



# Submission to the Law Reform Commission of WA on the Review of the *Equal Opportunity Act 1984* (WA) (Project 111)

**30 November 2021**



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## Acknowledgements of Country

Circle Green Community Legal acknowledges the Australian Aboriginal and Torres Strait Islander peoples as the traditional custodians of the lands where we live, learn and work, and particularly the Whadjuk people of the Noongar Nation, traditional custodians of the land where our office is located. We acknowledge and respect their continuing culture and the contribution they make to the life of this nation, and we pay deep respect to Elders past and present.

## Attribution

This submission can be attributed to Circle Green Community Legal.

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## Glossary

**2007 EOC Review** means the Equal Opportunity Commission, *Review of Equal Opportunity Act 1984* (Report, May 2007).

**AHRC Act** means the *Australian Human Rights Commission Act 1986* (Cth).

**AHRC** means the Australian Human Rights Commission.

**ACT Act** means the *Discrimination Act 1991* (ACT).

**ACTLRAC** mean the Australian Capital Territory Law Review Advisory Council.

**CaLD** means culturally and linguistically diverse.

**Circle Green Community Legal** means T.H.E Community Legal Centre Incorporated (ABN 53 788 553 148) trading as Circle Green Community Legal.

**Circle Green** means Circle Green Community Legal.

**Commissioner** means the Equal Opportunity Commissioner under the EO Act.

**DD Act** means the *Disability Discrimination Act 1992* (Cth).

**Discussion Paper** means the Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Discussion Paper Project 111, August 2021).

**ELC** means the Employment Law Centre of WA (Inc).

**EO Act** means the *Equal Opportunity Act 1984* (WA).

**EOC** means the Equal Opportunity Commission of WA.

**FC** means the Federal Court of Australia.

**FCFCA** means the Federal Circuit and Family Court of Australia.

**FW Act** means *the Fair Work Act 2009* (Cth).

**FWC** means the Fair Work Commission.

**FWO** means the Fair Work Ombudsman.



**ILO** means the International Labour Organisation.

**IR Act** means the *Industrial Relations Act 1979* (WA).

**LRCWA** means the Law Reform Commission of WA.

**Migration Act** means the *Migration Act 1958* (Cth).

**NSW Act** means the *Anti-Discrimination Act 1977* (NSW).

**NT Act** means the *Anti-Discrimination Act 1992* (NT).

**PCBU** means a person conducting a business or undertaking.

**Prohibition Act** means the *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic).

**QLD Act** means the *Discrimination Act 1991* (QLD).

**RD Act** means the *Racial Discrimination Act 1975* (Cth).

**Respect@Work Bill** means the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth).

**SA Act** means the *Equal Opportunity Act 1984* (SA).

**SAT** means the State Administrative Tribunal of WA.

**SD Act** means the *Sex Discrimination Act 1984* (Cth).

**TAS Act** means the *Anti-Discrimination Act 1998* (Tas).

**VIC Act** means the *Equal Opportunity Act 2010* (Vic).

**WA** means Western Australia.

**WAIRC** means the Western Australian Industrial Relations Commission.

**WHS Act** means the *Work Health and Safety Act 2011* (Cth).



## 1. Introduction

Circle Green welcomes the opportunity to make these submissions to the LRCWA in relation to the review of the EO Act (Project 111).

### 1.1 About Circle Green Community Legal

Circle Green was formed on 1 October 2020 by a merger of three established and reputable specialist community legal centres in WA: the Employment Law Centre of WA; the Humanitarian Group; and Tenancy WA.

Circle Green is a community legal centre in WA providing state-wide specialist legal services in the areas of workplace law, residential tenancy law, migration law and family and domestic violence. Our services are aimed at assisting people who are disadvantaged in their access to legal services.

Circle Green is the only community legal centre in WA which has a specialist workplace law practice that provides state-wide employment and workplace discrimination law services to non-unionised vulnerable and disadvantaged WA workers. Our workplace law services include legal advice, case work, advocacy, and education on state and federal employment and workplace discrimination laws. This means Circle Green has first-hand experience and expertise in providing legal assistance across a range of laws and jurisdictions to help vulnerable WA workers address workplace discrimination.

You can find more information about Circle Green's services on our website: <https://circlegreen.org.au/>

### 1.2 About our submission

Our submission is based on our experience and expertise providing legal assistance services to people who are vulnerable or disadvantaged in our areas of practise, including people who:

- are low income earners or in financial hardship;
- are at risk of, or experiencing homelessness;
- live with physical or mental disabilities;
- are women or gender diverse;
- are pregnant;
- have dependents and family or other caring responsibilities;
- are younger or older;
- are culturally or linguistically diverse;
- are Aboriginal and Torres Strait Islander;



- are newly arrived migrants, refugees or asylum seekers; and
- are subject to family and domestic violence.

Typically, our clients are disproportionately affected by equal opportunity and discrimination issues. We hope to reflect on our client's experiences throughout our submission. Sometimes we reflect our experience in general terms. Other times, we share case studies of clients who have accessed our services. For all case studies, we have changed or removed names and other identifying information to protect client confidentiality.

Our submission builds on our preliminary submission to the LRCWA in relation to this review, dated 20 November 2020. Due to time constraints, it focusses on the questions in the Discussion Paper which are most relevant considering our areas of expertise and client base.

Overall, our submission aims to support meaningful reform to the EO Act to better prevent and protect the vulnerable and disadvantaged Western Australians we assist from unfair and unjust discrimination.



## 2. Summary of Circle Green's recommendations

Question	Circle Green recommendation
Should the scope and objects of the EO Act be broadened?	<p><u>Recommendation 1</u></p> <p>Circle Green recommends that the scope and objects of the EO Act be broadened, including to reflect a more comprehensive understanding of discrimination, to ensure the EO Act achieves its intended purpose.</p>
Would the EO Act benefit from an interpretation provision? If so, what type of interpretative provision should be included?	<p><u>Recommendation 2</u></p> <p>Circle Green recommends that the EO Act include an interpretation provision requiring the EO Act be interpreted in a way that is beneficial to a person who has a protected attribute, to the extent it is possible to do so consistently with the objects of the EO Act.</p>
Should the protections in the EO Act relating to guide or hearing dogs be extended to any assistance or therapeutic animal certified by a medical practitioner or regulation?	<p><u>Recommendation 3</u></p> <p>Circle Green recommends that EO Act protections relating to guide or hearing dogs be extended to any medically certified assistance or therapeutic animal.</p>
Should the protections in the EO 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?	<p><u>Recommendation 4</u></p> <p>Circle Green recommends the protections in the EO Act be expanded to include gender identity and intersex status, with broad definitions of these terms to reflect a modern understanding of gender diversity.</p>
Should the definition of impairment be broadened in the EO Act and, if so, how?	<p><u>Recommendation 5</u></p> <p>Circle Green recommends the definition of impairment be broadened, including to cover behaviour that is a manifestation of an impairment, and potential future impairment.</p>



Question	Circle Green recommendation
Should the protections for religious or political conviction be defined or clarified?	<u>Recommendation 6</u> Circle Green recommends amending the EO Act to adopt a defined ground for political or religious conviction, similar to the ACT Act.
Should the protections for religious or political conviction expressly include religious and political beliefs and activities?	<u>Recommendation 7</u> Circle Green recommends that the protections for religious and political conviction be defined under the EO Act to expressly include religious and political beliefs and activities.
Should the protections for religious or political conviction expressly include religious appearance or dress?	<u>Recommendation 8</u> Circle Green recommends that the protections for religious and political conviction be defined under the EO Act to expressly include religious appearance and dress.
Should the protections for religious or political conviction be extended to relatives or associates of a person protected by the ground?	<u>Recommendation 9</u> Circle Green recommends that the protections for political or religious conviction be extended to cover relatives and associates of a person protected by the ground, to bring the EO Act into line with most other Australian jurisdictions.
Should the protections for religious or political conviction be extended to all areas covered by the EO Act?	<u>Recommendation 10</u> Circle Green recommends that the protections for religious and political conviction be extended to all areas covered by the EO Act.
Should the protections for pregnancy be broadened in the EO Act to potential pregnancy and/or childbearing capacity?	<u>Recommendation 11</u> Circle Green recommends the protections for pregnancy be broadened in the EO Act to potential pregnancy and childbearing capacity.
Should the requirement that pregnancy discrimination is 'not reasonable in the circumstances' be removed?	<u>Recommendation 12</u> Circle Green recommends the requirement that pregnancy discrimination is 'not reasonable in the circumstances' be removed.



Question	Circle Green recommendation
Should express exceptions to the protections for pregnancy be incorporated and, if so, what exceptions should be incorporated?	<u>Recommendation 13</u> Circle Green recommends limited express exceptions to the protections for pregnancy be incorporated into the EO Act, together with a positive obligation to make reasonable adjustments to accommodate a person's pregnancy.
Should the protections for race discrimination be broadened in the EO Act and, if so, how?	<u>Recommendation 14</u> Circle Green recommends that the protections for race discrimination in the EO Act be broadened by adopting a more comprehensive definition of race.
Should physical features be included as a ground?	<u>Recommendation 15</u> Circle Green recommends that physical features be included as a ground of discrimination in the EO Act, with limited specific exceptions, similar to those in the ACT Act and VIC Act.
Should industrial / trade union activity / employment activity be included as a ground, or are those protections adequately covered by industrial laws?	<u>Recommendation 16</u> Circle Green recommends that industrial / trade union activity / employment activity be included as a ground of discrimination in the EO Act.
Should employment status be included as a ground?	<u>Recommendation 17</u> Circle Green recommends that protections for employment status, similar to those in the ACT Act, be inserted into the EO Act.
Should irrelevant criminal record be included as a ground?	<u>Recommendation 18</u> Circle Green recommends that irrelevant criminal record be included as a protected attribute under the EO Act.
Should irrelevant medical record be included as a ground? Should this also extend to a person's workers' compensation history?	<u>Recommendation 19</u> Circle Green recommends that irrelevant medical record and workers' compensation history be included as grounds of discrimination in the EO Act.



Question	Circle Green recommendation
Should social origin or profession, trade, occupation or calling be included as a ground?	<u>Recommendation 20</u> Circle Green recommends social origin be included as a ground of discrimination in the EO Act.
Should lawful sexual activity be included as a ground? If so, what exceptions might apply?	<u>Recommendation 21</u> Circle Green recommends that lawful sexual activity be included as a ground of discrimination, with a similar definition and exceptions to those in the VIC Act.
Should spouse or domestic partner identity be included as a ground?	<u>Recommendation 22</u> Circle Green recommends spouse or domestic partner identity be included as a specific ground of discrimination in the EO Act, without the requirement that a spouse or domestic partner possess a protected attribute.
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 EO Act?	<u>Recommendation 23</u> Circle Green recommends the protections for relatives / associates be extended to relatives / associates of people who have or are assumed to have any protected attribute under the EO Act.
Should accommodation status be included as a ground? If so, what exceptions might be reasonable?	<u>Recommendation 24</u> Circle Green recommends that accommodation status be included as a ground, with a 'reasonableness' exception to this protection.
Should immigration status be included as a ground?	<u>Recommendation 25</u> Circle Green recommends that broad protections for immigration status be included in the EO Act, either as a specific ground of discrimination, or as a part of the protections for race.



Question	Circle Green recommendation
Should subjection to domestic or family violence be included as a ground?	<p><u><b>Recommendation 26</b></u></p> <p>Circle Green recommends that subjection to family or domestic violence should be included as a ground of discrimination in the EO Act, together with positive obligations to make reasonable adjustments to accommodate people who experience family and domestic violence.</p>
Should coverage of family responsibility and family status be extended to all areas under the EO Act?	<p><u><b>Recommendation 27</b></u></p> <p>Circle Green recommends that protections for family responsibility and family status be extended to all areas of public life covered by the EO Act.</p>
Should a definition of discrimination be inserted into the EO Act?	<p><u><b>Recommendation 28</b></u></p> <p>Circle Green recommends that definitions for discrimination, similar to those in the VIC Act, QLD Act and ACT Act, be inserted into the EO Act.</p>
Should the meaning of direct discrimination in the EO Act be amended to remove the comparator test and, if so, what test should be inserted into the EO Act?	<p><u><b>Recommendation 29</b></u></p> <p>Circle Green recommends that the meaning of direct discrimination in the EO Act be amended to remove the comparator test and insert a meaning of direct discrimination similar to that in the VIC Act.</p>
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?	<p><u><b>Recommendation 30</b></u></p> <p>Circle Green recommends that the definition of indirect discrimination be amended to allow that the aggrieved person has a characteristic which pertains to people who have a protected attribute.</p>
Should the meaning of indirect discrimination be amended to remove the proportionality test?	<p><u><b>Recommendation 31</b></u></p> <p>Circle Green recommends that the definition of indirect discrimination be amended to remove the proportionality test.</p>



Question	Circle Green recommendation
Should the meaning of indirect discrimination be amended to shift the onus of proof from the complainant to the alleged discriminator?	<p><b><u>Recommendation 32</u></b></p> <p>Circle Green recommends amending the meaning of indirect discrimination to shift the onus of proof from the complainant to the respondent.</p>
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?	<p><b><u>Recommendation 33</u></b></p> <p>Circle Green recommends that 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.</p>
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?	<p><b><u>Recommendation 34</u></b></p> <p>Circle Green recommends that the meaning of indirect discrimination be amended to specify that it is not necessary for the discriminator to be aware of the indirect discrimination.</p>



Question	Circle Green recommendation
<p>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?</p>	<p><b><u>Recommendation 35</u></b></p> <p>Circle Green recommends that the disadvantage requirement be removed from the definition of sexual harassment under the EO Act.</p> <p><b><u>Recommendation 36</u></b></p> <p>Circle Green recommends that a new definition of sexual harassment be adopted by the EO Act, so that:</p> <ul style="list-style-type: none"> <li>• sexual harassment occurs in circumstances where the person: <ul style="list-style-type: none"> <li>a) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or</li> <li>b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed.</li> </ul> </li> <li>• a respondent has a defence against a claim of sexual harassment in circumstances where the respondent can establish both that: <ul style="list-style-type: none"> <li>a) the harasser had did not intend to offend, humiliate or intimidate the person harassed; and</li> <li>b) a reasonable person, having regard to all the circumstances, would not have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.</li> </ul> </li> </ul>
<p>Should the protections from sexual harassment be extended to all areas under the EO Act? If not, should certain areas remain untouched by the protections?</p>	<p><b><u>Recommendation 37</u></b></p> <p>Circle Green recommends that protections from sexual harassment be extended to all areas of public life covered by the EO Act.</p>



Question	Circle Green recommendation
Should the EO Act be amended to expressly prohibit members of Parliament from sexually harassing their staff or those who carry out duties at Parliament House?	<p><b><u>Recommendation 38</u></b></p> <p>Circle Green recommends that the EO Act be amended to expressly prohibit members of Parliament from sexually harassing parliamentary staff, or other persons who carry out duties at Parliament House.</p>
Should the EO 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 EO Act be amended in light of the amendments proposed by the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth)?	<p><b><u>Recommendation 39</u></b></p> <p>Circle Green recommends that the EO Act be amended to expressly prohibit judicial officers from sexually harassing their co-workers.</p>
Should the EO Act be amended to expressly prohibit duty holders from sexually harassing unpaid or volunteer workers?	<p><b><u>Recommendation 40</u></b></p> <p>Circle Green recommends that the EO Act be amended to protect volunteers and unpaid workers from sexual harassment and unlawful discrimination.</p>
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?	<p><b><u>Recommendation 41</u></b></p> <p>Circle Green recommends that the disadvantage requirement be removed from the definition of racial harassment in the EO Act.</p>
Should the protections from racial harassment be extended to all areas under the EO Act? If not, should certain areas remain untouched by the protections?	<p><b><u>Recommendation 42</u></b></p> <p>Circle Green recommends that protections from racial harassment be extended to all areas of public life covered by the EO Act.</p>



Question	Circle Green recommendation
Does the EO 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 EO Act be amended or clarified?	<p><b><u>Recommendation 43</u></b></p> <p>Circle Green recommends that the EO Act be amended to include positive obligations to make reasonable adjustments for people who have an impairment.</p>
Should the EO Act include positive obligations to make reasonable adjustments for persons with impairment?	<p><b><u>Recommendation 44</u></b></p> <p>Circle Green recommends that the EO Act be amended to include positive obligations to make reasonable adjustments for all people who are protected from discrimination under the EO Act.</p>
Should any positive obligations be framed as stand-alone obligations or included within the discrimination definitions?	<p><b><u>Recommendation 45</u></b></p> <p>Circle Green recommends that positive obligations to make reasonable adjustments for all people who are protected from discrimination under the EO Act be framed as stand-alone obligations, separate to discrimination definitions.</p>
What matters should be included in the EO Act to determine whether adjustments are 'reasonable' or will impose 'unjustifiable hardship'?	<p><b><u>Recommendation 46</u></b></p> <p>Circle Green recommends that the matters included in the EO Act to determine whether adjustments are reasonable should be modelled on the matters outlined in section 24(3) of the NT Act.</p>
Do the victimisation protections or related provisions in the EO Act require reform?	<p><b><u>Recommendation 47</u></b></p> <p>Circle Green recommends that a reference to section 67 of the EO Act be inserted into section 5 of the EO Act.</p> <p><b><u>Recommendation 48</u></b></p> <p>Circle Green recommends that the EO Act be amended to provide for a reverse onus of proof for a victimisation complaint, similar to section 361 of the FW Act.</p>



Question	Circle Green recommendation
Should the definition of employment in the EO Act be extended to include unpaid and voluntary workers?	<p><u>Recommendation 49</u></p> <p>Circle Green recommends that discrimination and harassment protections in the EO Act be extended to cover all workers in all workplaces, including unpaid or voluntary workers, by adopting the concepts of PCBU and worker.</p>
In the event the definition of employment in the EO Act is not extended, should the sexual harassment provisions extend to apply in relation to unpaid or volunteer workers?	<p><u>Recommendation 50</u></p> <p>Circle Green recommends that the sexual harassment protections in the EO Act be extended to cover all workers in all workplaces, including unpaid or voluntary workers, by adopting the concepts of PCBU and worker.</p>
Should a positive duty to eliminate discrimination, other than the requirement to make reasonable adjustments, be included in the EO Act?	<p><u>Recommendation 51</u></p> <p>Circle Green recommends that the EO Act be amended to place positive obligations on duty holders to take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible.</p>
If a positive duty is included, what measures must be fulfilled by duty holders that are reasonable and proportionate?	<p><u>Recommendation 52</u></p> <p>Circle Green recommends that the EO Act adopt a range of factors, similar to those in the VIC Act, in determining whether measures taken by duty holders are reasonable and proportionate to eliminate discrimination, sexual harassment or victimisation as far as possible.</p>
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?	<p><u>Recommendation 53</u></p> <p>Circle Green recommends that a positive duty should apply to all grounds and prohibitions in the EO Act.</p>



Question	Circle Green recommendation
<p>Should an individual complainant be able 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?</p>	<p><b><u>Recommendation 54</u></b></p> <p>Circle Green recommends that a complaint for breach of the positive duty by a duty holder be actionable by:</p> <ul style="list-style-type: none"> <li>(a) the EOC via broad investigative and enforcement powers; and</li> <li>(b) an individual complainant who has been affected by the breach.</li> </ul>
<p>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?</p>	<p><b><u>Recommendation 55</u></b></p> <p>Circle Green recommends that the SAT be given the power to hear an application for breach of the positive duty by a duty holder.</p>
<p>Should the EO Act place the burden of proof on the alleged discriminator to provide that no discrimination occurred and, if so, in what circumstances?</p>	<p><b><u>Recommendation 56</u></b></p> <p>Circle Green recommends that the EO Act be amended to reverse the burden of proof in relation to discrimination, harassment, and victimisation complaints, by adopting a rebuttable presumption similar to that in section 361 of the FW Act.</p>
<p>Should the investigative powers of the Equal Opportunity Commissioner or complaints handling process under the EO Act be updated or expanded and, if so, how?</p>	<p><b><u>Recommendation 57</u></b></p> <p>Circle Green recommends that Commission's powers be expanded in the EO Act so that the Commissioner has the power to proactively investigate complaints on its own initiative and to commence proceedings on behalf of complainants.</p> <p><b><u>Recommendation 58</u></b></p> <p>Circle Green recommends that the complaint handling process under the EO Act be updated to include an entitlement for a party to a complaint to have any agreement reached registered in the SAT, so that once registered, the terms of the agreement are enforceable (to the extent possible) by the SAT.</p>



Question	Circle Green recommendation
Should the dismissal powers of the Commissioner be amended and expanded?	<p><u><b>Recommendation 59</b></u></p> <p>Circle Green recommends that the Commissioner’s dismissal powers under the EO Act remain unchanged.</p>
Should the Commissioner's assistance function be amended and expanded?	<p><u><b>Recommendation 60</b></u></p> <p>Circle Green recommends that the Commissioner’s assistance functions be expanded to providing complainants with assistance with initially making and formulating complaints.</p>
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?	<p><u><b>Recommendation 61</b></u></p> <p>Circle Green recommends that the EO Act be amended so that the EOC has a greater role in proactively monitoring and regulating compliance with the EO Act.</p>
Should the complainant's option to request the Commissioner to refer a dismissed complaint to the SAT be retained?	<p><u><b>Recommendation 62</b></u></p> <p>Circle Green recommends that a complainant’s option to request the Commissioner to refer a dismissed complaint to the SAT be retained in the EO Act.</p>
Should the EO 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?	<p><u><b>Recommendation 63</b></u></p> <p>Circle Green recommends that the EO Act be amended to empower the SAT to enforce the obligations of the parties during the investigation and conciliation phase of a complaint.</p>
Should the EO 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?	<p><u><b>Recommendation 64</b></u></p> <p>Circle Green recommends that the current costs provisions in the SAT be retained.</p>



Question	Circle Green recommendation
Should the EO Act be amended to clarify that a person is prevented from lodging a claim under the EO Act if they have already made a complaint under Commonwealth anti-discrimination legislation in relation to the same conduct?	<p><u>Recommendation 65</u></p> <p>Circle Green recommends that a person should not be prevented from making a complaint under the EO Act if they have already made a prior complaint under Commonwealth anti-discrimination legislation in relation to the same discriminatory conduct, except where the prior complaint has been finally and substantively determined by a court or commission.</p>
Should the \$40,000 compensation cap be retained, increased or removed?	<p><u>Recommendation 66</u></p> <p>Circle Green recommends that the \$40,000 compensation cap be removed from the EO Act, so that the SAT may order compensation amounts which appropriately remedy the loss suffered by a complainant due to a breach of the EO Act.</p>
Should the EO Act be amended to clarify that an order may be made for the payment of interest on compensation amounts?	<p><u>Recommendation 67</u></p> <p>Circle Green recommends that the EO Act be amended to clarify that the SAT may order the payment of interest on compensation amounts ordered by the SAT, or due under the terms of a settlement agreement registered with the SAT.</p>
Should the EO Act be amended to make discrimination based on two or more overlapping Grounds unlawful?	<p><u>Recommendation 68</u></p> <p>Circle Green recommends that the EO Act be amended to make discrimination based on two or more overlapping grounds unlawful to better address the complexity of intersectional and multidimensional complaints.</p>
Should the EO Act adopt a modern drafting style that is easier to follow?	<p><u>Recommendation 69</u></p> <p>Circle Green recommends that the EO Act adopt a modern plain English drafting style, which is easier to understand and follow for the public at large.</p>
Should the timeframe for lodging a complaint be increased from the current 12 months?	<p><u>Recommendation 70</u></p> <p>Circle Green recommends that the EO Act be amended to change the timeframe for lodging a complaint from 12 months to 6 years.</p>



Question	Circle Green recommendation
Should the current discretion for the Commissioner to accept a complaint made out of time on good cause being shown be changed?	<u>Recommendation 71</u> Circle Green recommends that the Commissioner's current discretion under the EO Act to accept a complaint made out of time on good cause being shown be retained.
Should prohibitions on conversion practices be included in the EO Act?	<u>Recommendation 72</u> Circle Green recommends that prohibitions on conversion practices be legislated in a separate and specific statute, rather than included in the EO Act.



### 3. Submissions

#### 3.1 Objects

##### *Should the scope and objects of the EO Act be broadened?*

Circle Green recognises that the objects of the EO Act have an important role in ensuring the EO Act achieves its intended purpose. Further, we consider that the objects of the EO Act may be influential in signalling desirable community attitudes in relation to equal opportunity and anti-discrimination.

In our experience, many Western Australians still face discrimination and inequality. As such, Circle Green supports broadening the scope and objects of the EO Act to reflect a more comprehensive understanding of discrimination and equal opportunity, including systemic discrimination and substantive equality.

##### **Recommendation 1**

Circle Green recommends that the scope and objects of the EO Act be broadened, including to reflect a more comprehensive understanding of discrimination, to ensure the EO Act achieves its intended purpose.

##### *Would the EO Act benefit from an interpretation provision? If so, what type of interpretative provision should be included?*

Circle Green considers that the EO Act would benefit from an interpretation provision and should be amended to include one. We agree with the Discussion Paper, that the EO Act should be amended to include an interpretation provision similar to the provision in section 4AA of the ACT Act. Circle Green supports the EO Act being interpreted in a way that is beneficial to a person who has a protected attribute, to the extent it is possible to do so consistently with the objects of the EO Act.

##### **Recommendation 2**

Circle Green recommends that the EO Act include an interpretation provision requiring the EO Act be interpreted in a way that is beneficial to a person who has a protected attribute, to the extent it is possible to do so consistently with the objects of the EO Act.

#### 3.2 Grounds of Discrimination

##### 3.2.1 Assistant or therapeutic animal

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



Since the current protections relating to guide or hearing dogs were included in the EO Act, the role of assistance and therapeutic animals in providing support to people with disabilities has dramatically expanded beyond sight and hearing impairments. Expanded protections are needed to ensure protections for vulnerable groups within society who rely on assistance or therapeutic animals to improve their health outcomes and quality of life. For example, the current protections do not cover people that require an assistance or therapeutic animal for epileptic seizures or autism spectrum disorder.

Circle Green supports expanding protections in the EO Act to cover any assistance or therapeutic animal certified by a medical practitioner or regulation. This would bring the EO Act into line with other Australian jurisdictions, including South Australia and the Australian Capital Territory.<sup>1</sup>

### **Recommendation 3**

**Circle Green recommends that EO Act protections relating to guide or hearing dogs be extended to any medically certified assistance or therapeutic animal.**

#### **3.2.2 Gender history discrimination / gender identity / intersex status**

*Should the protections in the EO 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?*

Circle Green supports expanded protections in the EO Act beyond the currently defined gender reassigned persons, which would recognise and protect gender identity and intersex status, without requiring a gender recognition certificate.

#### **Case Study 1 – Morgan**

*Morgan is a non-binary client, who has alopecia. Shortly after Morgan commenced working for a new employer in the hospitality industry, the employer requested that Morgan wear a long-haired wig and provided them with a female uniform. Morgan expressed to the employer that they would prefer a male uniform instead and complained that wearing a wig made them feel uncomfortable. In response, the employer told Morgan that their employment was terminated.*

Case Study 1 above highlights the current deficiency with the definition of gender reassigned persons. Morgan was not gender reassigned person under the current definition in the EO Act, so did not have a gender recognition certificate. As a result, they were not protected from discriminatory conduct by their employer under the current protections for gender reassigned persons in the EO Act.

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<sup>1</sup> SA Act s 88A; ACT Act s 5AA(2)(d).



Circle Green considers that expanded protections for gender diverse persons are critical to protect a highly vulnerable and marginalised group that is not currently protected from discrimination under the EO Act. Further, these protections would align the EO Act with other Australian jurisdictions,<sup>2</sup> and better reflect a modern understanding of gender diversity.

Circle Green supports a broad definition of gender identity, similar to that in section 2 of the ACT Act. A protection based on such a definition would have provided Morgan, in Case Study 1, with clearer protection against the discriminatory conduct of the employer.

Circle Green considers it unnecessary to include any exceptions to protections based on gender identity or intersex status. The disproportionately high rate of discrimination experienced by gender diverse individuals evidences the need for an expansive definition. Exceptions are problematic for their tendency to reinforce a binary construction of gender, and to unjustifiably marginalise gender diverse individuals from the protections afforded by anti-discrimination and equal opportunity laws.

#### **Recommendation 4**

**Circle Green recommends the protections in the EO Act be expanded to include gender identity and intersex status, with broad definitions of these terms to reflect a modern understanding of gender diversity.**

### **3.2.3 Impairment**

#### ***Should the definition of impairment be broadened in the EO Act and, if so, how?***

Circle Green supports expanding the definition of impairment to cover a broader range of impairments to align the EO Act with the other Australian jurisdictions.<sup>3</sup> This would allow a greater range of vulnerable people to be covered by the term ‘impairment’.

In Circle Green’s experience, clients are often self-represented and struggle to make complicated or interpretative arguments. A broader, more contemporary definition of impairment that aligns with other Australian jurisdictions would provide individuals with greater clarity when making impairment discrimination claims. Providing more explicit coverage of what the term ‘impairment’ includes would assist applicants in identifying when they may have experienced discrimination based on an impairment. This is especially important, as many of Circle Green’s clients already face barriers, including literacy issues and cultural reluctance to acknowledge certain illnesses, which make claiming discrimination on the ground of impairment challenging.

In addition, an expansion of the definition to cover potential future impairments, or imputed future impairments, may help reduce the stigma and reluctance that many applicants may feel when employers ask for medical information. As employers look to increase medical screenings on

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<sup>2</sup> NSW Act s 38A(c); QLD Act s 4; VIC Act s 4; TAS Act s 3; ACT Act s 2.

<sup>3</sup> ACT Act s 5AA; DD Act s 4; NSW Act ss 4, 49A; NT Act s 4(1); QLD Act sch 1; SA Act s 5; VIC Act s 4; TAS Act s 3.



employees, it is important that employees are protected from discrimination against future impairments that have not yet manifested and do not impact an employee's ability to fulfil the inherent requirements of their role. Protection from this form of discrimination is important to many Circle Green clients who feel that medical information may be used against them in terms of their employment or potential future employment.

Circle Green supports the Disability Discrimination Legal Service's recommendation that the definition of impairment be extended to include behaviour which is a symptom or manifestation of an impairment.<sup>4</sup> To provide the greatest possible protections to people with impairments, it is important to ensure that all potential impairments are explicitly covered by the definition of impairment in the EO Act. Drawing on the more expansive definitions that exist in other jurisdictions across Australia,<sup>5</sup> Circle Green's proposed definition of impairment is as follows:

*impairment in relation to a person, means one or more of the following conditions —*

- (a) total or partial loss of a bodily or mental function; or*
- (b) total or partial loss of a part of the body; or*
- (c) the presence in the body of organisms that cause disease or illness; or*
- (d) the presence in the body of organisms that are capable of causing disease or illness; or*
- (e) the presence in the body of organisms impeding, capable of impeding or which may impede the capacity of the body to combat disease; or*
- (f) the malfunction, malformation or disfigurement of a part of the body; or*
- (g) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction; or*
- (h) a disorder, illness or disease that affects a 'person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; or*
- (i) reliance on a guide, hearing or assistance dog, wheelchair or other remedial or therapeutic device; or*
- (j) behaviour that is a symptom or manifestation of an impairment;*

*and includes an impairment that:*

- (k) a person has; or*

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<sup>4</sup> Discussion Paper 110.

<sup>5</sup> NSW Act s 38A(c); QLD Act s 4; VIC Act s 4; TAS Act s 3; ACT Act s 2.



*(l) a person is thought to have (whether or not the person in fact has the impairment); or*

*(m) that a person had in the past, or is thought to have had in the past (whether or not the person in fact had the impairment); or*

*(p) that a person will have in the future, or that it is thought a person will have in the future (whether or not the person in fact will have the impairment).*

### **Recommendation 5**

**Circle Green recommends the definition of impairment be broadened, including to cover behaviour that is a manifestation of an impairment, and potential future impairment.**

### **3.2.4 Religious or political conviction**

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

Circle Green supports amending the EO Act to adopt a defined ground for political or religious conviction, similar to the ACT Act. Circle Green proposes the following definition:

***political conviction*** includes -

*(a) having a political conviction, belief, opinion, or affiliation; and*

*(b) engaging in political activity; and*

*(c) not having a political conviction, belief, opinion, or affiliation; and*

*(d) not engaging in political activity.*

***religious conviction*** includes -

*(a) having a religious conviction, belief, opinion, or affiliation; and*

*(b) engaging in religious activity; and*

*(c) appearance or dress required by, or symbolic of, the person's religious beliefs; and*

*(d) the cultural heritage and distinctive spiritual practices, observances, beliefs, and teachings of Aboriginal and Torres Strait Islander people; and*

*(e) engaging in the cultural heritage and distinctive spiritual practices, observances, beliefs, and teachings of Aboriginal and Torres Strait Islander peoples; and*

*(f) not having a religious conviction, belief, opinion, or affiliation; and*

*(g) not engaging in religious activity.*



Adopting this definition would increase clarity, allow for the explicit inclusion of Aboriginal and Torres Strait Islander cultures and beliefs, and bring the EO Act into line with other Australian jurisdictions. These amendments would also remove ambiguity and the level of subjectiveness that currently exists in the EO Act.

Circle Green's proposed amendment would ensure that the EO Act better incorporates article 26 of the International Covenant on Civil and Political Rights, which states that:

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as ... political or other opinion...*

Importantly, the clarity of the proposed definition allows for a reasonable balance between protection from religious discrimination and the protection of other protected attributes under the EO Act.

#### **Recommendation 6**

**Circle Green recommends amending the EO Act to adopt a defined ground for political or religious conviction, similar to the ACT Act.**

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

Circle Green supports expressly including political and religious beliefs and activities under the definitions for political or religious conviction, as outlined in the proposed definition above. Circle Green recommends that any definition of religious or political convictions, beliefs or activities includes not having religious or political convictions, beliefs, or engaging in religious or political activities.

Circle Green cautions against a definition of religious conviction or religious activity that would allow for unlawful activities. Circle Green notes in the Discussion Paper, a proposed definition of religious activity including acts, that while unlawful, do not incur a period of imprisonment. However, even acts which do not incur a term of imprisonment may have a substantial detrimental impact on vulnerable groups.

These behaviours should not be protected on any grounds and would elevate the protection of religious belief above that of other protected grounds, which is not in line with community expectations or values.

#### **Recommendation 7**

**Circle Green recommends that the protections for religious and political conviction be defined under the EO Act to expressly include religious and political beliefs and activities.**



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

Circle Green supports the express inclusion of religious appearance or dress under the definition of religious conviction, as outlined in the proposed definition above. This will remove any uncertainty regarding whether religious appearance or dress is currently protected under the EO Act.

**Recommendation 8**

**Circle Green recommends that the protections for religious and political conviction be defined under the EO Act to expressly include religious appearance and dress.**

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

Circle Green supports the extension of political or religious conviction protections to cover relatives and associates of a person protected by the ground. Circle Green does not see any policy reason why the current EO Act should not extend protection to relatives or associates of a person protected. Circle Green agrees with the EOC in its submission to the 2007 EOC Review when it recommended this amendment.<sup>6</sup>

**Recommendation 9**

**Circle Green recommends that the protections for political or religious conviction be extended to cover relatives and associates of a person protected by the ground, to bring the EO Act into line with most other Australian jurisdictions.**

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

Circle Green supports the extension of these grounds to all areas covered by the EO Act. Circle Green cannot see any reason why access to places and vehicles, and the disposal of land are not protected against discrimination based on political or religious conviction. Circle Green agrees with the EOC submission to the 2007 EOC Review that the protection be extended to all areas covered by the EO Act.

**Recommendation 10**

**Circle Green recommends that the protections for religious and political conviction be extended to all areas covered by the EO Act.**

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<sup>6</sup> 2007 EOC Review 29.



### 3.2.5 Pregnancy

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

Circle Green supports extending protections under the EO Act to cover potential pregnancy and childbearing capacity to provide clarity regarding whether the EO Act prohibits discrimination on these grounds. This also would bring the EO Act into line with protections under other Australian jurisdictions.<sup>7</sup>

#### **Case Study 2 – Miriam**

*Miriam was employed with the same employer for over 7 years when she went on parental leave for her first child. A few months after returning to work, she was made redundant. The employer suggested one of the reasons they selected Miriam for redundancy was because they presumed she would want to have another child in the near future.*

#### **Case Study 3 – Una**

*Una was employed for over 3 years in a male-dominated industry. She commenced IVF and told her employer about this, as she had a few upcoming medical appointments. About two weeks later, the employer made Una redundant and readvertised her role with a slightly different job title. Una believed the employer's conduct was because of her undergoing IVF and potential pregnancy.*

In Circle Green's experience, people who might express an intention or desire to have children fall between the cracks of pregnancy protections in the current EO Act. As seen in Case Study 2, Miriam was selected for redundancy based on her employer's presumptions she would fall pregnant again in the near future. In Case Study 3, Una's employment was terminated after she told her employer about her plans to undergo IVF. However, for Miriam or Una to pursue a claim under the current EO Act, they would have to make complex legal arguments to rely on existing protections, which do not clearly cover their respective situations.

Broadening the EO Act to include potential pregnancy and childbearing capacity would clarify and strengthen protections for individuals like Miriam and Una. Further, Circle Green considers that the definition of childbearing capacity should be broad enough to cover individuals who might need fertility or reproductive assistance, such as IVF, to bear a child.

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<sup>7</sup> SD Act s 6; ACT Act s 5A; SA Act s 85T(4)(a); NT Act s 4(1) (definition of 'pregnancy'); TAS Act s 3 (definition of 'pregnancy').



## **Recommendation 11**

**Circle Green recommends the protections for pregnancy be broadened in the EO Act to potential pregnancy and childbearing capacity.**

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

Circle Green supports removing the requirement that pregnancy discrimination is 'not reasonable in the circumstances' from the EO Act, as it is too broad and creates uncertainty for complainants, which operates as a barrier to complainants pursuing a complaint under the EO Act.

### **Case Study 4 – Jonelle**

*Jonelle was a long-term employee who was dismissed by her employer following disclosure of her pregnancy. She had indicated that she was finding it difficult to complete work at the same pace and in the same time as she used to, so asked for flexible working arrangements. Following some discussions with the employer around this and Jonelle's capacity to perform the role, Jonelle was told she could either resign or be dismissed. Feeling pressured in this situation, Jonelle resigned.*

### **Case Study 5 – Peta**

*Peta was working in a project management role. She had recently been appointed the lead in a new project, which represented significant career progression, when she fell pregnant. After Peta told her employer about her pregnancy, they reassigned the lead role to another employee. When Peta complained, the employer told Peta that it was not reasonable for her to expect to continue as the project lead due to the project delivery date falling after her expected date of birth.*

Case Studies 4 and 5 above reflect a common experience of Circle Green clients, who have experienced discriminatory conduct based on their pregnancy. Individuals like Jonelle and Peta are faced with having to pursue a discrimination complaint at a time in their life when they feel physically, emotionally, and financially vulnerable. Under the current EO Act, they are then faced with having to argue that the discriminatory conduct was not reasonable in the circumstances, which causes further uncertainty and effectively operates as an additional barrier to complainants. Complainants would benefit from greater clarity when deciding whether to make a pregnancy discrimination complaint to the EOC.



### **Recommendation 12**

**Circle Green recommends 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?***

Instead of the requirement that pregnancy discrimination is 'not reasonable in the circumstances', Circle Green supports the inclusion of limited express exceptions, similar to those in the SA Act.<sup>8</sup> One such exception should be for workplace discrimination where an individual is unable to perform the inherent requirements of their position without endangering themselves, their unborn child or others because of their pregnancy. Circle Green considers that these limited express exceptions should be coupled with a positive obligation to make reasonable adjustments to accommodate a person's pregnancy. Replacing a general 'reasonableness' test with clear limited express exceptions, coupled with a positive obligation to make reasonable adjustments, would better protect pregnant workers, while maintaining a balance where they can no longer safely perform the key aspects of their role, even after reasonable adjustments are made.

### **Recommendation 13**

**Circle Green recommends limited express exceptions to the protections for pregnancy be incorporated into the EO Act, together with a positive obligation to make reasonable adjustments to accommodate a person's pregnancy.**

## **3.2.6 Race**

***Should the protections for race discrimination be broadened in the EO Act and, if so, how?***

Circle Green supports the broadening of the protections for race discrimination to provide more explicit protections. While the EO Act in its current form may, in some cases, provide protections, the inclusion of a more explicit protections will provide certainty. Circle Green proposes the following definition for race, which incorporates aspects from other Australian jurisdictions:<sup>9</sup>

*race includes –*

- *colour;*
- *nationality (current, past or proposed);*
- *descent;*
- *ethnic, ethno-religious or national origin; and*

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<sup>8</sup> SA Act s 85Z(3)(a)(i).

<sup>9</sup> TAS Act s 3; NT Act s 4; ACT Act s 2; VIC Act s 4(1); SA Act s 5.



- *status of being, or having been, an immigrant.*

*The fact that a race may comprise 2 or more distinct races does not prevent it being a race for the purposes of this Act.*

This definition would bring the EO Act into line with other Australian jurisdictions and would ensure greater clarity around the inclusion of ethno-religious groups such as Jewish people, Muslims, Sikhs, and persons of a specific immigration status. If the inclusion of immigration status is not accepted as its own ground (as discussed in section 3.2.17 below), Circle Green supports immigration status being included within the definition of race, as proposed above. This would better reflect the complex nature of race and modern understandings of race as they apply to discrimination.

#### **Recommendation 14**

**Circle Green recommends that the protections for race discrimination in the EO Act be broadened by adopting a more comprehensive definition of race.**

### **3.2.7 Physical features**

#### ***Should physical features be included as a ground?***

Circle Green considers that individuals generally should not be subject to discrimination based on their physical features. For example, workers should be assessed based on their ability to perform a role, not on any irrelevant physical features when applying for a job. As such, Circle Green supports including physical features as a protected ground in the EO Act.

#### **Case Study 6 – Marchella**

*Marchella commenced in a clerical role. After a couple of weeks, she wore a short sleeve top to work, which showed part of a tattoo. The employer told Marchella that her employment wasn't going to work out, as the business owner didn't like tattoos. Marchella offered to wear clothing to cover the tattoo at work in future, but the employer told Marchella it wouldn't make a difference, as they now knew she was a 'tattoo person'.*

#### **Case Study 7 – Lilly**

*Lilly was a young worker in the retail industry. She gained about 5 kilograms in weight over a two-month period as she was going through a stressful life change. The employer made negative comments about Lilly's appearance and told Lilly she would be rostered on for fewer shifts to give her more time to exercise. Lilly felt humiliated by her employer's conduct and resigned her employment leaving her unemployed at a vulnerable time in her life.*

Case Studies 6 and 7 above highlight that physical features protections are a significant gap in the current protections in the EO Act. In Circle Green's experience, discrimination based on physical



features can result in significant stress, shame, and harm to vulnerable individuals. Western Australians like Marchella and Lilly should be entitled to protection from this harm.

Circle Green supports a broad definition of physical features being inserted into the EO Act with limited specific exceptions, similar to the ACT Act and VIC Act.<sup>10</sup>

### **Recommendation 15**

**Circle Green recommends that physical features be included as a ground of discrimination in the EO Act, with limited specific exceptions, similar to those in the ACT Act and VIC Act.**

### **3.2.8 Industrial / trade union activity / employment activity**

***Should industrial / trade union activity / employment activity be included as a ground, or are those protections adequately covered by industrial laws?***

Circle Green supports the inclusion of trade union activity, industrial activity and employment activity as grounds in the EO Act. In Circle Green's experience, employees frequently face and fear discrimination on these grounds in their employment. This fear is exacerbated for vulnerable and disadvantaged employees. Case Studies 8 and 9 below outline two examples of discrimination based on employment activity.

#### **Case Study 8 – Noah**

*Noah, a young farmhand, responded to an online job advertisement seeking a six-month seasonal engagement in a remote area of Western Australia. He was promised plenty of work for at least the six-month period and a pay rate that would increase by \$5 per hour after he settled into the role. Based on this, Noah relocated and commenced working for the employer, who was a state system employer.*

*Noah worked hard, up to 12 hours a day, 7 days a week, and received positive feedback from the employer for his work. After two months, Noah asked the employer about the pay rise of \$5 per hour that had been promised once he settled in. Later the same day, the employer terminated Noah's employment effective immediately, and evicted Noah from his accommodation, alleging poor work performance.*

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<sup>10</sup> ACT Act s 2 (definition of 'physical features'); VIC Act s 4(1) (definition of 'physical features').



### **Case Study 9 – Yusef**

*Yusef is a migrant worker on a temporary protection visa. After attending a community legal education workshop on employment law in WA, Yusef realised he was being significantly underpaid in his employment. Yusef fears losing his job if he asks to be paid correctly, so he continues working below minimum wage.*

The dual jurisdiction of employment laws in WA means there are currently some gaps in protections against discrimination on industrial / trade union activity / employment activity grounds. For example, state system employees are not adequately protected against discrimination on employment activity grounds at present. Under employment laws, state system employees are only currently protected against dismissal because of making a complaint to a workplace authority.<sup>11</sup> They are not protected against other kinds of discriminatory conduct, or if they make a complaint or enquiry to their employer. However, Circle Green notes at the time of writing this submission, there is a Bill before WA Parliament which proposes to close these gaps.

Even if protections against discrimination on industrial / trade union activity / employment activity grounds do come to be adequately covered by employment laws, Circle Green considers there is still significant merit in including these grounds in the EO Act, similar to the VIC Act.<sup>12</sup> Adding these grounds to the EO Act would simplify the legal framework and streamline the resolution process for people discriminated against on multiple grounds, including industrial, trade union, or employment activity. Circle Green frequently advises people that have experienced discrimination on multiple grounds, who can face having to make multiple claims across several different jurisdictions despite being disadvantaged in their access to legal services. As such, Circle Green considers there would be great practical benefit for vulnerable and disadvantaged individuals to include industrial / trade union activity / employment activity grounds as a new ground in the EO Act.

### **Recommendation 16**

**Circle Green recommends that industrial / trade union activity / employment activity be included as a ground of discrimination in the EO Act.**

### **3.2.9 Employment status**

#### ***Should employment status be included as a ground?***

Circle Green supports protecting Western Australians against discrimination based on employment status by adding protections into the EO Act, similar to those in the ACT Act.<sup>13</sup>

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<sup>11</sup> FW Act pt 6-4.

<sup>12</sup> VIC Act s 4.

<sup>13</sup> ACT Act ss 2, 7(f).



In Circle Green's experience, vulnerable and disadvantaged people in WA (such as people who are unemployed and/or homeless), experience discrimination based on employment status in relation to employment and accommodation. Further, discrimination based on employment status can result in types of disadvantage, like unemployment and homelessness becoming entrenched.<sup>14</sup>

Circle Green considers that adding protections against discrimination based on employment status would help protect the community generally, and specifically a highly vulnerable section of the community.

### **Recommendation 17**

**Circle Green recommends that protections for employment status, similar to those in the ACT Act, be inserted into the EO Act.**

#### **3.2.10 Irrelevant criminal record**

*Should irrelevant criminal record be included as a ground?*

Circle Green supports irrelevant criminal record being included as a protected attribute under the EO Act, to ensure equality of opportunity for people with criminal records, which are irrelevant to their ability to participate in protected areas of life.

#### **Case Study 10 – Boyd**

*Boyd is a low-income earner with three children. After three months of Boyd working for the employer, the employer told Boyd that his employment was terminated, as his police clearance was not up to the employer's standard. Boyd had one traffic offence on his police clearance check, and his employment did not involve driving. Boyd struggled to support his family and pay his bills after his dismissal.*

In Case Study 10 above, Boyd was dismissed from his employment and had limited recourse, as even at a federal level, there is no enforcement mechanism for discrimination complaints made on the basis of irrelevant criminal record where there is no settlement at conciliation. As a result, WA employees, or potential employees, who face discrimination on the ground of irrelevant criminal record currently have no enforceable discrimination complaint against the employer.

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<sup>14</sup> ACTLRAC, *Review of the Discrimination Act 1991 (ACT)* (Final Report, 18 March 2015) 78-79. The ACTLRAC recommended that employment status be added as a protected attribute to the ACT Act. It did so on the basis that people in the Australian Capital Territory reported discrimination on that basis. Notably, the ACTLRAC related this ground to homelessness, which it also recommended be added as a protected attribute.



Circle Green considers that the EO Act should be brought into line with other Australian jurisdictions by adopting appropriate and balanced protections for people with an irrelevant criminal record.<sup>15</sup> In this respect, Circle Green broadly supports the position taken in the Discussion Paper,<sup>16</sup> and the 2007 EOC Review.<sup>17</sup>

### **Recommendation 18**

**Circle Green recommends that irrelevant criminal record be included as a protected attribute under the EO Act.**

#### **3.2.11 Irrelevant medical record**

***Should irrelevant medical record be included as a ground? Should this also extend to a person's workers' compensation history?***

Circle Green supports the inclusion of irrelevant medical record and workers' compensation history as specific grounds that are protected under the EO Act. Whilst there may already be some protections that would potentially overlap with this protection, in Circle Green's experience, it has not always been clear to individuals whether they are protected against discrimination on this basis.

#### **Case Study 11 – Ali**

*Ali comes from a CaLD background and works as a casual employee in the security services industry. He is the sole income earner in his household and has two dependent children. Ali had an accident at work, which left him with an injury to his leg. Ali made a workers' compensation claim. After his recovery, Ali was medically cleared to work, yet his employer refused to provide him with shifts because they were worried about Ali making another workers' compensation claim in future due to his history of making a workers' compensation claim.*

In Case Study 12 above, Ali was directly discriminated against due to his workers' compensation history. Circle Green has also experienced that employees are hesitant to make potentially valid workers' compensation claims because of a fear that they would be forced to disclose the claim to future employers and be prejudiced in obtaining future employment as a result. This can often leave highly vulnerable individuals, with potentially serious injuries, avoiding medical treatment, and continuing to work in an unsafe manner.

Given these experiences, Circle Green supports more explicit protections for irrelevant medical record and workers' compensation history in the EO Act, so that people who are vulnerable and

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<sup>15</sup> Australian Human Rights Commission Regulations 2019 (Cth) s 6(a)(ii); ACT Act s 7(1)(k); NT Act s 19(1)(q); TAS Act s 16(q).

<sup>16</sup> Discussion Paper 120-121.

<sup>17</sup> 2007 EOC Review 22-23.



disadvantaged can better understand and rely on these protections, without needing to make more complex legal arguments to rely on other existing protections. Specifically including irrelevant medical records and workers' compensation history as grounds in the EO Act would provide a clear position that discrimination based on these grounds is unlawful, and would remove any ambiguity or gaps in the law as it stands (for example, in relation to possible genetic predisposition to a future medical condition).

#### **Recommendation 19**

**Circle Green recommends that irrelevant medical record and workers' compensation history be included as grounds of discrimination in the EO Act.**

### **3.2.12 Social origin / profession/ trade / occupation / calling**

#### ***Should social origin or profession, trade, occupation or calling be included as a ground?***

Given the prevalence of class discrimination in Australia, Circle Green supports social origin being included as a ground of protection from discrimination. If social origin is to be defined in the EO Act, it should include a reference to class or class discrimination. Circle Green also recommends the inclusion of a definition of class, given the broad nature of the term.<sup>18</sup> Trade, occupation and calling could then potentially be incorporated into this definition.

Adopting 'social origin' as a ground would bring the EO Act into line with the ILO Discrimination (Employment and Occupation) Convention 1958, to which Australia is a signatory. The convention expressly includes 'social origin' in its definition of discrimination.

#### **Recommendation 20**

**Circle Green recommends social origin be included as a ground of discrimination in the EO Act.**

### **3.2.13 Lawful sexual activity**

#### ***Should lawful sexual activity be included as a ground? If so, what exceptions might apply?***

Circle Green supports including lawful sexual activity as a ground of discrimination in the EO Act. In Circle Green's experience, discrimination on this basis does occur in WA, particularly in relation to young women. As engaging in lawful sexual activity, or not engaging in lawful sexual activity, generally does not impact the ability of an individual to engage in the areas of life protected by the EO Act, Circle Green considers there should be protections from discriminatory conduct on this basis.

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<sup>18</sup> Angelo Capuano, 'Giving Meaning to 'Social Origin' in International Labour Organization ('ILO') Conventions, the *Fair Work Act 2009* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth): 'Class' Discrimination and its Relevance to the Australian Context' (2016) 39(1) *UNSW Law Journal* 84, 85.



Circle Green suggests that the EO Act adopt a similar definition of lawful sexual activity, and exceptions to protections on this ground, to those in the VIC Act.

#### **Recommendation 21**

**Circle Green recommends that lawful sexual activity be included as a ground of discrimination, with a similar definition and exceptions to those in the VIC Act.**

### **3.2.14 Spouse or domestic partner identity**

#### ***Should spouse or domestic partner identity be included as a ground?***

Circle Green supports including a specific protection for spouse or domestic partner identity in the EO Act, without the requirement that a spouse or domestic partner possess a protected attribute. In Circle Green's experience, discrimination on this basis does occur, particularly in relation to employment. One recent example is outlined in Case Study 12 below, although it is noted that Amanda may also be protected under the relatives / associates protections currently in the EO Act.<sup>19</sup>

#### ***Case Study 12 – Amanda***

*Amanda and her husband worked for the same employer. Amanda's husband was injured at work and resigned from his position as a part of a workers' compensation settlement. Shortly after, Amanda was made redundant and believed that one of the reasons for her redundancy was because of who her husband was. This left Amanda and her husband both unemployed.*

#### **Recommendation 22**

**Circle Green recommends spouse or domestic partner identity be included as a specific ground of discrimination in the EO Act, without the requirement that a spouse or domestic partner possess a protected attribute.**

### **3.2.15 Relative or association with someone who has, or is assumed to have, specific protected attribute**

#### ***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 EO Act?***

Circle Green supports extending the protections for relatives or associates to all protected attributes under the EO Act. This change would bring WA into line with most other Australia jurisdictions and

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<sup>19</sup> EO Act ss 36, 66A, 66V, 35O.



would fill gaps in protections for relatives or associates of people who have, or are assumed to have, protected attributes which are not presently protected. In Case Study 12 above, Amanda would have arguably benefited from protections as a relative / associate of a person with a workers' compensation history.

In Circle Green's view, there is no reasonable basis that protections for relatives or associates should not be extended to all protected attributes, even if discrimination against relatives / associates of people with certain protected attributes may be uncommon or infrequent.

### **Recommendation 23**

**Circle Green recommends the protections for relatives / associates be extended to relatives / associates of people who have or are assumed to have any protected attribute under the EO Act.**

#### **3.2.16 Accommodation status**

***Should accommodation status be included as a ground? If so, what exceptions might be reasonable?***

Circle Green considers that Western Australians should be protected against discrimination based on their accommodation status, including their status of being a tenant, waiting for or being in receipt of public housing, or being homeless. These protections are needed to address and prevent social inequality. As such, Circle Green supports accommodation status being included as a ground of discrimination in the EO Act and recommends the EO Act adopt a similar protection to that under ACT Act.

Circle Green understands exceptions to these protections may be needed, but suggests that any exceptions should:

- be narrow and limited to discrimination that is reasonable and proportionate in the circumstances; and
- place the burden of proof on the respondent to prove that the discrimination was reasonable and proportionate in the circumstances.

### **Recommendation 24**

**Circle Green recommends that accommodation status be included as a ground, with a 'reasonableness' exception to this protection.**

#### **3.2.17 Immigration status**

***Should immigration status be included as a ground?***



As noted in the Discussion Paper, the current framework is ambiguous about whether the EO Act covers individuals who are discriminated on the basis of their immigration status.<sup>20</sup>

In Circle Green's experience, immigrant communities, especially individuals on temporary visas, are highly vulnerable. They experience significant exploitation and disadvantage in a number of areas of public life as a result of their vulnerable visa status. There is often an intersection between grounds for individuals discriminated against on the basis of immigration status, including race, impairment, family and domestic violence, and family and caring responsibilities.

As a result of these intersecting factors, Circle Green commonly sees temporary visa holders facing issues with securing accommodation and employment. Case Study 13 below provides an example of a person who had no recourse under the current EO Act framework, despite an employer refusing to offer employment because the individual was a temporary visa holder.

#### **Case Study 13 – Ankit**

*Ankit was on a temporary visa. He was successful in an application for a job. However, the employer decided to revoke their offer of employment, as they wanted to employ a candidate with permanent residency status. Ankit had already started working for the employer.*

*It would have been difficult for Ankit to argue that the employer discriminated against him based on his race, as both Ankit and the other candidate were of the same race.*

Even if temporary visa holders secure employment, there is a significant power imbalance between migrant workers and their employers, as many visa holders are dependent on their employer to provide sponsorship or sign off on hours worked. For example, the Safe Haven Enterprise Visa (SHEV) pathway provides options for visa holders to apply for a limited number of visas, including permanent visas, if they meet certain requirements. These include that for a total of 42 months (three and a half years) of the SHEV period, holders or members of their family work and/or study full time and do so in a designated 'SHEV regional area'. This leaves the visa holder highly vulnerable, as the employer has a lot of control over the success of the visa pathway. In Circle Green's experience, this leads to temporary visa holders being treated less favourably than workers who are permanent residents or Australian citizens, even where they perform the same work for the same employer.

Existing enforcement mechanisms under the Migration Act and FW Act are often burdensome and intimidating for clients who are threatened that they will be sent back to their home country if they defy their employer. Many of the clients that Circle Green sees, who come from asylum seeking or are on protection visa, have experienced significant trauma and sometimes torture. The threat to return these clients to their home country creates significant distress, and is a powerful and coercive tool. In Circle Green's experience, this exploitation can take the form of underpayment, unpaid overtime, unreasonable additional hours, cash-back schemes, and working in unsafe workplaces. This form of discrimination is often distinct from discrimination on the basis of race, as it is the

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<sup>20</sup> Discussion Paper 126.



uncertainty of residency that is used to pressure, coerce or force individuals into accepting unlawful conditions.

Circle Green supports the adoption of the definition of 'immigration status' currently found in s7(1)(i) ACT Act. Importantly, this definition includes individuals on any kind of visa under the Migration Act and individuals who were previously visa holders or are thought to be visa holders. The individual should be protected from discriminatory behaviour where the discrimination is based on the assumption that the individual is an immigrant, even if this is not true.

Circle Green does not support the inclusion of a more subjective 'reasonableness' test to create a general exception to this ground. Any exceptions should be limited to employers having to comply with their legal obligations. For example, employers must comply with visa requirements. A general exemption would unnecessarily open the scope for potential discrimination and increase ambiguity for individuals and employers in terms of what is considered to be 'reasonable' discrimination.

### **Recommendation 25**

**Circle Green recommends that broad protections for immigration status be included in the EO Act, either as a specific ground of discrimination, or as a part of the protections for race.**

### **3.2.18 Subjection to domestic or family violence**

#### ***Should subjection to domestic or family violence be included as a ground?***

Circle Green supports the inclusion of subjection to domestic or family violence as a ground of discrimination under the EO Act. The existing protections are not clear or targeted enough, and so including this specific ground would provide stronger protections for people who have experienced family or domestic violence. These individuals would benefit from an unambiguous ground of protection that provides them with clear recourse if they experience discrimination because of subjection to family or domestic violence. Such protections would help to prevent further negative impacts and outcomes for people facing family and domestic violence.

#### **Case Study 14 – Jocelyn**

*Jocelyn is an Aboriginal woman who is a single parent. She experienced family violence and had a family violence restraining order (FVRO) against the perpetrator of the family violence. Jocelyn worked at a small store and the FVRO prevented the perpetrator from entering the store. Jocelyn told the employer about the FVRO and explained that the police would need to be called if the perpetrator entered the store she worked at. The employer told Jocelyn that they would not prevent the perpetrator from entering the store, regardless of the FVRO. The employer dismissed Jocelyn because the FVRO made her working at the store too difficult for them. This left Jocelyn without an income, and at risk of homelessness, with a young child under her care. Unfortunately, Jocelyn was not protected against unfair dismissal under employment laws.*



When individuals like Jocelyn in Case Study 14 experience family or domestic violence discrimination in their employment, often their main option under the current anti-discrimination and equal opportunity framework in Australia is a technical argument for sex discrimination, as women are disproportionately impacted by family and domestic violence. This argument has significant barriers for self-represented applicants who are also experiencing substantial impacts from the violence. While there are some protections against unfair dismissal, these avenues are subject to eligibility criteria that some individuals may not meet. Jocelyn, in Case Study 14, would have been assisted by having a specific ground in the EO Act, which prohibits discrimination based on subjection to domestic or family violence.

In addition to creating specific protections for people who have experienced family or domestic violence, Circle Green supports creating a positive obligation to make reasonable adjustments to accommodate this vulnerable group of people. While the FW Act suggests that some employees may request flexible working arrangements in relation to their employment if they face family or domestic violence, these provisions do not create an enforceable right for employees to ultimately receive flexibility at work, which may assist them to remain employed and maintain some level of economic security. Circle Green considers that this represents a gap in the legal framework, which should be addressed by including a positive obligation to make reasonable adjustments for people experiencing family and domestic violence in the EO Act.

#### **Recommendation 26**

**Circle Green recommends that subjection to family or domestic violence should be included as a ground of discrimination in the EO Act, together with positive obligations to make reasonable adjustments to accommodate people who experience family and domestic violence.**

### **3.2.19 Family responsibility and family status**

#### ***Should coverage of family responsibility and family status be extended to all areas under the EO Act?***

Circle Green supports extending protections for family responsibility and family status to all areas of public life covered by the EO Act as suggested by the EOC in the 2007 EOC Review.<sup>21</sup>

#### **Recommendation 27**

**Circle Green recommends that protections for family responsibility and family status be extended to all areas of public life covered by the EO Act.**

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<sup>21</sup> 2007 EOC Review 37.



### 3.3 Key definitions

#### 3.3.1 Defining discrimination

##### *Should a definition of discrimination be inserted into the EO Act?*

The EO Act does not currently contain definitions of discrimination, but rather describes what have become known as direct and indirect discrimination in relation to relevant grounds and particular areas of public life.

From a strictly legal perspective, it is unnecessary to insert definitions into the EO Act. The meanings of direct and indirect discrimination are generally well understood among legal practitioners who practise in this area based on the descriptions currently contained in the EO Act. However, Circle Green considers it may be desirable for this understanding to be codified in a clearer way in the EO Act by inserting definitions of discrimination into the EO Act. This could potentially make anti-discrimination and equal opportunity laws in WA clearer, simpler, and more accessible to laypersons.

Circle Green broadly supports inserting definitions of discrimination into the EO Act, although we acknowledge there are risks in doing so. Caution should be exercised to avoid definitions which may narrow current protections. In Circle Green's view, the definitions of discrimination in the VIC Act, QLD Act and the ACT Act achieve a good balance between clarity and simplicity, and maintaining broad protections.<sup>22</sup> Additionally, such definitions of discrimination could assist in better recognising and capturing intersectional discrimination under the EO Act.

#### **Recommendation 28**

**Circle Green recommends that definitions for discrimination, similar to those in the VIC Act, QLD Act and ACT Act, be inserted into the EO Act.**

#### 3.3.2 Meaning of direct discrimination and the use of the comparator test

##### *Should the meaning of direct discrimination in the EO Act be amended to remove the comparator test and, if so, what test should be inserted into the EO Act?*

Circle Green understands that, in theory, the comparator test is meant to be a useful way to determine whether the treatment of an individual is partly or wholly on the ground of a protected attribute. However, as indicated by the omission of the comparator test from legislation in other Australian jurisdictions, in practice the comparator test has been found to be an additional requirement that complainants need to satisfy in order to make a successful discrimination claim.<sup>23</sup>

Because it is very difficult to locate a real person who can act as a comparator, courts and commissions are often required to engage in the artificial exercise of seeking to determine how the

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<sup>22</sup> VIC Act s 7; QLD Act s 8; ACT Act s 8.

<sup>23</sup> In the Australian capital territory see: *Prezzi v Discrimination Commissioner* (1996) 39 ALD 729. In Victoria see: *Slattery v Manningham City Council (Human Rights)* [2013] VCAT 1869.



respondent would have treated a hypothetical person.<sup>24</sup> In Circle Green's experience, the comparator test has consequently become an exercise that is not only artificial, but creates additional complexity. Additionally, this requirement makes an already difficult legal framework almost impossible to navigate for some disadvantaged individuals. Notwithstanding the view expressed by the EOC in its 2007 EOC Review, Circle Green submits that the comparator test adds an unnecessary degree of technicality and difficulty to the assessment of direct discrimination. We do acknowledge that the removal of the comparator test might not resolve the problem, and may still result in the courts and tribunals continuing to compare groups in determining unfavourable treatment. However, Circle Green is of the view that this by no means justifies maintaining an overly complex test, such as the comparator test. Further, the removal of the comparator test would be a significant improvement in facilitating access to justice to particularly vulnerable individuals.

Circle Green supports the removal of the comparator test as a threshold requirement, which must be met by the complainant to make their case of direct discrimination. Circle Green supports the adoption of a meaning of direct discrimination which provides simply that direct discrimination occurs if a person treats, or proposes to treat, a person with a protected attribute unfavourable because of that protected attribute, similar to the VIC Act.<sup>25</sup>

### **Recommendation 29**

**Circle Green recommends that the meaning of direct discrimination in the EO Act be amended to remove the comparator test and insert a meaning of direct discrimination similar to that in the VIC Act.**

### **3.3.3 Meaning of indirect discrimination and the use of the proportionality test**

***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?***

Circle Green supports the broadening the meaning of indirect discrimination under the EO Act to include discrimination on the basis that the aggrieved person has a characteristic, which:

- pertains to people who have a protected attribute; or
- pertains to people who are imputed to have a protected attribute.

While it may only be in limited circumstances that an individual does not have a protected attribute, Circle Green would suggest that the individuals that are in this situation can be some of the most disadvantaged and marginalised. An example of such as a group are people who are gender diverse.

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<sup>24</sup> Rees, Neil Lindsay, Katherine Rice, Simon (2008) 'Australian Anti-Discrimination Law - Text, Cases and Materials' *Federation Press*, p 80 [4.2.8]

<sup>25</sup> VIC Act s 8.



Currently, while there may be arguments that individuals are, or will be, covered by other grounds, this would require a level of understanding and technical knowledge that many of our clients do not possess. Circle Green's clients, as noted elsewhere in this submission, often experience significant barriers to accessing their legal protections in comparison to self-represented applicants. This reduces the level of interpretation necessary to bring a claim, and would greatly assist these individuals.

### **Recommendation 30**

**Circle Green recommends that the definition of indirect discrimination be amended to allow that the aggrieved person has a characteristic which pertains to people who have a protected attribute.**

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

Circle Green supports removing the proportionality test to simplify the meaning of indirect discrimination. This amendment would align the EO Act with other Australian jurisdictions' anti-discrimination legislation.<sup>26</sup>

In Circle Green's experience, the inclusion of a proportionality test creates a significant barrier to individuals seeking protection, as the evidence necessary to prove the test is often held by the employer, or requires significant resources to acquire. In addition, many of Circle Green's clients already face significant barriers to accessing protection and support due to language and literacy issues, as well as a general lack of understanding of more technical legal requirements. This inclusion of the proportionality test creates an access to justice issue, due to the unnecessary legal complexity, which creates a barrier for some of the most vulnerable individuals and communities who are most likely to seek the protection of indirect discrimination claims.

Circle Green supports the position of the EOC in its 2007 EOC Review and submits that the proportionality test adds an unnecessary degree of technicality and difficulty to the assessment of indirect discrimination. The current inclusion of this complex and technical requirement disproportionately impacts many of Circle Green's clients, who lack the technical ability, time, and understanding to undertake potentially large-scale analysis.

### **Recommendation 31**

**Circle Green recommends that the definition 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?***

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<sup>26</sup> ACT Act; TAS Act; VIC Act; AD Act; DD Act; SD Act.



Circle Green supports amending the meaning of indirect discrimination to shift the onus of proof from the complainant to the alleged discriminator. This would align the EO Act with other Australian jurisdictions that seek to support victims of systemic discrimination and improve access to justice for disadvantaged individuals.<sup>27</sup>

Circle Green's clients are often from CaLD backgrounds and face significant barriers to accessing services, including bringing claims. People who have lower literacy levels, those who require interpreting services, older members of the community, and those with limited computer skills face significant barriers to compiling the necessary supporting evidence without assistance. Circle Green often sees clients who have lost their source of income, and in some cases, face homelessness, and are often unable to meet this technical standard. Shifting the onus of proof would better meet the objects of the EO Act in promoting the equality of all people, and would remove an unreasonable requirement.

Given that an underlying purpose of indirect discrimination frameworks is to redistribute opportunity for groups who have previously or historically been disadvantaged, ensuring that individuals that are part of these groups are able to access the protection is integral to the overall effectiveness of the framework.

In the circumstances of alleged discriminatory action, it is reasonably necessary to require that the alleged perpetrator of the discriminatory action substantiates that the requirement or conditions was reasonable.

### **Recommendation 32**

**Circle Green recommends amending the meaning of indirect discrimination to shift the onus of proof from the complainant to the respondent.**

### ***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?***

Circle Green supports the removal of the requirement that the complainant does not, or is not, able to comply with the requirement or condition. Circle Green supports efforts to align the EO Act with the other Australian jurisdictions in this respect.<sup>28</sup>

The issue with the phrasing of 'inability to comply' is that practically speaking, a complainant may be able to physically comply with a requirement or condition, but complying may be detrimental to them, so they choose not to.<sup>29</sup> Whilst this has been interpreted broadly to accept a lack of compliance as stemming from both physical and more ideological reasons, this requirement still operates as another obstacle for complainants to overcome.

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<sup>27</sup> ACT Act; QLD Act; VIC Act; SD Act; AD Act.

<sup>28</sup> ACT Act; TAS Act; VIC Act.

<sup>29</sup> Rees, Neil Lindsay, Katherine Rice, Simon (2008) 'Australian Anti-Discrimination Law - Text, Cases and Materials' *Federation Press*, p 145 [4.3.38].



In the event that the proportionality test is retained, it is Circle Green's opinion that this additional requirement would be an onerous burden for the complainant to satisfy. If the EOC requires a complainant to substantiate that they have experienced disadvantage, it is overly burdensome to require the complainant to also substantiate that they are unable to comply with the requirement or condition. In Circle Green's experience vulnerable clients will be deterred from progressing a claim in circumstances whereby the requirements to progress a matter are onerous and technical.

### **Recommendation 33**

**Circle Green recommends that 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?***

Circle Green considers that amending the meaning of indirect discrimination to specify that it is not necessary for the discriminator to be aware of the indirect discrimination would help to codify the existing understanding of indirect discrimination in the EO Act. Circle Green broadly supports making legislation, including the EO Act, more accessible to the public. In this respect, it is often useful to specify widely understood legal concepts or interpretations in legislation. However, any such specification should be drafted in plain English, so it is easy to understand.

### **Recommendation 34**

**Circle Green recommends that the meaning of indirect discrimination be amended to specify that it is not necessary for the discriminator to be aware of the indirect discrimination.**

#### **3.3.4 Harassment**

#### ***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?***

Circle Green strongly supports reforming the current definition of sexual harassment in the EO Act.

#### **Removal of disadvantage requirement**

Currently, the EO Act contains a 'disadvantage requirement'. In the context of sexual harassment in employment, the disadvantage requirement means a harassed employee must show that:

- they had reasonable grounds for believing that a rejection of an unwelcome sexual advance, a refusal of the unwelcome request for sexual favours, or the taking of objection to the unwelcome conduct would disadvantage them in any way in connection with their employment; or



- as a result of their rejection of an unwelcome sexual advance, refusal of the unwelcome request for sexual favours, or objection to the unwelcome conduct they are disadvantaged in connection with their employment.

Circle Green considers that this disadvantage requirement is especially problematic and its removal is vital to modernise and bring the EO Act into line with all other Australian jurisdictions. This is primarily because the requirement for disadvantage does not acknowledge that sexual harassment is inherently disadvantageous.

#### **Case Study 15 - Abbey**

*Abbey is an Aboriginal and Torres Strait Islander woman, who is a single parent with a young child. Abbey decided to resign her employment due to a toxic work environment. After she resigned, while she was working out her notice period, Abbey was sexually harassed by a co-worker at work. Abbey objected to the harassment at the time, didn't bother reporting the harassment to her employer as she was leaving in any case.*

In Case Study 15 above, Abbey was sexually harassed in circumstances which create ambiguity around whether she would meet the current disadvantage requirement in the EO Act. One argument may be that Abbey had already resigned, so did not experience, or fear, any disadvantage in connection with her employment as a result of objecting to the sexual harassment. Another argument may be that Abbey experiencing and objecting to the sexual harassment was inherently a disadvantage in connection with her employment, as it would have made her feel unsafe and uncomfortable at work for the remainder of her employment. While Circle Green prefers the latter argument, the fact that individuals like Abbey are faced with having to make complex legal arguments to satisfy the disadvantage requirement is concerning from an access to justice perspective.

In Circle Green's experience, vulnerable and disadvantaged individuals who face workplace sexual harassment struggle to understand and make the arguments to overcome the disadvantage requirement. As a result, such individuals may decide that bringing a complaint under the EO is too difficult. The main alternative is for complainants to make a sexual harassment complaint to the AHRC under the AHRC Act and SD Act. However, after a certain point, a complaint made under the AHRC Act and SD Act can become too risky due to the lack of costs protections in this jurisdiction if the complaint is not resolved in conciliation by the AHRC. Further, the FC and FCFA are difficult for laypersons to navigate without legal assistance, which can be prohibitively expensive for people already facing vulnerability or disadvantage. Overall, these circumstances can leave vulnerable and disadvantaged Western Australians feeling like they have limited options for pursuing a workplace sexual harassment complaint.



### New definition and defence

As noted in our prior submissions on sexual harassment,<sup>30</sup> Circle Green considers that a new definition of sexual harassment should be introduced as follows:

***a person sexually harasses another person (the person harassed) if the person:***

- (a) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or*
- (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed.*

Circle Green does not consider that requirement that the sexual harassment definition needs to include the element that the conduct was ‘in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated’, similar to Acts in other Australian jurisdictions. Instead, this requirement should operate as a defence, which the respondent will have the burden of proving. A defence to sexual harassment complaints could be created so that a respondent will have a defence to a sexual harassment complaint if they can establish that the conduct in question occurred in circumstances where both:

- (a) the harasser did not intend to offend, humiliate or intimidate the person harassed; and*
- (b) a reasonable person, having regard to all the circumstances, would not have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.*

The inclusion of an intention limb in the defence has the additional benefit of broadening sexual harassment protections to include where a harasser intended to offend, humiliate, or intimidate the harassed person, similar to the QLD Act.<sup>31</sup>

Circle Green considers that these changes to the would address some of the barriers a complainant must overcome to establish a sexual harassment complaint.

### **Recommendation 35**

**Circle Green recommends that the disadvantage requirement be removed from the definition of sexual harassment under the EO Act.**

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<sup>30</sup> Circle Green’s preliminary submission to the LRCWA (20 November 2020); ELC 2019 submission to the National Inquiry into Sexual Harassment in Australian Workplaces (attached to Circle Green’s preliminary submission).

<sup>31</sup> QLD Act s 119.



### **Recommendation 36**

Circle Green recommends that a new definition of sexual harassment be adopted by the EO Act, so that:

- sexual harassment occurs in circumstances where the person:
  - a) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
  - b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed.
- a respondent has a defence against a claim of sexual harassment in circumstances where the respondent can establish both that:
  - a) the harasser had did not intend to offend, humiliate or intimidate the person harassed; and
  - b) a reasonable person, having regard to all the circumstances, would not have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

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

Circle Green supports extending the protections from sexual harassment to all areas under the EO Act. Sexual harassment is well-recognised to be a form of gendered violence,<sup>32</sup> so people should be able to seek redress for sexual harassment that they experience in any area of public life covered by the EO Act. This would bring WA into line with other Australian jurisdictions, such as New South Wales, Victoria and the Commonwealth.<sup>33</sup>

In Circle Green's experience, it can be difficult for clients to make a sexual harassment claim against the harasser if the harassment occurred in the context where a worker is providing goods and/or services to customers, patients or clients. Sexual harassment happens in all areas of public life, so it is imperative that people are adequately protected from the harm that sexual harassment can cause.

### **Recommendation 37**

Circle Green recommends that protections from sexual harassment be extended to all areas of public life covered by the EO Act.

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<sup>32</sup> United Nations General Assembly, *Declaration on the Elimination of Violence against Women*, GA Res 48/104, UN Doc A/RES/48/104 (20 December 1993) arts 1, 2(b).

<sup>33</sup> NSW Act pt 2A; VIC Act pt 6; SD Act div 3.



***Should the EO Act be amended to expressly prohibit members of Parliament from sexually harassing their staff or those who carry out duties at Parliament House?***

Circle Green supports amending the EO Act to expressly prohibit members of Parliament from sexually harassing parliamentary staff or those who carry out duties at Parliament House. The recent allegations of sexual harassment in Federal Parliament are concerning and indicative of a broader trend of sexual harassment by individuals in positions of power and privilege. Circle Green considers that members of Parliament should be held to the same standard as the communities that they serve.

**Recommendation 38**

**Circle Green recommends that the EO Act be amended to expressly prohibit members of Parliament from sexually harassing parliamentary staff, or other persons who carry out duties at Parliament House.**

***Should the EO 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 EO Act be amended in light of the amendments proposed by the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth)?***

Circle Green supports amending the EO Act to expressly prohibit judicial officers from sexually harassing their co-workers. This would align the EO Act with the changes made by the Respect@Work Bill, which amended the SD Act to extend to judicial officers.

In the SA Act, sexual harassment protections have been extended to cover judicial officers, as the South Australian Equal Opportunity Commission reported alarmingly high rates of sexual harassment in the profession. Judicial officers accounted for just under 13% of sexual harassment in the workplace,<sup>34</sup> which demonstrates the prevalence of this issue and the need for reform.

Circle Green sees no reason to treat judicial officers differently from the communities that they serve. Judicial officers should be modelling the highest standards of workplace behaviour and therefore should not perpetrate, tolerate or excuse sexual harassment in courts. However, this is not the current reality, as there have been a number of recent allegations of judicial officers sexually harassing their staff. This indicates a clear need to extend sexual harassment protections to staff of judicial officers and court staff.

**Recommendation 39**

**Circle Green recommends that the EO Act be amended to expressly prohibit judicial officers from sexually harassing their co-workers.**

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<sup>34</sup> South Australian Equal Opportunity Commission, *Review of Sexual Harassment in the South Australian Legal Profession* (Report, April 2021) 61.



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

Circle Green supports extending the coverage of the EO Act to ensure all workers and workplaces are protected against sexual harassment. Volunteers and unpaid workers can experience sexual harassment in the workplace, and there is no reason to treat them differently to paid employees under sexual harassment laws. In some instances, volunteers and unpaid workers can be more vulnerable to discrimination and sexual harassment than employees, as they don't enjoy many of the protections that paid employees do under employment laws (including protection from unfair or unlawful dismissal). They may also be completing volunteer or unpaid work to improve their skills and ability to gain paid employment, as is the case with many young students and newly arrived migrants.

Circle Green considers it is critical to protect volunteers and unpaid workers, not only from sexual harassment, but also from unlawful discrimination. This would be best achieved by adopting the concepts of 'worker' and 'PCBU' in alignment with model work health and safety legislation, like the SD Act does in relation to sexual harassment and sex-based harassment. This proposed amendment is discussed at section 0 below.

**Recommendation 40**

**Circle Green recommends that the EO Act be amended to protect volunteers and unpaid workers from sexual harassment and unlawful discrimination.**

***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?***

Circle Green supports removing the requirement for racial harassment to result in disadvantage, or for the person harassed to reasonably believe that it will result in disadvantage for similar reasons to those outlined above in relation to the disadvantage requirement in the definition of sexual harassment.

Therefore, Circle Green supports the amendment of the definition of racial harassment under section 49A(3) of the EO Act to state that:

*A person shall, for the purposes of this section, be taken to harass racially another person if the first-mentioned person threatens, abuses, insults or taunts the other person on a ground referred to in section 49D.*

**Recommendation 41**

**Circle Green recommends that the disadvantage requirement be removed from the definition of racial harassment in the EO Act.**



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

Circle Green agrees with the EOC in the 2007 EOC Review, and supports extending the protections from racial harassment to all areas under the EO Act. Racial harassment causes significant harm, especially to racial minorities, who should be protected in all areas of public life.

**Recommendation 42**

**Circle Green recommends that protections from racial harassment be extended to all areas of public life covered by the EO Act.**

**3.3.5 Impairment (including a requirement to make reasonable adjustments for persons with an impairment)**

***Does the EO 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 EO Act be amended or clarified?***

Circle Green believes that the EO Act fails to adequately protect individuals who need reasonable accommodations in areas of public life due to an impairment. This is because there is currently no express positive obligation to make reasonable accommodations or adjustments for people with impairments under the EO Act.

**Case Study 16 – Mandy**

*Mandy has an impairment, and made a request to work from home, as opposed to the main office for 10 weeks whilst she was changing her medication and was unable to drive to and from work. She was otherwise cleared to work by her treating medical practitioner. Mandy worked in a clerical role and had previously worked from home for shorter periods, including during the COVID-19 pandemic lockdowns. Mandy's employer refused her request and suggested she could take unpaid leave or resign instead.*

In Mandy's situation in Case Study 16 above, the employer did not consider they had any obligations to provide Mandy with reasonable adjustments to her role due to her impairment. This left Mandy facing no income and/or no job.

Circle Green considers that amending the EO Act to more clearly establish a positive obligation to make reasonable adjustments for individuals with impairments will assist in achieving substantive equality for this vulnerable and disadvantaged group in WA. Such an amendment will also have the benefit of:

- clarifying the protections (which may already exist);



- providing certainty to duty holders and people with impairments about what their respective obligations and rights are;
- redress the power imbalance that often exists between the duty holder (e.g. an employer) and a person with an impairment (e.g. an employee);
- placing a clear, proactive obligation on duty holders, which may in turn reduce discrimination claims; and
- bring WA into line with the VIC Act, NT Act and SA Act.

#### **Recommendation 43**

**Circle Green recommends that the EO Act be amended to include positive obligations to make reasonable adjustments for people who have an impairment.**

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

As outlined in response to the prior question, Circle Green supports including a positive obligation to make reasonable adjustments for people with impairments. Further, we consider that the EO Act should include positive obligations to make reasonable adjustments for people who possess any of the attributes or grounds protected by the EO Act. More expansive positive duties are needed if the EO Act is to truly achieve substantive equality for people protected from discrimination in WA.

The NT Act currently makes it unlawful for a person to fail or refuse to accommodate a special need that another person has because of a protected attribute, unless it is unreasonable in the circumstances.<sup>35</sup> While not strictly constructed as a positive duty, the NT Act provision effectively require a person to make reasonable adjustments or accommodations for all attributes / grounds protected by the NT Act (tempered by reasonableness).

At the very least, positive duties should be introduced for individuals who have an impairment, are pregnant, have family or carer responsibilities, or who have been subjected to family and domestic violence.

#### **Recommendation 44**

**Circle Green recommends that the EO Act be amended to include positive obligations to make reasonable adjustments for all people who are protected from discrimination under the EO Act.**

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<sup>35</sup> NT Act s 24.



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

Circle Green believes that the clearest way to incorporate positive obligations to make reasonable adjustments is to insert a separate new section. This is because a positive obligation is an additional step above simply refraining from discriminating. This change would also allow for there to be different penalties for discrimination generally, as compared to failing to take positive steps to reasonably accommodate.

However, Circle Green notes that this position depends on the extent of the positive obligation, to whom it is intended to apply, and which characteristics are intended to be covered. If the obligation is wide and covers all grounds, then Circle Green sees the benefit of a stand-alone obligation. If the positive obligations ultimately adopted by the EO Act are more limited to certain grounds, then a different approach may be preferable.

**Recommendation 45**

**Circle Green recommends that positive obligations to make reasonable adjustments for all people who are protected from discrimination under the EO Act be framed as stand-alone obligations, separate to discrimination definitions.**

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

If more expansive positive obligations are adopted, Circle Green considers that the matters included in the EO Act to determine whether adjustments are reasonable or will impose unjustifiable hardship will need to be general enough to apply to a broad range of circumstances. In this respect, the matters outlined in section 24(3) of the NT Act may provide useful guidance. Section 24(3) of the NT Act states:

*Whether a person has unreasonably failed to provide for the special need of another person depends on all the relevant circumstances of the case including, but not limited to:*

- (a) the nature of the special need; and*
- (b) the cost of accommodating the special need and the number of people who would benefit or be disadvantaged; and*
- (c) the financial circumstances of the person; and*
- (d) the disruption that accommodating the special need may cause; and*
- (e) the nature of any benefit or detriment to all persons concerned.*



#### **Recommendation 46**

**Circle Green recommends that the matters included in the EO Act to determine whether adjustments are reasonable should be modelled on the matters outlined in section 24(3) of the NT Act.**

### **3.3.6 Victimisation**

#### ***Do the victimisation protections or related provisions in the EO Act require reform?***

Circle Green supports the EOC's recommendation in the 2007 EOC Review that a reference to section 67 of the EO Act should be inserted into section 5 of the EO Act. Circle Green agrees that complainants should not have to carry the burden of proving victimisation to a higher standard than discrimination.<sup>36</sup>

Further, Circle Green considers that complainants should not have the onus of proving victimisation complaints, and in particular, the link between the detriment experienced (threatened) and the various listed grounds. Respondents are in a better position to prove why they subjected a complainant to detriment, as they possess this knowledge.

Circle Green supports amending the EO Act to establish a reverse onus of proof, or a rebuttable presumption for victimisation complaints similar to that in section 361 of the FW Act.

#### **Recommendation 47**

**Circle Green recommends that a reference to section 67 of the EO Act be inserted into section 5 of the EO Act.**

#### **Recommendation 48**

**Circle Green recommends that the EO Act be amended to provide for a reverse onus of proof for a victimisation complaint, similar to section 361 of the FW Act.**

### **3.3.7 Employment**

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

As noted in section 3.3.4 above, Circle Green supports extending discrimination and harassment protections to cover all workers in all workplaces, to reflect modern working arrangements, whether

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<sup>36</sup> Discussion Paper 148, citing 2007 EOC Review 35.



paid or unpaid. Recently, the Respect@Work Bill extended sexual harassment protections by adopting the concepts of 'PCBU' and 'worker', as defined under the WHS Act.

Circle Green considers the concepts of PCBU and worker should be adopted in place of the definition of employment. These concepts would capture unpaid and voluntary workers, as well as a broad range of modern working arrangements, beyond the traditional employment relationship.

#### **Case Study 17 – Alice**

*Alice has a disability and was volunteering at an organisation. Alice faced disability discrimination by her immediate supervisor while working for the organisation. Alice reported this to the HR manager and was placed on an immediate suspension. When Alice complained again, she was dismissed from her volunteer position.*

Circle Green has advised several clients like Alice in Case Study 17 above, who have been discriminated against while engaging in unpaid or voluntary work. Unfortunately, they are left without recourse under the EO Act. They are also not protected from dismissal or adverse action under employment laws, as they are not employees. Alice, and others like her, would have been assisted by the extension of the coverage of protections from discrimination to volunteers.

#### **Recommendation 49**

**Circle Green recommends that discrimination and harassment protections in the EO Act be extended to cover all workers in all workplaces, including unpaid or voluntary workers, by adopting the concepts of PCBU and worker.**

***In the event the definition of employment in the EO Act is not extended, should the sexual harassment provisions extend to apply in relation to unpaid or volunteer workers?***

As stated in section 3.3.4, Circle Green recommends extending the coverage of the EO Act to ensure all workers and workplaces are protected against sexual harassment. This should include unpaid or volunteer workers, as these types of workers are vulnerable to experiencing sexual harassment in the workplace.

This amendment would help to combat sexual violence and harassment in the world of work and would align the EO Act with the recent amendments to the SD Act, made by the Respect@Work Bill.

#### **Recommendation 50**

**Circle Green recommends that the sexual harassment protections in the EO Act be extended to cover all workers in all workplaces, including unpaid or voluntary workers, by adopting the concepts of PCBU and worker.**



### 3.4 Positive duty not to discriminate

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

As stated in Circle Green's preliminary submission, we support the inclusion of a positive duty in the EO Act to eliminate discrimination, harassment and victimisation. This would bring the EO Act into line with the VIC Act and would encourage a best practice approach in relation to anti-discrimination and equal opportunity in WA. A positive duty will encourage a proactive framework that reduces the burden on the individual who has experienced the discrimination and would empower the EOC to address systemic discrimination issues.

Circle Green considers that any positive duty introduced into the EO Act should be modelled on the duty in section 15(2) of the VIC Act, which provides that:

*A person must take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation as far as possible.*

In Circle Green's experience, many employers avoid dealing with workplace discrimination and harassment issues until an individual makes a formal complaint to a court or commission. Even then, many employers tend to focus on dealing with individual complaints by adopting a 'pay to go away' mindset together with confidentiality and non-disparagement requirements, rather than seeking to eliminate discrimination and harassment in their workplace. A positive duty would also more effectively deal with toxic workplaces and industry-wide discrimination and harassment issues.

#### **Recommendation 51**

**Circle Green recommends that the EO Act be amended to place positive obligations on duty holders to take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible.**

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

Circle Green considers it would be useful to adopt legislated factors to assist duty holders to determine what is reasonable and proportionate. Circle Green supports the adoption of a provision similar to section 15(6) of the VIC Act, which states:

*(6) In determining whether a measure is reasonable and proportionate the following factors must be considered -*

*(a) the size of the person's business or operations;*

*(b) the nature and circumstance' of the person's business operations;*

*(c) the person's resources;*



*(d) the person's business and operational priorities;*

*(e) the practicability and the cost of the measures.*

#### **Recommendation 52**

Circle Green recommends that the EO Act adopt a range of factors, similar to those in the VIC Act, in determining whether measures taken by duty holders are reasonable and proportionate to eliminate discrimination, sexual harassment or victimisation as far as possible.

***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?***

Circle Green supports a positive duty applying to all grounds and prohibitions in the EO Act. A positive duty is critical to eliminating discrimination on the grounds and prohibitions covered by the EO Act. In Circle Green's experience, discrimination is widespread and systemic for many vulnerable and disadvantaged Western Australians. In our Workplace stream, approximately 1 in 5 clients experience discrimination and/or sexual harassment issues, which indicates that the existing legal framework does not go far enough to address these issues.

#### **Recommendation 53**

Circle Green recommends that a positive duty should apply to all grounds and prohibitions in the EO Act.

***Should an individual complainant be able 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?***

Circle Green strongly supports the EOC being given investigative and enforcement powers in relation to the positive duty. However, we note that the EOC is likely to have resource constraints, and as a result, be unable to investigate and enforce all breach of positive duty complaints.

As such, Circle Green supports the ability for individual complainants to be able to bring a complaint for breach of the positive duty by a duty holder to ensure its effectiveness from a practical perspective. Under the VIC Act, while positive duties exist, individuals cannot make a complaint for a breach of a positive duty, which has significantly reduced the effectiveness of the positive duty, and has undermined the objects of such a provision. If individuals are also able to make a complaint for a breach of the positive duty, this would enhance the effectiveness of the positive duty in the EO Act, as the risk of duty holders being pursued for breaching a positive duty would increase. In turn, this would increase proactive compliance with the positive duty.



#### **Recommendation 54**

Circle Green recommends that a complaint for breach of the positive duty by a duty holder be actionable by:

- (a) the EOC via broad investigative and enforcement powers; and
- (b) an individual complainant who has been affected by the breach.

*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?*

Circle Green supports providing the SAT with the power to hear applications of a breach of the positive duty. In the VIC Act, the inclusion of a positive duty with a limited compliance model has not been effective in addressing systemic discriminatory issues. As such, Circle Green considers that powers under the EO Act should not be limited to investigation and recommendations by the EOC.

Providing the SAT with the power to hear complaints would provide a practical enforcement mechanism that would encourage greater proactive compliance and may reduce discrimination, harassment and victimisation. This would also empower the EOC to enforce the outcomes of an investigation.

#### **Recommendation 55**

Circle Green recommends that the SAT be given the power to hear an application for breach of the positive duty by a duty holder.

### **3.5 Burden of proof**

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

Circle Green supports an amendment to the EO Act to reverse the burden of proof in relation to discrimination, harassment and victimisation claims. As noted in our preliminary submission,<sup>37</sup> it can be very difficult for a complainant to establish the reason for a respondent's behaviour. Often a complainant does not have access to relevant evidence, while the respondent has a 'monopoly of knowledge' about the decision-making process that led to the complainant's detrimental treatment.<sup>38</sup> Circle Green's clients are often disadvantaged in their resources and knowledge, and frequently face significant barriers to evidencing discrimination complaints.

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<sup>37</sup> Circle Green's preliminary submission to the LRCWA (20 November 2020).

<sup>38</sup> Laurence, Lustgarten, 'Problems of Proof in Employment Discrimination Cases' (1977) 6 *Industrial Law Journal* 212, 213.



A reverse burden of proof would also align the EO Act with the FW Act in relation to the discrimination in employment. Circle Green considers that a rebuttable presumption, similar to that in section 361 of the FW Act, should be inserted into the EO Act. This provision has successfully balanced concerns about reversing the burden of proof for respondents while removing evidentiary barriers for complainants.

#### **Recommendation 56**

**Circle Green recommends that the EO Act be amended to reverse the burden of proof in relation to discrimination, harassment, and victimisation complaints, by adopting a rebuttable presumption similar to that in section 361 of the FW Act.**

### **3.6 Functions and Investigative Powers of the Equal Opportunity Commissioner**

#### **3.6.1 Investigative and complaint handling function**

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

Circle Green supports both the expansion of the Commissioner's investigative powers and the updating of the complaints handling process under the EO Act. As noted in our preliminary submission, Circle Green considers that the Commissioner should have expanded powers to proactively investigate complaints on its own initiative, and to commence proceedings on behalf of complainants, similar to the powers of the FWO, as this would alleviate the burden on complainants to commence and progress complaints under the EO Act.<sup>39</sup> Such powers would complement Circle Green's prior recommendations in relation to a positive duty.

Circle Green also considers that the complaint handling process under the EO Act should be updated to include an entitlement for a party to a complaint to have any agreement reached registered in the SAT, so that once registered, the terms of the agreement are enforceable by the SAT. Similar provisions are available in the NSW Act.<sup>40</sup> Such provisions would provide greater certainty that agreements reached as a part of the EOC's complaint handling function are enforceable (to the extent the terms are enforceable by the SAT) if parties fail to comply.

#### **Recommendation 57**

**Circle Green recommends that Commission's powers be expanded in the EO Act so that the Commissioner has the power to proactively investigate complaints on its own initiative and to commence proceedings on behalf of complainants.**

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<sup>39</sup> Circle Green's preliminary submission to the LRCWA (20 November 2020).

<sup>40</sup> NSW Act s 120



### **Recommendation 58**

**Circle Green recommends that the complaint handling process under the EO Act be updated to include an entitlement for a party to a complaint to have any agreement reached registered in the SAT, so that once registered, the terms of the agreement are enforceable (to the extent possible) by the SAT.**

#### **3.6.2 Dismissal powers**

*Should the dismissal powers of the Commissioner be amended and expanded?*

As a starting point, Circle Green does not support the Commissioner's dismissal powers under the EO Act being expanded. However, if an expansion is considered necessary, it should be limited to the EOC's recommendation that the Commissioner be able to dismiss complaints where a complainant refuses a reasonable settlement sum or refuses to settle based on unrealistic settlement expectations.<sup>41</sup>

Although, Circle Green notes the inherent difficulties with assessing if a settlement sum is reasonable, or if a complainant's settlement expectations are unrealistic, especially if the compensation cap under the EO Act is removed. For example, some recent workplace sexual harassment claims brought in relation to the SD Act have seen large sums of general and exemplary damages awarded against respondents.<sup>42</sup> In our view, it would be challenging to overcome such difficulties by prescribing factors the Commissioner must consider in exercising its power to dismiss a complaint on these grounds.

### **Recommendation 59**

**Circle Green recommends that the Commissioner's dismissal powers under the EO Act remain unchanged.**

#### **3.6.3 Assistance**

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

Circle Green supports an expansion of the assistance function of the Commissioner. Circle Green assists clients who are often highly vulnerable and face barriers in progressing complaints, including clients from CaLD backgrounds, and those who have experienced sexual harassment. These kinds of clients would benefit from the expansion of the Commissioner's assistance function to include assisting a person to initially make a complaint. This expansion would reduce barriers for vulnerable

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<sup>41</sup> Discussion Paper 181.

<sup>42</sup> *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82; *Fraser-Kirk v David Jones Limited* (2010) 190 FCR 325.



complainants, who face difficulties including language and literacy, and would ensure that complainants are in a position to best articulate their experiences.

Circle Green's clients are often from CaLD backgrounds who face significant barriers to accessing services, including bringing claims. The CaLD community primarily access services in person and prefer face-to-face contact. People who have lower literacy levels, those who require interpreting services, older members of the community, those experiencing homelessness, and people with limited computer skills often struggle to access services which are increasingly placed online and through web portals. These clients often find it particularly difficult to access legal services and to understand their rights. When they do access the legal system, they experience specific and significant challenges. Expanding the power of the Commissioner to intervene at an early stage is essential to ensuring that these highly vulnerable individuals are able to access protections under the EO Act.

Circle Green does not support the adoption of restrictions on the current provision of assistance under the EO Act. Restrictions on the current assistance provisions inevitably increase barriers for complainants and ultimately reduce the EO Act's ability to meet its objects in eliminating discrimination and promoting recognition and acceptance within the community.

#### **Recommendation 60**

**Circle Green recommends that the Commissioner's assistance functions be expanded to providing complainants with assistance with initially making and formulating complaints.**

### **3.6.4 Regulator involvement in compliance**

***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?***

Circle Green supports the expansion of the EOC's regulatory powers and considers that greater proactive compliance powers are necessary for the EOC to best achieve its functions. It is noted that the EOC has no power to initiate investigations on its own initiative under the EO Act. The absence of such proactive compliance powers distinguishes the EOC from other Australian workplace regulators like FWO, as noted above.

Anti-discrimination legislation is designed to protect disempowered and marginalised individuals, so to expect such individuals to have the knowledge and resources to pursue legal action is a fundamental weakness of the current framework. The absence of the EOC having a larger role in the investigation, proactive compliance, and prosecution of unlawful discrimination, harassment and victimisation, serves to characterise discrimination as merely a private matter and one that harms only the victim, not society at large.<sup>43</sup>

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<sup>43</sup> Belinda Smith, 'It's About Time – For a New Regulatory Approach to Equality' (2008) 36(2) *Federal Law Review* 117.



Circle Green welcomes a shift in focus from the EOC primarily providing dispute resolution services, to playing a more proactive role in monitoring and regulating compliance the EO Act. Such a shift would complement the introduction of positive duties into the EO Act, as outlined above.

#### **Recommendation 61**

**Circle Green recommends that the EO Act be amended so that the EOC has a greater role in proactively monitoring and regulating compliance with the EO Act.**

### **3.7 Requirements for the Referral of Complaints to the SAT**

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

Circle Green supports retaining a complainant's option to request the Commissioner refer a dismissed complaint to the SAT in the EO Act. Circle Green is concerned that if such an option is not maintained it may prevent the pursuit of test cases by individuals and may stifle the evolution of case law.

#### **Recommendation 62**

**Circle Green recommends that a complainant's option to request the Commissioner to refer a dismissed complaint to the SAT be retained in the EO Act.**

### **3.8 Role and Jurisdiction of the SAT**

#### ***Should the EO 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?***

Circle Green supports providing the SAT with the power to enforce the obligations of parties during the investigation and conciliation stage of a complaint.

As noted above in section 3.6.1, Circle Green considers that a party to a complaint should be able to have any agreement reached during the investigation or conciliation stage of a complaint registered with the SAT, so that the terms of the agreement are enforceable by the SAT (to the extent that the SAT has the power to enforce the agreed terms).

Circle Green also agrees with the EOC's suggestion in its preliminary submission that the EO Act be amended to empower the SAT to compel parties who breach their obligations during the investigation or conciliation phase of a complaint to comply. This would facilitate better compliance and ensure matters are dealt with in a timely manner without needing to rely solely on the offence provisions under Part X of the EO Act.



### **Recommendation 63**

**Circle Green recommends that the EO Act be amended to empower the SAT to enforce the obligations of the parties during the investigation and conciliation phase of a complaint.**

*Should the EO 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?*

Circle Green does not support an amendment to the EO Act that would expand the powers of the SAT to awards costs in a broader range of circumstances. Costs that follow the event create a significant access to justice issue for people facing vulnerability or disadvantage and who cannot afford legal assistance.

In Circle Green's experience, the risk of an adverse costs order is one of the most significant barriers to complainants pursuing legal claims, even if the claim has considerable merit. Many of our clients, who are already financially vulnerable or disadvantaged, simply cannot risk a costs order against them, particularly in circumstances where the respondent may have substantial resources to defend any claim.

Circle Green considers that there are already appropriate provisions in relation to costs in the SAT, which achieve a fair and reasonable balance between reducing barriers for vulnerable and disadvantaged complainants, and protecting respondents against frivolous, vexatious, or unmeritorious claims and unreasonable conduct.

### **Recommendation 64**

**Circle Green recommends that the current costs provisions in the SAT be retained.**

## **3.9 Interaction with the Relevant Commonwealth Laws or Proposed Laws**

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

Circle Green considers that a person should not be prevented from making a complaint under the EO Act if they have already made a prior complaint under Commonwealth anti-discrimination legislation in relation to the same conduct, unless the prior complaint has been finally and substantively determined by a court or commission.

Circle Green agrees that the interaction between the EO Act and Commonwealth anti-discrimination laws can be confusing for complainants, and even more so for employees who also have discrimination-based claims open to them under workplace laws (i.e. the FW Act).<sup>44</sup> Circle Green

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<sup>44</sup> FW Act s 351.



frequently advises employees who have not accessed pre-lodgement advice on the discrimination claims available to them, including under the EO Act, and have brought their claim in an incorrect or undesirable forum considering their circumstances. Often these employees have not accessed pre-lodgement advice as they cannot afford legal advice or assistance and may be unaware of the options for free assistance available to them, including from Circle Green. Sometimes individuals are referred to Circle Green by a court or commission after they have lodged a claim and become aware of our service at this stage.

Given the complex interaction and differences between discrimination claims available to Western Australians, Circle Green considers that complainants should be able to choose to withdraw a complaint in another forum to pursue a complaint in the EOC if a final determination or outcome in relation to the discriminatory conduct has not been made.

In Circle Green's view, express 'double dipping' provisions may be unnecessary. The SAT likely has the power to take past compensation into account when determining compensation under the EO Act. This arguably provides an effective deterrent for complainants who would seek to double dip, as their efforts in re-litigating a complaint are extremely unlikely to be rewarded. We are unaware of any SAT case which has resulted in a complainant being compensated twice in relation to the same discriminatory conduct because the current EO Act does not contain double dipping provision.

If double dipping provisions are nevertheless seen to be desirable, Circle Green recommends that they be limited to when a complaint made about the same discriminatory conduct has been already been finally and substantively determined by a court or commission.

#### **Recommendation 65**

**Circle Green recommends that a person should not be prevented from making a complaint under the EO Act if they have already made a prior complaint under Commonwealth anti-discrimination legislation in relation to the same discriminatory conduct, except where the prior complaint has been finally and substantively determined by a court or commission.**

### **3.10 Other**

#### **3.10.1 Compensation cap**

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

Circle Green considers that the \$40,000 compensation cap should be removed so that the SAT has the discretion to order compensation amounts which appropriately remedy the loss suffered by a person because of unlawful discriminatory conduct.

A respondent should be liable, at the very least, for the harm they have caused a complainant if the respondent is found to have engaged in unlawful discriminatory conduct towards the complainant in breach of the EO Act.



It is unlikely that removing the compensation cap will encourage or cause a marked increase in unmeritorious complaints because compensation will still only result from successful complaints and be based on the loss suffered by a complainant because of the respondent's discriminatory conduct. If a complaint truly lacks merit, then a respondent should not reasonably fear a large award of compensation any more than a capped amount of compensation.

Further, the removal of the compensation cap would bring the EO Act into line with other discrimination-based complaints or claims, including under the AHRC Act and the FW Act.<sup>45</sup>

#### **Recommendation 66**

**Circle Green recommends that the \$40,000 compensation cap be removed from the EO Act, so that the SAT may order compensation amounts which appropriately remedy the loss suffered by a complainant due to a breach of the EO Act.**

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

Circle Green supports including an express provision for the SAT to have the power to make an order for the payment of interest on compensation amounts. This would provide clarity on this matter in the EO Act.

Circle Green considers that it may also be useful to include express provision for the SAT to order interest on any compensation amounts due under the terms of a settlement agreement registered with the SAT (see section 3.6.1 above), if this recommendation is adopted.

#### **Recommendation 67**

**Circle Green recommends that the EO Act be amended to clarify that the SAT may order the payment of interest on compensation amounts ordered by the SAT, or due under the terms of a settlement agreement registered with the SAT.**

### **3.10.2 Intersectionality or multidimensional complaints**

#### ***Should the EO Act be amended to make discrimination based on two or more overlapping Grounds unlawful?***

Circle Green supports the amendment of the EO Act to make discrimination based on two or more overlapping grounds unlawful. This would bring the EO Act into line with best practice internationally, and better legislate the complexity of intersectional discrimination. This amendment would also seek to better direct policy makers, practitioners and agencies to the challenges faced by individuals and groups experiencing intersectional discrimination.

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<sup>45</sup> AHRC Act s 46PO(4)(d); FW Act s 351.



Circle Green proposes the adoption of a broad, clarificatory provision in the EO Act, such as the following:

*Discrimination includes an action based on one or more of the prohibited grounds of discrimination, or on the effect of a combination of prohibited grounds.*

This could be incorporated in a definition of discrimination (see section 3.3.1 above for more detail).

#### **Recommendation 68**

**Circle Green recommends that the EO Act be amended to make discrimination based on two or more overlapping grounds unlawful to better address the complexity of intersectional and multidimensional complaints.**

### **3.10.3 Drafting form and style**

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

Circle Green acknowledges that the EO Act covers complex issues; however, is supportive of adopting a modern drafting style that is easier to follow, and more accessible plain English for laypersons (including people who may be disadvantaged in their access to legal assistance). In our experience, our clients have difficulties accessing and understanding legislation, and would benefit from a modern drafting style, especially as many of them are unrepresented when making a complaint under the EO Act.

#### **Recommendation 69**

**Circle Green recommends that the EO Act adopt a plain English modern drafting style, which is easier to understand and follow for the public at large.**

### **3.10.4 Timeframe for lodging complaints**

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

Circle Green considers that the current 12-month time frame for lodging a complaint with the EOC under the EO Act is too short, especially for people facing vulnerability and disadvantage. In our experience, people who have experienced discrimination, harassment or victimisation often wait longer than 12 months to pursue complaints. This has been apparent in the media recently from the number of women coming forward as part of the #MeToo movement, who have only taken action in relation to sexual harassment several years after the relevant conduct occurred.

The delay in making a complaint is likely to be even more pronounced for vulnerable and disadvantaged complainants, as their primary and immediate concern is often their physical, mental, and financial wellbeing. In Circle Green's experience in relation to workplace discrimination and harassment, employees frequently fear of being victimised or losing their job if they complain. Even



though such conduct would likely be actionable, vulnerable and disadvantaged employees often cannot afford take this risk in a practical sense, for example:

- where it would be difficult for the employee to find another job, because of their geographical location, age, disability, level of education, or visa status;
- where the employee relies on and supports others (for example, dependent children) with their income; and/or
- where the employee relies on an employer sponsored visa to stay in Australia.

In addition, vulnerable and disadvantaged people may face barriers to making a complaint within 12 months if they experience mental health issues resulting from the discriminatory conduct, or if discrimination, harassment and victimisation they are facing is systemic or ingrained, as it may take complainants longer to identify that the discriminatory conduct they are experiencing is not acceptable.

While the current 12-month timeframe may not be a strict limitation period, in practice, it creates a barrier which deters people who have experienced discrimination, harassment or victimisation from pursuing legal action under the EO Act once it has expired. In Circle Green's experience, for most vulnerable and disadvantaged people, knowing that their complaint may be rejected if they make it outside of the prescribed timeframe is likely to discourage them from proceeding with their complaint at all.

#### **Case Study 18 – Priya**

*Priya was dismissed from her employment without explanation while she was pregnant. This left Priya in a financially vulnerable position and the stress of her situation took a toll on her health while she was pregnant. Priya had miscarried before, so did not feel comfortable going through the stress of making a legal complaint while pregnant. After the arrival of her child, Priya had responsibility for caring for her child, who had some health issues.*

*After 15 months, Priya felt she was in a physically, mentally, and financially stable enough situation to pursue a pregnancy discrimination complaint against her former employer. However, she was outside of the 12-month timeframe in the EOC, the 6-month timeframe in the AHRC and the 21 day timeframe for dismissal claims in the FWC.*

*While Priya had the option of pursuing an EOC complaint outside of the 12-month EOC timeframe, she felt discouraged by the idea she would have to fight to even have her complaint considered. Priya would have been assisted by a longer time frame to make a discrimination complaint.*

In Circle Green's view, the timeframe for lodging a complaint to the EOC should be extended to six years. This is consistent with the general limitation period that applies to many other civil law actions.



It would also align the EO Act with the time limit for non-dismissal general protection claims based on discrimination under the FW Act.<sup>46</sup>

#### **Recommendation 70**

**Circle Green recommends that the EO Act be amended to change the timeframe for lodging a complaint from 12 months to 6 years.**

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

Circle Green considers that the Commissioner should retain the discretion to accept a complaint made out of time on good cause being shown, even if the timeframe for making a complaint is extended to be 6 years (see section 3.10.4 above).

#### **Recommendation 71**

**Circle Green recommends that the Commissioner's current discretion under the EO Act to accept a complaint made out of time on good cause being shown be retained.**

### **3.10.5 Prohibiting conversion practices**

***Should prohibitions on conversion practices be included in the EO Act?***

Circle Green is broadly supportive of prohibiting conversion practices which seek to suppress an individual's sexual orientation or gender identity. However, Circle Green considers that prohibitions on conversion practices may be best suited to a separate and specific piece of legislation, as they are complex, and require more detailed consideration.

#### **Recommendation 72**

**Circle Green recommends that prohibitions on conversion practices be legislated in a separate and specific statute, rather than included in the EO Act.**

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<sup>46</sup> FW Act s 544.



