



Review of the Equal Opportunity Act 1984 (Western Australia)

*Submission by the Youth Pride Network to the Law Reform Commission of
Western Australia*

October 2019

About the Youth Pride Network

The Youth Pride Network (YPN) is a peer-based advocacy group aiming to improve the lives and wellbeing of LGBTIQ+ young people in Western Australia. Membership of the YPN is exclusive to those aged between 12 and 25 who identify as LGBTIQ+, and is currently over 100 members strong. YPN is auspiced by the Youth Affairs Council of Western Australia (YACWA), the peak body for young people and the youth sector that supports them.

Established in February 2018, the YPN is self-directed and draws upon the views and expertise of its membership to address discrimination and isolation faced by LGBTIQ+ young people. YPN's work is governed by the principles of inclusivity, diversity, respect and equity.

Acknowledgement of Country

YPN acknowledges Aboriginal and Torres Strait Islander people as the traditional custodians of this land and its waters. We wish to pay our respects to elders past ,present and emerging and extend this to all Aboriginal people seeing this message.

Terms of Reference - Project 111

The Law Reform Commission of Western Australia is to provide advice and make recommendations for consideration by the Government on possible amendments to enhance and update the *Equal Opportunity Act 1984 (WA)* (“the Act”) taking into account Australian and international best practices regarding equality and non-discrimination.

In carrying out its review, the Law Reform Commission should consider whether there is a need for any reform, and if so, the scope of reform regarding:

- a.** the objects of the Act and other preliminary provisions;
- b.** the grounds of discrimination including (but not limited to) introducing grounds of gender identity and intersex status;
- c.** the areas of public life to which the Act applies;
- d.** definitions in the Act including (but not limited to) discrimination, harassment (including a requirement for disadvantage in a definition of sexual harassment), impairment (including a requirement to make reasonable adjustments for persons with an impairment), victimisation, services and employment;
- e.** the inclusion of vilification, including racial, religious, sexual orientation and impairment vilification;
- f.** the inclusion of a positive duty not to discriminate on grounds covered by the Act;
- g.** exceptions to grounds of discrimination including (but not limited to) those for religious institutions;
- h.** the burden of proof;
- i.** the functions and investigative powers of the Commissioner for Equal Opportunity including (but not limited to) the functions of the Commissioner (either personally or by counsel) assisting complainants in the presentation of their case to the State Administrative Tribunal (“SAT”);
- j.** requirements around the referral of complaints to SAT;
- k.** the role and jurisdiction of SAT under the Act, including the requirement for leave if the complaint is dismissed by the Commissioner;
- l.** interaction with the Commonwealth Marriage Amendment (Definition and Religious Freedoms) Act 2017 and with other relevant Commonwealth laws or proposed laws;

m. any other element of the Act or other laws relevant to equal opportunity and non-discrimination; and

n. any related matter.

Executive Summary

In response to the Law Reform Commission, Project 111 – Review of the Equal Opportunity Act 1984 (WA) (the Review), the Youth Pride Network (YPN) has produced the following submission.

This submission has been developed based on significant online consultation with Western Australians who are Lesbian, Gay, Bisexual, Transgender, Intersex, Queer, Asexual and other diverse sexualities and gender identities (LGBTIQ+). This report examines the Act in the context of how it impacts those who are from the LGBTIQ+ community. It is our intent to ensure that reform is underpinned by the views, experiences and needs of those most affected, in line with the United Nations Convention on the Rights of the Child.

This report has found that the current Equal Opportunity Act 1984 (the Act) does not adequately protect the LGBTIQ+ community.

To begin, the current Act does not reflect the diversity of ways people understand their sexuality and gender identity, which can be fluid and with a breadth of terminology. The “Gender History” subsection of the Act, requiring individuals to have been ‘reassigned’ by the Gender Reassignment Board before being able to access the Act, means that many, if not most, trans and gender diverse individuals are not protected by the Act. This needs urgent reform as Western Australia is currently the only state that has these prohibitive regulations.

Additionally, the Act does not explicitly protect those who are intersex and urgent reforms needs to be made, alongside the intersex community, in order to create legislation that adequately protects intersex people.

Finally, the Act grants sweeping exemptions to religious educational institutions and organisations that need urgent reform. As our survey of LGBTIQ+ West Australians shows, these exemptions lead to devastating experiences of discrimination across the state. While there are many religious schools and institutions that are not discriminatory and are very supportive of the LGBTIQ+ community, we have clearly identified that in several schools and services the opposite is the case. This report strongly recommends the urgent removal of these religious exemptions in order to maintain the human rights and dignity of LGBTIQ+ young people across Western Australia.

List of Recommendations

Recommendations are as follows:

Recommendation 1: The Equal Opportunity Commission work with Intersex groups to undertake a co-design process to ensure protections for Intersex people under the Act are relevant, sufficient and accessible.

Recommendation 2: The definition of sexual orientation under the Act be amended to better reflect the diversity of sexual orientations in the West Australian community.

Recommendation 3: The Act amend references to “opposite sex” to better reflect non-binary identities. This amendment should include acknowledgement of the distinction between sex and gender. Suggested wording is “another gender” or “a different gender”.

Recommendation 4: The Act amend protections on the basis of Gender History to remove the need for trans and gender diverse people to be ‘certified’ by the Gender Reassignment Board (for more information, please refer to the YPN Submission *“Review of Western Australian legislation in relation to the recognition of a person’s sex, change of sex, or intersex status.”*).

Recommendation 5: The Equal Opportunity Act be amended to remove religious exemptions that currently allow schools and services to discriminate against LGBTIQ+ communities.

Submission Process

This submission responds directly to the Terms of Reference of the Law Reform Commission's Review. Reflecting the YPN's intent to represent the views and expertise of its membership to key decision-makers, this submission has been developed on the basis of extensive consultation with over 50 people who identify as LGBTQIA+.

The voices of LGBTQIA+ people themselves is the foundation of our submission and collective advice. To ensure this submission adequately heard and represented their views, YPN developed an online survey based on the Review's Terms of Reference. This survey was promoted through YPN's social media in August and September 2019 and asked respondents about their experiences of discrimination. Question design was heavily based on the Terms of Reference of the Review.

Open-ended responses were encouraged so as to capture a diversity of opinion among respondents, which are occasionally represented in the text of this document. The response captured a total of 54 responses from across Western Australia and excluded those from outside the state.

As a submission representing the views and feedback of young people in Western Australia, this submission has been endorsed by the YPN's auspice body, the **Youth Affairs Council of Western Australia**.

Response to Terms of Reference

1.0 Response to criterion b. the grounds of discrimination including (but not limited to) introducing grounds of gender identity and intersex status

1.1 Intersex People:

Our legislative review found that intersex individuals currently lack explicit legislative protection for discrimination on the grounds of their status as intersex. The Act may provide some protection to intersex individuals under Section 8: Discrimination on the ground of sex, however this is open to interpretation.

Without explicit protections, intersex individuals and young people are left with unclear recourse in the event of discrimination.

Recommendation 1:

The Equal Opportunity Commission work with Intersex groups to undertake a co-design process to ensure protections for Intersex people under the Act are relevant, sufficient and accessible.

2.0 Response to criterion d. definitions in the Act

The Equal Opportunity Act, 1984 (WA), sets out the law in WA against the discrimination of LGBTQ+ people. Definitions worth reviewing are:

2.1 Discrimination on the Grounds of Sexual Orientation:

‘Sexual orientation’ is defined in the Act as “heterosexuality, homosexuality, lesbianism or bisexuality” and includes “heterosexuality, homosexuality, lesbianism or bisexuality imputed to the person” (Part I, s. 4). While this definition is more inclusive than other states within Australia, it does not accurately reflect the diversity of ways that someone may identify their sexual orientation. For example, someone may identify as pansexual, asexual or queer. It is unclear whether these terms would be included under broad definitions of the identities stated above. Nonetheless, a definition that is inclusive of those who do not identify as heterosexual, or words to that effect, could provide a better protection for the diverse ways that the LGBTIQ+ community identifies themselves.

Recommendation 2:

The definition of sexual orientation under the Act be amended to better reflect the diversity of sexual orientations in the West Australian community.

2.2 Discrimination on Gender History Grounds:

In part IIAA, Discrimination on Gender History grounds, ‘Gender history’ is defined as if a person “identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex”. ‘Opposite sex’ is here defined

as “a sex of which the person was not a member at birth” (Part IIAA, Division 1, s. 35AA). These definitions include trans people who have not yet undergone a medical transition. However, ‘opposite sex implies a binary and may exclude non-binary and otherwise gender diverse young people. The interchangeable use of sex and gender here also do not accurately reflect modern understandings of the distinction between one’s biological sex and their social and psychological gender.

Recommendation 3:

The Act amend references to “opposite sex” to better reflect non-binary identities. This amendment should include acknowledgement of the distinction between sex and gender. Suggested wording is “another gender” or “a different gender”.

In order to be protected against discrimination on gender history grounds, a person must currently be considered a “gender reassigned person” (Part IIAA, Division 1, s. 35AB). That is, “a person who has been issued with a recognition certificate under the Gender Reassignment Act 2000 or a certificate which is an equivalent certificate for the purposes of that Act (Part I, s. 4).

Thus, these anti-discrimination protections do not apply to trans and gender diverse people who have not been officially recognised by the Gender Reassignment Board. It is understood that the process of ‘coming out’ is a gradual process, and many individuals may present as trans or gender diverse, but not be in a position to have this acknowledged through existing frameworks in the State.

As YPN has previously outlined in our report *“Review of Western Australian legislation in relation to the recognition of a person’s sex, change of sex , or intersex status.”*, the existing process of certification is degrading, expensive and unnecessary, and stops many vulnerable groups from being able to access protection under the law.

Recommendation 4:

The Act amend protections on the basis of Gender History to remove the need for trans and gender diverse people to be ‘certified’ by the Gender Reassignment Board (for more information, please refer to the YPN Submission *“Review of Western Australian legislation in relation to the recognition of a person’s sex, change of sex, or intersex status.”*).

3.0 Response to criterion e. exceptions to grounds of discrimination including (but not limited to) those for religious institutions;

3.1 Exceptions:

General exceptions to the Equal Opportunity Act are detailed in Part IV.

Section 73 provides exemptions for “educational institutions established for religious purposes” in regards to:

- Employment as a member of staff/ contract worker
- Provision of education/training (doesn't apply to discrimination on the grounds of race, impairment or age).

These exemptions are legal so long as the discriminatory action carried out:

- “Is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed;” and
- In the case of employment: “discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed;” and
- In the case of provision of education/training: “discriminates in good faith in favour of adherents of that religion or creed generally, but not in a manner that discriminates against a particular class or group of persons who are not adherents of that religion or creed.”

Section 35Z, 3B and 35AM, 3B additionally outline that it is lawful for accommodation provided by a religious body to reject individuals on the basis of sexual orientation or gender history.

YPN undertook a survey of members who had been at religious schools or had interacted with religious organisations either as a staff member or a student to provide a qualitative and quantitative information of the reality of these exemptions and how they lead to young people being denied their human right to education.

3.2 YPN Community Survey — Outline

In response to the call out from the Law Reform Commission, the YPN created an online survey that asked LGBTIQ+ Western Australians about their experiences at religious schools and services. We excluded participants who had not lived in Western Australia (1 response) but did not exclude based on age because of the value historic experiences. Two responses were excluded as they indicated they did not consent to being a part of YPN advocacy activity. After exclusions there was a total of 51 responses. A full table of de-identified responses is attached to this submission.

3.3 YPN Community Survey Results — Religious Schools

The results of the survey paint a bleak picture of what life is like for a student at a discriminatory religious school. When asked whether the knowledge that their schools were able to discriminate against them made them feel like they needed to hide their identity, 79% of respondents said yes.

There were also a variety of ways these laws impacted students' human right to education:

Students felt they needed to hide their identity because of discriminatory lessons about LGBTIQ+ people.

Participants frequently mentioned how teachings in school that explicitly named LGBTIQ+ as a sin or as wrong made them “stifle” their identity or feel scared to reveal their identities. In some cases, even if peers and teachers were perceived as supportive, the general school environment and teachings were enough to make students feel the need to hide their identities at school. Participants noted:

“In religious education we were frequently told that being LGBT was a sin and LGBT people would go to hell.”

“I only came out several years after school, my gender and sexuality were very suppressed. Even without outright discrimination it was enough that all the conversations were heteronormative and that being gay wasn't an option.”

“I felt stifled though high school. Religion and the pressure that it brings made me feel like I didn't have a supportive outlet to be myself. This was despite knowing that my friends and teachers would be fine [with who I am].”

Students experienced direct discrimination from other students, teachers and pastoral care staff, which had long lasting psychological impacts.

54% of respondents said they experienced direct discrimination from their school. This was experienced in a variety of forms. Many participants outlined that they experienced directly homophobic and transphobic comments from chaplains,

teachers and counsellors. This is deeply disturbing as those in pastoral care roles are employed to look after the wellbeing of young people in their care and often act as a referral point for young people onto appropriate services. One participant commented that they were excluded from religious ceremonies within the schools because they were “a sinner in God’s eyes”. There was one particularly concerning comment where a counsellor asked a young person to “write a letter for our next session, to discuss how I intended to change and my feelings about these forbidden thoughts” - a practice akin to conversion therapy. Participants noted:

“I attended a rural Anglican high school and my chaplain was blatantly discriminatory to members of the LGBTQI community.”

“I had a teacher tell me I’m going to hell during a Religion & Life lesson.”

Schools expelled and threatened to expel LGBTIQ+ students.

Participants also told us that they saw students expelled from schools when they came out and many of them worked to hide their identities for fear of expulsion. Other students felt forced to leave school because of the discrimination they faced. One participant noted:

“When I came out as trans they had already cause [sic] a student to ‘Voluntarily’ leave and told my mum they’d do the same to me if I didn’t quiet down about being trans.”

“I was unable to go to the staff about what I was experiencing because I knew it would not be taken seriously and that it was likely I would be expelled.”

School bullying policies did not address LGBTIQ+ discrimination and students were unable to seek support for bullying from their school.

One participant made a comment that their school actively ignored bullying complaints related to gender or sexuality.

“My school actively ignored bullying on the basis of gender or sexuality, even when complaints were raised.”

Students experienced psychological distress when they were refused the opportunity to bring same-gender partners to school formal events.

A frequent experience amongst participants was schools regulating students taking same-gender partners to school formal events, often taking students aside and interrogating them about their partner. This process was sometimes to check the students were not in a “same-sex relationship”. In some cases this made students feel too intimidated to bring a same-gender partner, in other cases it was out-right denied to students. One participant noted:

“This [discriminatory process] made me (and other queer students) feel dirty and lesser”.

Trans and gender diverse students suffered psychological distress from inflexible uniform rules.

Trans and gender diverse participants noted that when they tried to wear uniforms that represented their gender identity, they often came across barriers and were punished by the school for wearing the wrong uniform. This is significant as the Transpathways report indicated that for young people Body Dysphoria was a driver for mental distress in 93% of their participants. The Transpathway report noted that not being able to wear the correct uniform for their gender identity made it difficult for students to participate in school. In our survey participants noted:

“A close friend of mine who was openly trans was refused the ability to wear a suit to our school ball and eventually left the school in our final year due to the discrimination he faced.”

“I was terrified of coming out as I was a boarding student...I had to wear dresses/skirts all day which resulted in dysphoria, as did being referred to as female and called by my dead name. Teachers would frequently refer to a collective group as 'ladies', which was also an issue for me. I was also worried that if I legally transitioned, I would have to go to a boys school and lose my scholarship, which provided necessary financial relief for my parents who didn't have a choice about sending us to boarding school. I suffered depression throughout my entire high school experience and really didn't start getting better until I left school and was no longer being forced to present as female.”

Students documented lasting negative impact of discriminatory experiences at school.

Discrimination, whether it is direct or more subtle, is well documented in having a negative impact on the mental health of LGBTIQ+ people. This was reflected in our consultations, where participants outlined the negative impact these policies had on their mental health, self-image and support-seeking behaviours, especially in the years beyond high school.

This impact was noted to last beyond the end of school. Participants noted how the actions of their schools made them feel like they were “disgusting”, “wrong”, and like a “freak”. Some noted that having to delay coming out until after school impacted their mental health. Many participants noted that their experiences prevented them from help-seeking. Either within the school because they didn't think that school staff would be supportive, and that the internalised negative self-image led them to feel nervous about asking for help. One participant noted:

“[a discriminatory experience with a school chaplain] made me believe that all adults would react that way if I told them I was bi”.

The consequences of this discrimination were felt beyond the school years and can quite tangibly be connected to negative mental-health outcomes for the participants.

Students also discussed the positive impact of having stronger anti-discrimination laws.

Conversely, when asked about the perceived impact of a change to the anti-discrimination law many participants recounted how they thought their experiences would have been different. Participants noted that they would have felt safer, more comfortable in exploring their sexuality and less stressed. Other participants noted that they would have felt more comfortable coming out to adults and more comfortable in their own skin. Many participants felt they would have been more comfortable standing up for themselves in a school environment if they felt they had the law behind them. Many participants noted the positive impact this would have had on their school experience.

Interestingly, a few participants noted that having a less discriminatory environment would have made them feel more open to religion. One participant noted:

“I know a handful of people who are religious and identify as LGBTQIA+ who would benefit greatly from being able to find solace in their faith without the fear of being pushed away.”

It is important to note that some participants did not feel like a change in the law would have improved their experience of school. We believe that this indicates that law reform on its own would not be a panacea for the discrimination in schools. Other culture changing programs like Inclusive Education need to be promoted within schools. Young people also need to feel empowered to use the anti-discrimination laws that are in place. When asked whether students were previously aware of the exemptions under the Equal Opportunity Act only 64% said yes.

“When you're a teenager, your high school is your world. And the world we lived in sent a very clear message that it preferred us to not exist. Just because they weren't actively expelling queer students doesn't mean they weren't deeply hurting us in ways that we would carry with us for many years to come.”

3.4 YPN Community Survey Results – Religious Services

As laid out in Section 35AM, 3B and 35, 3B it is lawful for accommodation provided by a religious body to reject individuals who on the basis of sexual orientation or gender history. As such, it was relevant to include questions about experiences with religious services in our survey. There were fewer responses

outlining experiences with services. The key experiences that were represented were:

Young people were rejected from homelessness services for being LGBTIQ+.

This was either through being outright refused from services because they would “make other people uncomfortable” or feeling pressured to leave because those services made very clear that they did not accept their identity. Participants noted:

“I tried to access a variety of homelessness services when I was kicked out of home after coming out. The vast majority of services made it clear that my identity was at odds with their religious beliefs and it meant I spent a lot more time on the street than I needed to. [if I was protected by law] I would have been housed right way and it would have saved months and months of trauma, distress, and eventual suicide attempts from occurring.”

“I know people that might still be alive if they had access to better support.”

All participants who indicated that they worked at religious organisation responded that they were closeted in their workplace and didn’t feel able to come out.

Other respondents noted their experiences of having discriminatory messages against LGBTIQ+ people preached at religious youth groups. It is unclear whether these groups would be covered by any anti-discrimination law reforms however if they receive government funding it would be worth reviewing.

3.5 YPN Community Survey Results – Additional note.

It is important to note that not all participants replied with bad experiences. Some participants responded saying that their schools and services were supportive of LGBTIQ+ people. This reflects the efforts of some schools and services to do the best by their young people. However, while we do not have an idea of how common these experiences are, the impact of discriminatory experiences are devastating for the participants who experienced them. The law must protect and maintain young people’s human rights.

Recommendation 5:

The Equal Opportunity Act be amended to remove religious exemptions that currently allow schools and services to discriminate against LGBTIQ+ communities.

Conclusion

LGBTIQA+ young people experience significant discrimination in their daily lives in Western Australia. This discrimination cuts across many spheres of life, including the legislative frameworks of Western Australia, as well as in the interpersonal and community interactions.

The review of the *Equal Opportunity Act 1984* provides an important opportunity to strengthen the protections afforded to LGBTIQA+ young people, and better protect their interests.

It is vital these laws are amended to better reflect the modern LGBTIQA+ community and also to protect vulnerable LGBTIQA+ young people who are denied their human rights to an education and access to services free from discrimination.

By explicitly incorporating LGBTIQA+ identities and diversity into a revised Act, the LRC can provide young people with adequate protections and recourse against discrimination. Given the links between discrimination and mental health, we believe this is a critical step in supporting the State Government's ambitious mental health and community wellbeing targets.

Glossary

Gender Diverse: an umbrella term used to describe those whose gender identity is at odds with their biological sex.

Non-binary: an individual who identifies outside of the binary genders of female and male.

Outed: when an individual has their identity expressed to a third party without the individual's consent.

Sex: one of or a combination of genitalia, gonads, chromosomes and sex hormones. This submission recognises sex as distinct from gender.

Transgender/Trans: an umbrella term for an individual who does not identify with the gender they were assigned at birth.