not a reason to maintain two separate pieces of

³⁶ See further Beth Gaze, 'The costs of equal opportunity' (2000) *Alternative Law Journal* 25(3), 125, 126, 129-130.

³⁷ Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & Equal Opportunity Law* (Federation Press, 3rd edition, 2018).

³⁸ ACT Law Reform Advisory Council: *Review of the Discrimination Act 1991 (ACT) Final Report* (2015); see the expert views favouring consolidation of commonwealth anti-discrimination legislation and alignment between state and territory EOC legislation and the Human Rights Acts: Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & Equal Opportunity Law* (Federation Press, 3rd edition, 2018).

³⁹ See for example, *General Comment No. 20 Non-Discrimination in Economic, Social and Cultural Rights* UN Doc E/C.12/GC/20 (10 June 2009).

legislation. There are overarching and compelling reasons favouring consolidation of the EOA to incorporate mechanisms for the protection of human rights in WA as articulated above.

6. Conclusion

- 6.1 WA is obliged to protect human rights under binding international human rights law, but has enacted very few laws that provide direct protection for human rights. The EOA is the core legislative instrument for the protection of the fundamental human right to equality and non-discrimination with broad objects to promote equality and eliminate discrimination and harassment in WA. As discussed, the EOA provides insufficient protection of the right to equality and non-discrimination, in particular the right to equality before the law and equal protection of the law, and does not otherwise include protections for the exercise and enjoyment of other fundamental rights.
- 6.2 Given the wide-ranging and comprehensive review of the EOA which is being undertaken, it would be prescient to consider the inclusion in the EOA of the mechanisms for human rights protections contained in the Human Rights Acts.
- 6.3 There is no reason in principle why the EOA could not be amended to include the mechanisms for human rights protections contained in the Human Rights Acts. As discussed, there are demonstrated benefits with the dialogue model mechanisms for the protection of human rights contained in the Human Rights Acts. The inclusion of human rights protections in an overarching Human Rights and Equal Opportunity Act would also promote certainty, consistency and clarity in the law to ensure that people can understand and enforce their rights, access meaningful remedies, and to foster compliance by public authorities with human rights. A Human Rights Act would benefit all people and ensure that WA is an inclusive society that respects the rule of law, human rights, human dignity, and freedom.

Recommendation

The WA4HRA Coalition recommends that the EOA be amended to include mechanisms for human rights protections such as those contained in the Human Rights Acts including:

- i. protection of a broad list of human rights;
- ii. a right for claims to be brought in Court for breaches of human rights by public authorities;
- iii. a requirement for compatibility statements from Parliament explaining whether proposed laws are consistent with human rights;
- iv. a requirement for public authorities to comply with human rights and to make decisions consistently with human rights;
- v. a requirement for Courts to interpret legislation consistently with human rights; and
- vi. for declarations to be issued by Courts where legislation is incompatible or inconsistent with human rights.

In the alternative, WA4HRA recommends that further consultations be held into the enactment of a separate Human Rights Act for WA.