



# **Review of organisational structures under the *Equal Opportunity Act 1984***

August 2014

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# Executive Summary

i. The review was undertaken at the request of the Attorney General, Hon Michael Mischin, MLC.

ii. The terms of reference for the review were:

*To examine what organisational structures would enable the efficient and effective achievement of the objectives of the Equal Opportunity Act 1984.*

iii. The review was supported by staff of the Public Sector Commission, and guided by input from a Review Reference Group that was chaired by the Public Sector Commissioner. The Commissioner for Equal Opportunity and the A/Director of Equal Opportunity in Public Employment were members of the Review Reference Group.

iv. In addition to written submissions, the review considered features of comparable bodies in other domestic jurisdictions, as well as relevant reports.

v. The Public Sector Commission also engaged a management consultant to undertake a performance audit of the Equal Opportunity Commission.

## The Equal Opportunity Commission

vi. The office of the Commissioner for Equal Opportunity is established under Part VII of the *Equal Opportunity Act 1984* to assist in the elimination of discrimination and harassment on the grounds prohibited by the Act.

vii. The *Equal Opportunity Act 1984* came into force on 8 July 1985. It provides for the establishment of a Commissioner for Equal Opportunity, to promote equality of opportunity in WA by assisting with the elimination of discrimination and harassment on the grounds prohibited by the Act, and recognition and acceptance of the principle of equality.

- viii. The office of the Commissioner for Equal Opportunity is an independent statutory office and autonomous in the performance of their functions. This is a fundamental aspect of the scheme of the *Equal Opportunity Act 1984* and was not subject to re-consideration by the review.
- ix. A total of 49 submissions were received by the Public Sector Commission.
- x. Analysis of the submissions showed there is broad and strong support for the office of the Commissioner for Equal Opportunity to retain its functional independence, and for the Equal Opportunity Commission to remain as the principal entity assisting the Commissioner in performing their functions under the *Equal Opportunity Act 1984*.
- xi. The submissions also revealed the concern of stakeholders if another agency were to support the Equal Opportunity Commissioner's statutory functions, in the place of the Equal Opportunity Commission, because the perception of the Commissioner for Equal Opportunity being operationally autonomous could be eroded.
- xii. The review did, however, find that opportunities exist to improve the Equal Opportunity Commission's effectiveness by being more proactive and strategic in its role to advise and assist individuals, businesses, organisations and agencies, to achieve the objectives of the EO Act. This includes the provision of strategic advice to the Government in relation to equal opportunity issues within the community. Submissions also supported the Equal Opportunity Commission having a greater presence in regional and remote WA.
- xiii. Opportunities were identified to improve the efficiency and effectiveness of the Equal Opportunity Commission by restructuring the organisation, reducing the number of support staffing, and making greater use of technology in the complaints handling operation and in other areas.
- xiv. Consideration was given to whether savings from economies of scale could be achieved if the EO Commissioner were supported in the performance of some or all of their functions by another agency with complaint handling and/or education functions, such as the Department of Commerce or Legal Aid Commission. However, the review concluded that under such a model there would be greater risk of conflicts of interest arising if a complaint was lodged with the Commissioner for Equal Opportunity against an agency that was assisting the performance of some or all of its functions. Also, if the Equal Opportunity Commission was to be subsumed into another agency, the community's perception of the operational autonomy of the Commissioner for Equal Opportunity would likely be diminished because their statutory functions would be performed under the auspices of another agency.

## The Director of Equal Opportunity in Public Employment

- xv. The office of the Director of Equal Opportunity in Public Employment (DEOPE) was established in 1985 under Part IX of the *Equal Opportunity Act 1984*. The DEOPE works with all public authorities to promote equal employment opportunities in the public sector, and to evaluate the effectiveness of programs and processes put in place to achieve that aim.
- xvi. The two key issues for the review regarding the DEOPE were its statutory status and where the functions should reside, either with the Public Sector Commissioner or the Commissioner for Equal Opportunity.
- xvii. The review considered whether the Commissioner for Equal Opportunity and the DEOPE should be co-located physically and administratively, as was the case when the *Equal Opportunity Act 1984* was first enacted, particularly because both officers have the power under the Act to investigate public authorities. However, the Commissioner for Equal Opportunity has a broader jurisdiction (i.e. the wider community) and the additional responsibility could risk diminishing either their current legal obligations or the DEOPE obligations.
- xviii. Alternatively, there was support for the proposition to subsume the DEOPE role into the Public Sector Commissioner's role. The advantages of this option are:
  - a. there is an overlap between agencies' human resources management obligations under s. 8(1)(d) of the PSM Act and their obligations to avoid discrimination in employment under Part IX of the EO Act
  - b. it presents an opportunity for agencies' reporting obligations to be streamlined to their current reporting obligations to the Public Sector Commissioner under the PSM Act
  - c. it presents an opportunity for agencies' compliance obligations to be rationalised in light of their current compliance obligations to the Public Sector Commissioner under the PSM Act.

# List of recommendations

## Recommendation 1

Maintain the EOC as an autonomous, state-based, stand-alone entity comprising the Commissioner and staff appointed by them, to exclusively support the EO Commissioner in achieving the objectives of the EO Act. However, the opportunity should be taken for the EOC to revise its structure and operations in the following ways:

- reduce the level of staffing in corporate support roles across the agency, consistent with other anti-discrimination agencies in other jurisdictions
- assess the requirements for having a specialised unit for Policy and Evaluation and consider distributing the responsibilities of the current unit between the Office of the Commissioner and other units
- enhance the efficiency of the Community Education and Corporate Services units
- explore, within the current budgetary framework, the possibility of automating the complaints handling process and the means to upgrade IT infrastructure and software generally
- review its operations with a focus on improving training delivery methods, analysis of complaints data, promotional activities, the dissemination of information and where possible use fee for service arrangements.

## Recommendation 2

To be more proactive and strategic in dealing with systemic issues of discrimination, the EOC should actively explore greater collaboration with the following agencies to achieve specific objectives in a more cost-effective way:

- AHRC—specifically with regard to the EOC acting as an agent for the AHRC in WA by performing its complaint handling functions for a fee (as has been the case in the past).
- Office of the Ombudsman—specifically with regard to improving the accessibility, efficiency and transparency of the EOC’s complaint handling systems and processes.
- Legal Aid Commission—specifically with regard to seeking advice on how a ‘means test’ could be applied in the provision of legal assistance to EOC clients within the parameters of the EO Act.
- Legal Aid Commission, Department of Commerce, Department of Housing and Office of the Ombudsman, relevant non-government agencies and private organisations—specifically with regard to raising the EOC’s profile in regional areas of the State.
- Universities and other educational institutions—to undertake research partnerships for projects (e.g. evaluations of education and training programs) that meet the EOC’s strategic priorities.

## Recommendation 3

The statutory role of the DEOPE be abolished and its statutory functions transferred to the role of the Public Sector Commissioner (PSC). The legislative changes that would be required to implement this recommendation would need to accommodate the jurisdictional differences between the role of the DEOPE and that of the Public Sector Commissioner to ensure that all ‘public authorities’ (not only ‘public sector’ bodies as defined under the PSM Act) remained required to meet their EEO obligations.

This recommendation could be implemented either by way of amendment of the PSM Act to expand the functions of the PSC to include those currently performed by the DEOPE under the EO Act. Alternatively, the EO Act could be amended to replace references to the DEOPE with references to the PSC.

Under this recommendation:

- the issue of having two statutory offices within the one agency would be avoided
- a public servant would not be required to perform a dual role (as is the case currently and has been the case in the past)
- there would be no diminution of the objects of Part IX of the EO Act to promote equal opportunity and eliminate discrimination in public authorities.



#### Recommendation 4

In implementing recommendation 3, the reporting and compliance regimes under Part IX of the EO Act be streamlined and rationalised with the current regimes under the PSM Act. All public authorities, as defined under Part IX of the EO Act, should be consulted before any changes to Part IX are implemented.

# List of acronyms and terms used

<b>ADA</b>	<i>Age Discrimination Act 2004 (Cth)</i>
<b>AHRC</b>	Australian Human Rights Commission
<b>AHRC Act</b>	<i>Australian Human Rights Commission Act 1986 (Cth)</i>
<b>DEOPE</b>	Director of Equal Opportunity in Public Employment
<b>DDA</b>	<i>Disability Discrimination Act 1992 (Cth)</i>
<b>EEO</b>	Equal employment opportunity
<b>EO Act</b>	<i>Equal Opportunity Act 1984 (WA)</i>
<b>EOC</b>	Equal Opportunity Commission
<b>EO Commissioner</b>	Commissioner for Equal Opportunity
<b>FTE</b>	Full time equivalent (as opposed to head count)
<b>OPSSC</b>	Office of the Public Sector Standards Commissioner
<b>PID Act</b>	<i>Public Interest Disclosure Act 2003 (WA)</i>
<b>PSC</b>	Public Sector Commission
<b>PSM Act</b>	<i>Public Sector Management Act 1994 (WA)</i>
<b>RDA</b>	<i>Racial Discrimination Act 1975 (Cth),</i>
<b>SAT</b>	State Administrative Tribunal
<b>SDA</b>	<i>Sex Discrimination Act 1984 (Cth),</i>
<b>WA</b>	Western Australia

# 1. Introduction

- 1.1 The review of organisational structures under the EO Act commenced on 17 February 2014.<sup>1</sup>

## Terms of reference

- 1.2 The review was undertaken by Mr M C Wauchope, Public Sector Commissioner, at the request of the Attorney General, Hon Michael Mischin, MLC.

- 1.3 The terms of reference for the review were:

*To examine what organisational structures would enable the efficient and effective achievement of the objectives of the EO Act.*

- 1.4 Central to the review was an examination of the role and structure of the EOC and the DEOPE, with a view to making recommendations as to how the objectives of the EO Act can best be achieved in WA today.

- 1.5 It is normal for the functions, structure and operations of government agencies to be subject to review from time to time, and under s. 21A(b) of the PSM Act, the Public Sector Commissioner has a role in advising ministers in relation to the machinery of government, to assist the overall effectiveness and efficiency of the public sector. Such reviews are aimed at ensuring that the public sector is structured, and relevant functions performed, in a manner which emphasises the importance of service to the community, and to ensure overall value for taxpayers' money.

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<sup>1</sup> The full text of the *Equal Opportunity Act 1984* can be viewed at the State Law Publisher website, <http://www.slp.wa.gov.au/legislation/statutes.nsf/default.html>.

- 1.6 Maintaining standards of equal opportunity and anti-discrimination within the community remains an issue of paramount importance. As the EOC approaches its 30th anniversary, it was timely to review how the EOC goes about its business and how it should be positioned within the broader public sector to ensure that the objectives of the EO Act are maintained and promoted in the most effective way.
- 1.7 The review did not consider or make recommendations about the grounds or areas of discrimination, or the exceptions under the EO Act.

## Review Reference Group

- 1.8 The PSC convened a reference group to assist the review. Membership of the Review Reference Group was as follows:

Mr Mal Wauchope	Public Sector Commissioner (Chair)
Ms Allanah Lucas	Commissioner for Equal Opportunity
Ms Fiona Roche	A/Director of Equal Opportunity in Public Employment
Mr Cliff Weeks	Director General, Department of Aboriginal Affairs
Dr Ron Chalmers	Director General, Disability Services Commission
Prof Colleen Hayward AM	Pro-Vice-Chancellor, Edith Cowan University and Head, Kurongkurl Katitjin
Ms Irina Cattalini	CEO, Western Australian Council of Social Service (proxy Mr Chris Twomey)
Dr Zarrin Siddiqui	President, Ethnic Communities Council of WA (proxy Ms Jan Williams)

- 1.9 The role of the Review Reference Group was to:
- provide information relating to each members' field of expertise to facilitate discussion and inform the review
  - assist in reviewing and providing feedback on the review findings and recommendations.

The Reference Group met three times during the review process.

## Methodology

- 1.10 The review was supported by staff of the PSC, and guided by input from the Review Reference Group.

- 1.11 The review commenced on 17 February 2014 with a six-week submission period. A webpage on the PSC's website was established, which provided further information about the review, the EO Act, the submission process and the terms of reference. To assist stakeholders, a submission guide was developed and made available online to provide background information on the review, the terms of reference and suggested topics for consideration.
- 1.12 To raise awareness of the review, the Public Sector Commissioner wrote to 182 stakeholders suggested by the EO Commissioner to notify them of the review, invite their submissions and provide them with the submission guide.
- 1.13 The submission period closed on 28 March 2014. However, 14 requests for extensions were granted to ensure that all interested stakeholders had an opportunity to make a submission. A total of 49 submissions were received (see **Appendix A**).
- 1.14 In addition to written submissions, the review considered features of comparable bodies in other domestic jurisdictions, and other relevant reports and information.

### **Performance audit**

- 1.15 Following endorsement from the Review Reference Group, the PSC engaged a management consultant, Quantum Management Consulting and Assurance, to undertake a performance audit of the EOC.
- 1.16 The objective of the performance audit was to seek options on how the efficiency and effectiveness of the EOC, as it is currently positioned within the public sector, could be improved. The audit included:
- an assessment of the EOC's core functions
  - an assessment of the provision of corporate services to the EOC
  - an assessment of how the EOC is positioned in the sector
  - benchmarking with similar agencies in other jurisdictions.
- 1.17 Quantum Management Consulting and Assurance assessed the EOC's current structure and operations by reviewing relevant documentation, data and processes, mapping the EOC's relationships with other agencies with similar functions, and benchmarking the EOC against other domestic jurisdictions. The findings and recommendations of the performance audit are further discussed in chapter 5.

## 2. Overview of the *Equal Opportunity Act 1984*

- 2.1 The EO Act was enacted by the Western Australian Parliament in 1984 and came into operation on 8 July 1985. Its objectives are set out in s. 3 as follows:
- (a) *to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status or pregnancy, family responsibility or family status, sexual orientation, race, religious or political conviction, impairment, age, publication of relevant details on the Fines Enforcement Registrar's website or, in certain cases, gender history in the areas of work, accommodation, education, the provision of goods, facilities and services and the activities of clubs; and*
  - (b) *to eliminate, so far as is possible, sexual harassment and racial harassment in the workplace and in educational institutions and sexual harassment and racial harassment related to accommodation; and*
  - (c) *to promote recognition and acceptance within the community of the equality of men and women; and*
  - (d) *to promote recognition and acceptance within the community of the equality of persons of all races and of all persons regardless of their sexual orientation, religious or political convictions or their impairments or ages.*
- 2.2 Parts II to IVB of the EO Act set out the grounds of unlawful discrimination and the areas of life in which that discrimination is prohibited. Part V makes victimisation of someone who lodges a complaint under the EO Act unlawful, and Part VI sets out exceptions, such as educational institutions established for religious purposes and accommodation for aged persons.

- 2.3 The relevant roles and functions of organisations under the EO Act are set out in the following parts of the Act:
- Part VII establishes the office of the EO Commissioner, and provisions for appointment, functions, powers, and administrative and procedural matters
  - Part VIII sets out the role of the SAT, including its jurisdiction to hold inquiries into matters referred to it by the EO Commissioner
  - Part IX sets out provisions aimed at promoting equal opportunity and the elimination of discrimination in the public sector, including through the establishment of the DEOPE.
- 2.4 The objects of Part IX are:
- (a) *to eliminate and ensure the absence of discrimination in employment on the ground of sex, marital status, pregnancy, family responsibility or family status, sexual orientation, race, religious or political conviction, impairment, age or the publication of relevant details on the Fines Enforcement Registrar's website; and*
  - (aa) *to eliminate and ensure the absence of discrimination in employment against gender reassigned persons on gender history grounds; and*
  - (b) *to promote equal employment opportunity for all persons, in the authorities to which this Part applies.*
- 2.5 The EO Act is administered by the Attorney General (except for Part IX, which is administered by the Premier).
- 2.6 In recent years, new grounds constituting discrimination have been included in the EO Act, including: gender history (2000), sexual orientation (2002), breast-feeding (2010), and being listed on the Fines Enforcement Registrar's website (2012).
- 2.7 Prior to this review commencing, in 2013 the Attorney General affirmed his commitment to the objects of the EO Act and indicated he is also open to consider organisational changes that the review may recommend as to how those objects could be better achieved.<sup>2</sup>

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<sup>2</sup> Transcript of the 2013–14 Budget Estimates Hearings, Standing Committee on Estimates and Financial Operations, 26/9/2013, p. 17.

# 3. Office of the Commissioner for Equal Opportunity

- 3.1 The office of the EO Commissioner is established under Part VII of the EO Act to assist in the elimination of discrimination and harassment on the grounds prohibited by the EO Act. The EO Commissioner is appointed by the Governor, on the recommendation of the Premier, on a full time basis for a term of up to seven years, which is renewable. There have been three EO Commissioners since 1985 and the role is currently occupied by Ms Allanah Lucas.

## Functions

- 3.2 The core functions of the EO Commissioner are to receive complaints from, and provide redress to, people who believe they have been discriminated against or subject to harassment, and to provide training, information and advice to the community about equal opportunity law. Complaints which are not resolved by conciliation, but are deemed by the EO Commissioner to have substance, may be referred to the SAT under s. 93 of the EO Act.
- 3.3 The specific functions of the EO Commissioner are set out under s. 80 of the EO Act as being to:
- carry out investigations, research and inquiries relating to discrimination or harassment
  - acquire and disseminate knowledge on all matters relating to the elimination of discrimination and harassment, and achievement of the principle of equality
  - arrange and coordinate consultations, inquiries, discussions, seminars and conferences
  - review, from time to time, the laws of the State
  - consult with governmental, business, industrial and community groups to ascertain means of improving services and conditions affecting persons who are subject to discrimination or harassment



- develop programs and policies promoting achievement of the principle of equality
- publish reports compiled in the exercise of the EO Commissioner's powers under the EO Act
- perform any function conferred on the EO Commissioner under another written law or under any arrangement with the Commonwealth relating to the promotion of the objects of the EO Act.

## Autonomy

- 3.4 The EO Commissioner is a statutory officer invested with statutory functions and the EO Act does not provide capacity for the Minister to give directions to the EO Commissioner in relation to the performance of those functions. This affords the EO Commissioner operational autonomy. It is a fundamental aspect of the scheme of the EO Act and was not subject to re-consideration by the review.
- 3.5 Section 79 of the EO Act provides power for public servants to be appointed under Part 3 of the PSM Act to assist the EO Commissioner in the performance of their functions. The EO Commissioner is the “employing authority” of such staff<sup>3</sup> and as such has independence in relation to the employment of individual employees<sup>4</sup>.
- 3.6 The EOC as a separate organisation is not recognised in either the EO Act or the PSM Act, forming part of the office of the EO Commissioner as a non-SES organisation under the PSM Act. However, the office of the EO Commissioner and its associated staff, resources and operations for which the EO Commissioner is responsible are commonly badged and referred to as the EOC.

## Services

- 3.7 In supporting the EO Commissioner, the EOC delivers the following services which promote the objects of the Act:
- receiving and referring public and individual enquiries in the areas of human rights and related legislation
  - complaint management which is free, fair and impartial for those who allege they have suffered discrimination. If the complaint is not able to be conciliated or otherwise resolved it may be dismissed or, in most cases, referred for a determination.

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<sup>3</sup> Regulation 5, *Public Sector Management (General) Regulations 1994*.

<sup>4</sup> Section 8(2) *Public Sector Management Act 1994*

- providing public education, awareness and training to promote an appreciation and understanding of people's rights and responsibilities under human rights legislation.<sup>5</sup>
- 3.8 In 2012/13 the EOC received 2332 enquiries and handled 738 complaints of discrimination of which 28.7 per cent were withdrawn, 27.1 per cent dismissed, 22.5 per cent conciliated, 15.5 per cent lapsed and 6.2 per cent referred to the SAT. The average time to resolve complaints was four months with 89 per cent of complaints being closed within six months.<sup>6</sup>
- 3.9 The cost of services in 2012/13 was \$4.4 million including \$2.9 million in employee benefits (66 per cent). The service appropriation from government was \$3.8 million with revenue earned from course delivery of \$0.3 million leaving a deficit of \$0.3 million for the year.<sup>7</sup>
- 3.10 The EOC currently has actual staffing of 24.25 FTE. There are several vacant positions and a proposal to add another 1.0 FTE to the Corporate Support function.<sup>8</sup> The current organisational structure is shown in **Appendix B**.

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<sup>5</sup> Acting Commissioner for Equal Opportunity 2014, *Submission to the review of organisations under the Equal Opportunity Act 1984*, Equal Opportunity Commission, Western Australia, p. 1.

<sup>6</sup> Acting Commissioner for Equal Opportunity 2013, *Annual report 2012-13*, Equal Opportunity Commission, Western Australia, pp. 20, 21 & 23.

<sup>7</sup> Quantum Assurance 2014, *Performance audit of the Equal Opportunity Commission*, Quantum Management Consulting and Assurance, Western Australia, p. 7.

<sup>8</sup> Quantum Assurance 2014, *Performance audit of the Equal Opportunity Commission*, Quantum Management Consulting and Assurance, Western Australia, p. 7.

## 4. Office of the Director of Equal Opportunity in Public Employment

- 4.1 The DEOPE was established in 1985 under Part IX of the EO Act. The DEOPE is appointed by the Governor for a term of up to four years, which is renewable. Although there is no legal requirement in the EO Act, as a matter of practice, in recent years, the position of the DEOPE has traditionally been occupied by a senior public servant who performs the role in conjunction with their public service role. Currently the office of the DEOPE is held by Ms Fiona Roche, a Deputy Commissioner of the PSC, who as such has a dual reporting role—one to the Minister for Public Sector Management (as the DEOPE) and secondly to the Public Sector Commissioner (as the Deputy Commissioner).

### Functions

- 4.2 The DEOPE works with public authorities to promote equal employment opportunities in the public sector, and to evaluate the effectiveness of programs and processes put in place to achieve that aim. The term ‘public authorities’, as defined in s. 139(3) of the EO Act, applies to all bodies established by the WA Government, including:
- all public sector entities
  - government trading enterprises
  - public universities
  - local government authorities.
- 4.3 The specific functions of the DEOPE, set out in s. 143 of the EO Act, are to:
- advise and assist public authorities in relation to EEO management plans (in accordance with the responsibilities of public authorities under s. 145 of the EO Act)
  - evaluate the effectiveness of EEO management plans in achieving the objects of Part IX of the EO Act

- monitor and report to the responsible Minister (the Premier) on the operation and effectiveness of EEO management plans.
- 4.4 In addition, the DEOPE has power under s. 147 of the EO Act to conduct investigations where there is dissatisfaction with any matter in relation to the preparation or implementation of a public authority's EEO management plan.
- 4.5 The DEOPE is responsible for evaluating public authorities' progress towards the achievement of an equitable and diverse workforce and reporting annually to the responsible Minister (under s. 144(1) of the EO Act). Agencies are required to report to the DEOPE annually on the activities and programs undertaken to eliminate discrimination within the workplace, as well as proposed activities and aims for the following year. This information is included in the DEOPE annual report. Under s. 144(2) of the EO Act, the responsible Minister is required to table such reports in Parliament.
- 4.6 While the EO Commissioner deals with disputes between aggrieved parties which are not necessarily due to any Government administrative or regulatory actions, the focus of the DEOPE is on equal opportunity in the government sector. This is achieved through a general advisory, assistance and monitoring function in relation to the EEO management plans required of public authorities.
- 4.7 As a statutory office with a specific role, the DEOPE has functional autonomy in the manner in which they perform their statutory functions.

## **Accommodation and operational arrangements**

- 4.8 When initially established, the DEOPE role had shared administrative and budgetary resources with the EO Commissioner. This was consistent with the two offices being created by one Act—the intention being that the work of each would complement the work of the other.
- 4.9 Since 1994, when the PSM Act was enacted, changes to the administrative and legislative framework governing the public sector have created an overlap in the functions undertaken by the DEOPE and the Public Sector Commissioner (and former Commissioner for Public Sector Standards). In 1994, the role was relocated to the former OPSSC. That arrangement continued until 2010, when the OPSSC was abolished and the DEOPE functions were located within the PSC. The PSC provides officers, accommodation, corporate services as well as administrative and business systems to support the statutory and operational functions of the DEOPE. The PSC is the accountable authority for the purposes of the *Financial Management Act 2006*.

- 4.10 Historically, the DEOPE has relied on collaborative working arrangements with the former OPSSC and the Department of the Premier and Cabinet for the collection and analysis of equity and diversity data as a subset of a broader workforce data collection process. More recently, the source for this evaluation is data that is collected and evaluated by the PSC as part of its broader evaluation framework.
- 4.11 The DEOPE works with the Public Sector Commissioner to achieve common objectives relating to EEO, diversity and workforce planning. For instance, the functions of the Public Sector Commissioner include advising public sector bodies and assisting them to comply with the principles of human resource management and monitoring that compliance. These principles are set out in s. 8(1) of the PSM Act, as follows:
- (a) all selection processes are to be directed towards, and based on, a proper assessment of merit and equity
  - (b) no power with regard to human resource management is to be exercised on the basis of nepotism or patronage
  - (c) employees are to be treated fairly and consistently and are not to be subjected to arbitrary or capricious administrative acts
  - (d) there is to be no unlawful discrimination against employees or persons seeking employment in the Public Sector on a ground referred to in the EO Act or any other ground.
- 4.12 The DEOPE's jurisdiction under the EO Act, which includes all public sector entities, government trading enterprises, public universities and local government authorities, is broader than the jurisdiction of the Public Sector Commissioner under the PSM Act, which is limited to public sector entities. The Public Sector Commissioner's jurisdiction under the PID Act is similar to the DEOPE's jurisdiction under Part IX of EO Act.

## 5. Findings and recommendations

5.1 A total of 49 submissions were received, comprising of:

- 15 from public sector agencies (30.6 per cent)
- 12 from advocacy and interest groups (24.5 per cent)
- 9 from legal services organisations (18.3 per cent)
- 6 from union groups (12.2 per cent)
- 5 from individuals (10.2 per cent)
- 1 from a political party (2 per cent)
- 1 from a local government authority (2 per cent).

### The EOC

#### Key points arising from submissions to the review

5.2 There is broad and strong support from submissions for the office of EO Commissioner to retain its functional independence, and for the EOC (comprising the EO Commissioner and staff) to remain as the entity responsible for performing the functions of the EO Commissioner under the EO Act.

#### **Desirability of the EO Commissioner being supported by another government or non-government organisation, rather than the EOC**

5.3 Stakeholders are concerned that engaging another agency to support the EO Commissioner in the exercise of their functions, rather than the EOC which is under the EO Commissioner's direct control, may erode the community's perception of the EO Commissioner's operational autonomy.

5.4 There is limited support for recommending that the AHRC take responsibility for any or all of the EOC's operations. While the functions of the EO Commissioner are set out in a single Act (i.e. the EO Act), the AHRC has functions under five Acts, namely the AHRC Act, RDA, DDA, SDA and ADA. There are considerable variances between the federal and State Acts, including:

- the phrases and terms used—for example, the definition of race in the EO Act includes nationality, whilst the RDA has no definition of race at all; the definition of direct discrimination in relation to sex in the EO Act uses the phrase ‘on the ground of’, whilst the SDA uses ‘by reason of’. These subtle variations could result in significantly different outcomes
- the grounds of discrimination—for example, the SDA excludes discrimination on the ground of intersex status but the EO Act has no similar provision; the EO Act prohibits religious or political discrimination but none of the federal Acts have a similar provision
- the exceptions and exemptions—for example, the genuine occupational qualifications exception<sup>9</sup> exists under the EO Act but not under the RDA; the SAT under the EO Act and the AHRC under the DDA, ADA and SDA can grant exemptions to those Acts, but there is no process for exemptions under the RDA. Therefore, irrespective of any exemption under the EO Act no exemption from the operation of the provision of the RDA could be obtained.<sup>10</sup>

5.5 Another major difference between the AHRC and the EOC is evident when a complaint is unable to be resolved through conciliation. Under such circumstances, the EO Commissioner can refer the matter to the SAT and provide legal representation. However, under the AHRC’s jurisdiction, the complainant would have to lodge an application with the Federal Court or Federal Circuit Court, which is a costs jurisdiction, and would not be provided with legal representation. Submissions also raise concerns that the AHRC does not have an office in WA, arguing a state-based body is necessary for a range of reasons, including visibility and the need for awareness of local conditions.

5.6 In its submission, the Legal Aid Commission suggests it has the capacity under its existing organisational structure and processes to absorb most functions performed by the EOC. However, it acknowledges that it would need to retain the focus of its core operation (i.e. it is principally engaged in providing legal assistance to disadvantaged persons) and it does not usually advocate in public forums nor for individuals. The review was also concerned about the potential for conflicts of interest arising, such as a situation where the Legal Aid Commission could be required to represent a claimant (which the EOC can at times do when assisting complainants) and a respondent in a discrimination or harassment case.

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<sup>9</sup> The EO Act does not apply where the work or employment involves providing persons of a particular race with services for the purpose of promoting welfare where those services can effectively be provided by a person of the same race.

<sup>10</sup> State Solicitor’s Office 2014, *Review of the Equal Opportunity Commission*, pp. 2-4.

- 5.7 The EOC's submission argues that the EO Commissioner would have better control in administering the objects of the EO Act through a single organisation, rather than by seeking to be supported through services provided by other agencies with different core policies and purposes. However, the EO Commissioner acknowledges that there is the potential for efficiency gains through greater collaboration with other agencies. There is also support from stakeholders for all services under the EO Act being in one central physical location in WA, under the auspices of the EOC.

### **Strengths and weaknesses in the performance of the EOC's functions**

- 5.8 The provision of legal assistance to complainants when a matter is referred to the SAT is considered beneficial by stakeholders and an important function of the EOC. However, the EOC's submission suggests that the EO Commissioner should have the ability to decide whether or not to provide assistance to a complainant and, if so, the extent and nature of that assistance, when a matter is referred to the SAT. The review acknowledges the potential for such a change to enable the EOC to direct its limited resources to persons in need, consistent with the approach of other legal assistance organisations such as the Legal Aid Commission. This would require legislative change to s. 93(2) of the EO Act.
- 5.9 Submissions identified complaint handling as a key function and some suggest that it could be more accessible, simplified, better documented and better communicated to ensure transparency, clarity and consistency.
- 5.10 Greater collaboration and engagement with stakeholders is another issue raised by some submissions that could improve the EOC's effectiveness by being more proactive and strategic to better deal with systemic issues of discrimination. Submissions also support the EOC having a greater presence in regional and remote WA.

### **Summary of management consultant's findings**

- 5.11 The management consultant engaged to conduct a performance audit on the EOC concluded that there are opportunities to improve the efficiency and effectiveness of the EOC by:
- restructuring the organisation
  - reducing the number of support staffing
  - making better use of technology in the complaints handling operation and in other areas
  - strengthening the relationship with the AHRC and investigating options to partner with other agencies for service delivery in regional and remote areas
  - diversifying training methods to include alternate approaches such as 'train the trainer' and developing anti-discrimination 'tool kits' for potential sale.



- 5.12 The EO Commissioner and other Reference Group members broadly support the consultant's recommendations.

### **Other considerations**

- 5.13 Reference Group deliberations pointed to the outdated nature of some aspects of the EO Act, which is largely a product of the era in which it was drafted and enacted. The review considers that the EO Act would benefit from modernisation because this could fully realise any efficiencies derived from the structural and operational improvements.
- 5.14 In considering whether to subsume some or all functions of the EOC within another organisation, the review noted that the potential benefits include cost savings and efficiency gains through shared IT infrastructure, corporate services and accommodation, as well as the potential to expand the reach of the EO Commissioner through the established networks of other organisations, such as the Legal Aid Commission.
- 5.15 The review considered whether the EOC could enter into a service delivery agreement with the Legal Aid Commission or the Office of the Ombudsman, whereby the organisation would perform at least part of the EOC's operational functions (e.g. the provision of corporate services, community education, conciliation and/or legal services). The EO Commissioner would remain as a statutory officer and be responsible for their legal obligations. However, if the EOC's conciliation and/or legal services functions were out-sourced to the Legal Aid Commission or Office of the Ombudsman, a conflict of interest could arise if a complaint was lodged with the EO Commissioner against either organisation.
- 5.16 Consideration was also given to subsuming the operations of the EOC into another agency, such as the Department of Commerce because like the EOC, it performs complaint handling and investigative functions. Under this model, an existing department such as the Department of Commerce would provide the full range of operational services to the EO Commissioner, and the EO Commissioner would remain as a statutory officer responsible for their functions under the EO Act. A comparison can be drawn with the Commissioner for Consumer Protection and Worksafe Commissioner who are both statutory officers and Executive Directors of discrete divisions within the organisational structure of the Department of Commerce.

- 5.17 However, under such a model, the community's perception of the EO Commissioner's operational autonomy would likely be diminished because their statutory functions would be performed under the auspices of another agency. There may be greater potential for conflicts of interest arising should a discrimination complaint be lodged with the EO Commissioner against the other agency. In addition, under such a model, the EO Commissioner would no longer be the employing authority of the staff appointed to assist them in the performance of their functions, which could be seen to further diminish their operational independence.
- 5.18 Following consideration of the submissions to the review and the management consultant's recommendations, the review's recommendations regarding the EOC are as follows:

### **Recommendation 1**

Maintain the EOC as an autonomous, state-based, stand-alone entity, comprising the EO Commissioner and staff appointed by them, to exclusively support the EO Commissioner in achieving the objectives of the EO Act. However, the opportunity should be taken for the EOC to revise its structure and operations in the following ways:

- reduce the level of staffing in corporate support roles across the agency, consistent with other anti-discrimination agencies in other jurisdictions
- assess the requirements for having a specialised unit for Policy and Evaluation and consider distributing the responsibilities of the current unit between the Office of the Commissioner and other units
- enhance the efficiency of the Community Education and Corporate Services units
- explore, within the current budgetary framework, the possibility of automating the complaints handling process and the means to upgrade IT infrastructure and software generally
- review its operations with a focus on improving training delivery methods, analysis of complaints data, promotional activities, dissemination of information and where possible use fee for service arrangements.

## Recommendation 2

To be more proactive and strategic in dealing with systemic issues of discrimination, the EOC should actively explore greater collaboration with the following agencies to achieve specific objectives in a more cost-effective way:

- AHRC—specifically with regard to the EOC acting as an agent for the AHRC in WA by performing its complaint handling functions for a fee (as has been the case in the past).
- Office of the Ombudsman—specifically with regard to improving the accessibility, efficiency and transparency of the EOC’s complaint handling systems and processes.
- Legal Aid Commission—specifically with regard to seeking advice on how a ‘means test’ could be applied in the provision of legal assistance to EOC clients within the parameters of the EO Act.
- Legal Aid Commission, Department of Commerce, Department of Housing and Office of the Ombudsman, relevant non-government agencies and private organisations—specifically with regard to raising the EOC’s profile in regional areas of the State.
- Universities and other educational institutions—to undertake research partnerships for projects (e.g. evaluations of education and training programs) that meet the EOC’s strategic priorities.

## The DEOPE

### Key points arising from submissions to the review

- 5.19 The two key issues for the review regarding the DEOPE are its statutory status and where the functions should reside, either with the Public Sector Commissioner or the EO Commissioner.
- 5.20 Many submissions supported the continuing of the DEOPE functions being performed because of the perceived need to ensure that anti-discrimination policies in public employment are maintained.
- 5.21 The main argument from stakeholders in support of the DEOPE remaining as a statutory office is that it provides strength and integrity to the function. In most cases, this view is coupled with the rejection of the proposition that the DEOPE functions be subsumed into the Public Sector Commissioner’s role.
- 5.22 The DEOPE submission questioned whether there continues to be value in having two separate statutory officers within the PSC (i.e. the DEOPE and the Public Sector Commissioner) each with different reporting obligations (to the Premier in the case of DEOPE and to Parliament in the case of the Public Sector Commissioner).

## Other considerations

- 5.23 There is a difference in jurisdictional coverage between the DEOPE and the Public Sector Commissioner. The DEOPE covers all ‘public authorities’ as defined under Part IX of the EO Act, thereby capturing State instrumentalities and other types of bodies that are outside the definition of the ‘public sector’ under the PSM Act to which the Public Sector Commissioner’s jurisdiction is limited, at least under that Act.
- 5.24 Part IX of the EO Act was drafted when the administration of the public sector was highly centralised, the employment regime was different and the sector was managed differently to the current devolved regime overseen by the Public Sector Commissioner. For instance, under the PSM Act, which was enacted subsequent to the EO Act, each chief executive officer is the employer of their own staff and human resource management standards<sup>11</sup> are in place. Therefore, there would be value in Part IX of the EO Act being modernised by streamlining agencies’ reporting obligations and rationalising their compliance obligations.
- 5.25 For instance, agencies already have an annual reporting obligation to the Public Sector Commissioner under s. 31(2) of the PSM Act which covers human resource management standards, and that information is subsequently reported to Parliament each year (through the *State of the sector report*). The requirement for agencies to also report annually to the DEOPE on their EEO management plans under s. 146(1) of the EO Act seems to be an unnecessary legal obligation that could be aligned with the reporting obligations under the PSM Act. Also, public sector agencies currently have obligations under the PSM Act to comply with human resource management standards that promote the principles of equity, transparency and merit.
- 5.26 Currently, the EO Commissioner, the DEOPE and the Public Sector Commissioner are each exempt from the application of the *Parliamentary Commissioner Act 1971* (administered by the WA Ombudsman). Therefore, there would be no change to this arrangement regardless of whether the DEOPE function were given to the EO Commissioner or the Public Sector Commissioner.
- 5.27 The Review considered whether the EO Commissioner and DEOPE should be co-located physically and administratively, as was the case when the EO Act was first enacted, particularly because both the EO Commissioner and DEOPE have the power under the EO Act to investigate public authorities (beyond the ‘public sector’) in relation to discrimination, and both have an anti-discrimination function.

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<sup>11</sup> The human resource management standards are issued by the Public Sector Commissioner under s. 21(1)(a) of the PSM Act and apply when filling vacancies and in relation to performance management, discipline, termination, grievance resolution and redeployment.

However, this would not address the potential tension from having two separate statutory officers co-located within the one organisation.

- 5.28 A further issue for consideration was whether the functions of the DEOPE could be subsumed into the office of the EO Commissioner under the EO Act. However, if the DEOPE's functions were transferred to the EO Commissioner, a key issue is whether this additional responsibility for the EO Commissioner would risk diminishing either their current obligations under the EO Act or the DEOPE obligations. Further, the jurisdiction of the EO Commissioner is broader than the DEOPE's jurisdiction because it extends to the wider community.
- 5.29 Alternatively, there is some support for the proposition to subsume the DEOPE role into the Public Sector Commissioner's role. The advantages of this option are:
- there is an overlap between agencies' human resources management obligations under s. 8(1)(d) of the PSM Act<sup>12</sup> and their obligations to avoid discrimination in employment under Part IX of the EO Act
  - it presents an opportunity for agencies' reporting obligations to be streamlined to their current reporting obligations to the Public Sector Commissioner under the PSM Act
  - it presents an opportunity for agencies' compliance obligations to be rationalised in light of their current compliance obligations to the Public Sector Commissioner under the PSM Act.
- 5.30 The reporting and compliance obligations of public authorities under Part IX of the EO Act were not directly captured by the terms of reference of the review so stakeholder views on those matters were not canvassed nor were such views forthcoming. Any proposed changes to the reporting and compliance obligations of public authorities should, therefore, involve further consultation with stakeholders.
- 5.31 It would be appropriate to examine all the provisions under Part IX of the EO Act with the objective of streamlining and rationalising the regime with the current regimes under the PSM Act. In particular, consideration could be given to whether:
- all public authorities should be required to have an EEO management plan (as is currently required under s. 145(1) of the EO Act) when a high-level policy statement may suffice

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<sup>12</sup> Section 8(1)(d) of the PSM Act provides for no unlawful discrimination against public sector employees or other persons seeking employment in the sector on a ground included in the EO Act or any other grounds.

- if the requirement for EEO management plans were to remain, there are any benefits in prescribing in legislation what should be in those plans (as is currently required under s. 145(2) of the EO Act).

5.32 Clearly, any amendments to Part IX would impact on all public authorities, therefore, an examination of Part IX would necessitate consultation with those stakeholders to ensure their acceptance of any revised reporting and compliance regimes.

### Recommendation 3

The statutory role of the DEOPE be abolished and its statutory functions transferred to the role of the Public Sector Commissioner (PSC). The legislative changes that would be required to implement this recommendation would need to accommodate the jurisdictional differences between the role of the DEOPE and that of the Public Sector Commissioner to ensure that all 'public authorities' (not only 'public sector' bodies as defined under the PSM Act) remained required to meet their EEO obligations.

This recommendation could be implemented either by way of amendment of the PSM Act to expand the functions of the PSC to include those currently performed by the DEOPE under the EO Act. Alternatively, the EO Act could be amended to replace references to the DEOPE with references to the PSC.

Under this recommendation:

- the issue of having two statutory offices within the one agency would be avoided
- a public servant would not be required to perform a dual role (as is the case currently and has been the case in the past)
- there would be no diminution of the objects of Part IX of the EO Act to promote equal opportunity and eliminate discrimination in public authorities.

### Recommendation 4

In implementing recommendation 3, the reporting and compliance regimes under Part IX of the EO Act be streamlined and rationalised with the current regimes under the PSM Act. All public authorities, as defined under Part IX of the EO Act, should be consulted before any changes to Part IX are implemented.

# 6. Appendices

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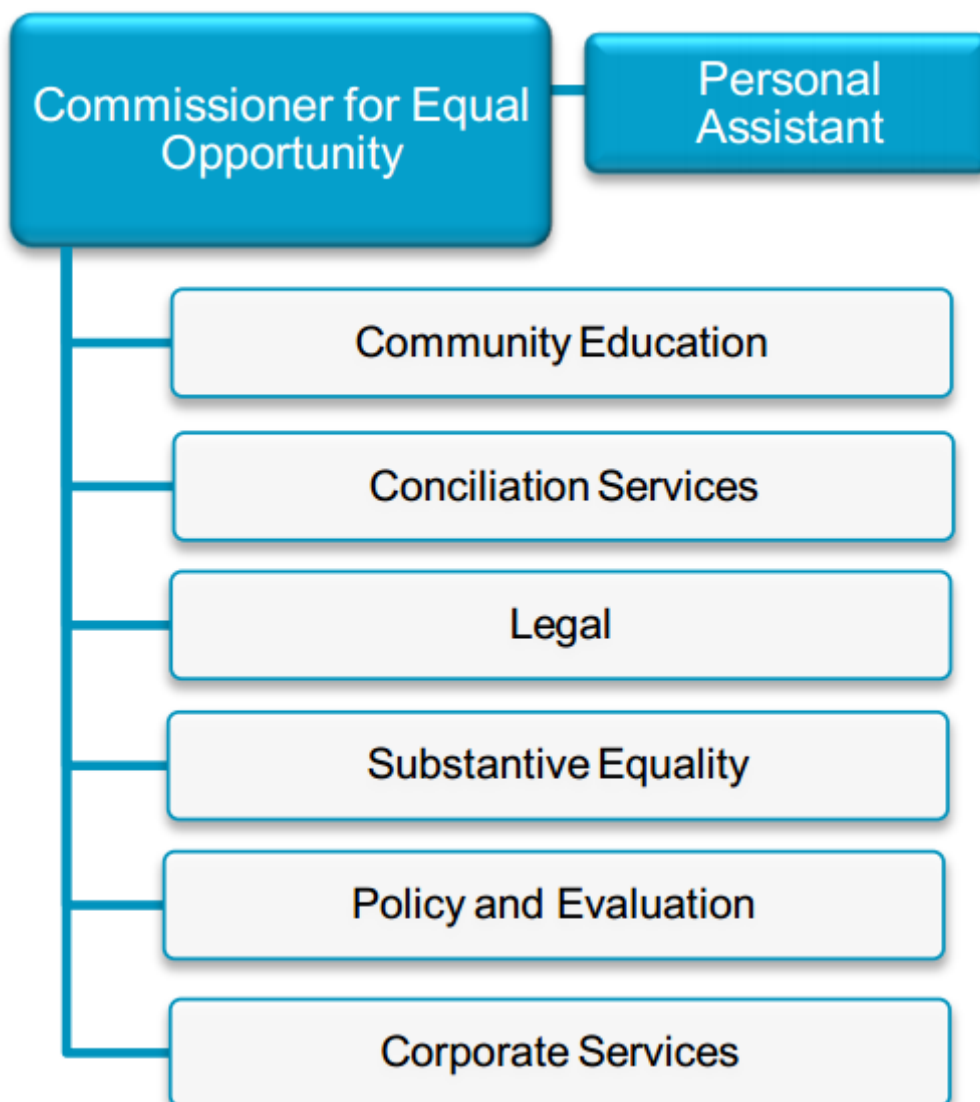
# Appendix A – List of submissions

1. City of Kwinana
2. Local Government, Racing and Cemeteries Employees Union & Western Australian Municipal, Road Boards, Parks and Racecourse Employees Union
3. Disability Services Commission
4. Department of Housing
5. Department of the Premier and Cabinet
6. Ethnic Disability Advocacy Centre
7. The Muslim Women's Support Centre of WA (Inc.)
8. Sussex Street Community Law Service
9. Australian Association of Social Workers WA
10. Legal Aid Commission
11. State School Teachers' Union of WA (Inc.)
12. Employment Law Centre of WA (Inc.)
13. Nollamara Branch of WA Labor Party
14. WA AIDS Council
15. United Voice WA
16. Joint submission from the Aboriginal Legal Service of WA (Inc.) and the Aboriginal members of the Substantive Equality Program Partners
17. Undisclosed individual
18. The Community & Public Sector Union / Civil Service Association of WA
19. Equal Opportunity Commission
20. Western Australian Council of Social Service (Inc.)
21. Unions WA
22. Peel Community Legal Services



23. Women's Law Centre of WA (Inc.)
24. Centre for Human Rights Education, Curtin University
25. Construction Forestry Mining and Energy Union WA
26. Pilbara Community Legal Service (Inc.)
27. Southern Communities Advocacy Legal and Education Service (Inc.) (SCALES)
28. Undisclosed individual
29. Undisclosed individual
30. Commissioner for Children and Young People
31. Office of Multicultural Interests
32. Department of Aboriginal Affairs
33. Undisclosed individual
34. National Disability Services WA
35. Mental Health Law Centre WA (Inc.)
36. Men's Resource Centre (Inc.)
37. Undisclosed individual
38. Department of Education
39. Department of Transport
40. Public Transport Authority
41. Main Roads WA
42. Community Legal Centre Association of WA
43. Shelter WA
44. WA Police
45. Women Lawyers of WA
46. The Law Society of WA
47. Tenancy WA (Inc.)
48. A/Director of Equal Opportunity in Public Employment
49. Department of Health

## Appendix B – Organisational structure of the EOC



Source: Acting Commissioner for Equal Opportunity 2013, *Annual report 2012-13*, Equal Opportunity Commission, Western Australia, p. 6. The Substantive Equality Unit was abolished as of 30 June 2014.