



Law Council
OF AUSTRALIA

Office of the President

28 January 2025

Senator Louise Pratt
Chair
Senate Finance and Public Administration Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: fpa.sen@aph.gov.au

Dear Chair

Response to Question on Notice: Workplace Gender Equality Amendment (Setting Gender Equality Targets) Bill 2024

1. The Law Council of Australia appreciates the opportunity to have appeared before the Senate Finance and Public Administration Legislation Committee (**Committee**) on 22 January 2025 as part of its inquiry into the provisions of the Workplace Gender Equality Amendment (Setting Gender Equality Targets) Bill 2024 (Cth) (**Bill**).
2. During the hearing, we were asked to take one question on Notice. The Law Council's response to that question is provided below.

Question on Notice

3. The following question on notice has been extracted from the Proof Committee Hansard transcript:

CHAIR: There's just one final question from me. Some of the organisations reporting to WGEA have access to the religious exemptions to the Sex Discrimination Act. In evidence you've given, the Sex Discrimination Act, in taking a case, is reactive, but not everyone who gets access to that will be successful. Frankly, they may get ruled out of being able to take a case at all. In the meantime, that very same school or institution can say that they are working towards an uplift or that they have policies and formal strategies on sex based harassment and discrimination. Should there be a qualifier for organisations that retain a right? They are given that right by virtue of being a religious organisation, but we don't know if they exercise that right, so it's hard to interpret what they're actually reporting against based on the reality of what's happening on the ground. For example, one of the schools in WGEA's data required staff to affirm that they believe marriage is between a man and a woman. While that in itself might not be outside the Sex Discrimination Act, discrimination on marital status is. We want to be able to see whether we can take what they are reporting against WGEA's reporting guidelines at face value—that it actually is what they say it is.

Ms Warner: We might have to take that question on notice and give that one a little bit more thorough consideration, if that's acceptable.

CHAIR: Yes. I think we've got a short timeline. I did have an intern write a short paper for me on it. I'll see if I can get that to you.

Ms Warner: Sure, certainly.

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Law Council response

4. At the outset, it is important to note that the Law Council's position on exceptions for religious educational institutions under section 38 of the *Sex Discrimination Act 1984* (Cth) (**SDA**) is they should be abolished as they relate to staff and students—see our submission to the Australian Law Reform Commission (**ALRC**) on Religious Educational Institutions and Anti-Discrimination Laws of March 2023.¹ Our position is further explained in the Law Council submission to the Senate Legal and Constitutional Affairs References Committee regarding its inquiry into 'Legislative exceptions that allow faith-based educational institutions to discriminate against students, teachers and staff' of 2018.²
5. We note that, in December 2024, the ALRC made relevant recommendations regarding amendments to the SDA. It recommended (inter alia) that: section 38 be repealed; and section 37 be amended to specify that section 37(1)(d) does not apply to an act or practice in relation to an educational institution.³ This is consistent with the Law Council's positions. The ALRC made several broader reform recommendations in the same report. The Australian Government is yet to publicly respond to that report, including through the introduction of legislation.
6. The Law Council has now had the opportunity to examine the supplied paper entitled *Discrimination Protections for Women in Australian Law: Existing Protections and Options for Change* (**research paper**).⁴ The research paper sets out in more detail the concern that reports to the Workplace Gender Equality Agency (**WGEA**) from certain religious employers may be distorted or incomplete due to those employers' reliance on exceptions for religious organisations in the SDA.
7. The question posed by the Chair, as we understand it, is whether the Setting Gender Equality Targets Bill should be amended to identify organisations that avail themselves of exceptions in the SDA.
8. After the Law Council's appearance, there was an exchange between the Chair and the Sex Discrimination Commissioner (**Commissioner**), Dr Anna Cody, about this subject:

¹ Law Council of Australia, *Religious Educational Institutions and Anti-Discrimination Laws*, Submission to Australian Law Reform Commission Consultation (March 2023)

<<https://lawcouncil.au/resources/submissions/religious-educational-institutions-and-anti-discrimination-laws>>.

² Law Council of Australia, *Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff*, 29 November 2018: <<https://lawcouncil.au/media/news/legislative-exemptions-that-allow-faith-based-educational-institutions-to-discriminate-against-students-teachers-and-staff>>.

³ Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination laws*, (ALRC Report 142, December 2023)

<<https://www.alrc.gov.au/publication/adl-report-142/>>.

⁴ Paper prepared by Taylor Fenner under the Australian National Internship Program (Ref: ANIP3005).

CHAIR: I don't know if you were listening to my question for the Law Council, but it was a technical question around access to the exemptions in the Sex Discrimination Act and the reporting obligations under this bill, which affirm a positive duty in relation to the prevention of sex discrimination and harassment. I am unclear as to the extent to which those exemptions can be used to opt out of that positive duty and, when an organisation is reporting to WGEA, what that means about their relationship with those exemptions.

Dr Cody: I think that the example that you used is perhaps not as useful in terms of a same-sex marriage relationship—

CHAIR: Right. I expected that.

Dr Cody: because that should be more—

CHAIR: It's probably more about divorce and marital status in general.

Dr Cody: Or pregnancy of a single woman, for example.

CHAIR: Yes.

Dr Cody: Both of those would be examples where a religious organisation may claim the exemption that they are not bound by the Sex Discrimination Act, because it goes against the teachings of their faith. I think it's an interesting point. I can see that an organisation could—because of the choice of numeric and action targets that they comply with and if they had to introduce a policy or if they had to introduce a flexible working arrangement for parents at their particular workplace, depending on where they were in that journey towards gender equality—completely avoid reporting or discussing whether or not, for example, someone was dismissed because they became pregnant and were unmarried.

CHAIR: Do you have any insight for us in terms of how we should deal with that? I would be a supporter of repealing those exemptions, but at a baseline perhaps we need to collect data on whether a reporting organisation is exempt under the Sex Discrimination Act and whether they would seek to access that exemption should a case be brought against them, because if they've got a defence then they shouldn't need to access the exemption unless they're seeking to explicitly discriminate.

Dr Cody: The Australian Human Rights Commission has argued for those exemptions being removed. I've personally advocated on these issues, and I know that the commission has advocated over a period of years that those exemptions should be removed. It's difficult because the targets are ultimately used for benefits of government grants, Commonwealth grants, as well as access to procurement for government services. I could see that you could potentially limit if you extended use of the exemption to whether or not an organisation should get a grant. We know that many religious schools do get Commonwealth grants for education. They all get support for private school funding, for example. So I think that it would perhaps be outside the remit of this to try and put those two issues together. It would be a creative use of this particular piece of legislation.

CHAIR: I'm not sure that education funding is in this case necessarily part of what's expected in grants or procurement, as much as I might argue that it should be. I'm reflecting on the lack of transparency around it. In addition to pregnancy, I've also heard cases of discrimination involving the use of IVF and a range of other attributes that are covered by the Sex Discrimination Act that have been brought up by unions. Nevertheless, reporting entities are saying that they seek to uphold the Sex Discrimination Act, and we can never really find out what's going on. When people take these issues to the Human Rights Commission, often they don't get past the first pass because of the exemption.

Dr Cody: Yes, that's absolutely correct, and there is a lack of clarity and transparency about how widespread the use of the exemption is. We certainly hear anecdotally and through the complaints service that there is use of it, but in our public advocacy we would frequently hear that it's not used by religious institutions. I think it's a difficult one to try and get a grasp of, unless the exemption were removed, and then we would have a clear understanding of just how widespread it had been used.

CHAIR: What about even just that public-facing side—that an institution be placed on record whether they would ever seek to use that provision, just so that at least if someone does take a case there's a way of highlighting the fact that it is against what they've put on the public record?

Dr Cody: Within this particular amendment, whether or not it could form part of a policy that an employer would introduce, that would be possible. I find it difficult to imagine how you would include that in the legislation itself, other than in the explanatory memorandum, perhaps, around including the intention to not use it in a policy around employment of staff.

CHAIR: Yes, or a declaration that, notwithstanding the reporting in this, we retain the right to use religious exemptions. I could see that it could be impacting the data or that kind of discrimination not properly being reflected in the data where a school, for example, could declare it has got a policy to prevent discrimination and nevertheless might discriminate against someone for being married out of wedlock or using IVF.

Dr Cody: I think legally it would be difficult. I could see how hard that would be for somebody to actually make a complaint and say, 'But you said in your policy that you're not going to be bound.' So I'm not sure that that would be binding, but, in terms of the educative process and function, I could see that that could have a purpose.

9. We agree with the Commissioner that it would be legally difficult to reflect reliance on SDA exceptions in the present Bill. The Bill would establish a regime for organisations employing 500 or more people to select and report progress towards various targets. As discussed throughout the hearings, different organisations' choice of targets would reflect their organisational priorities and preferences, in discussions with the WGEA. As such, although the Law Council sees merit in considering the principal recommendations in the research paper (that exceptions be removed and protected attributes be expanded), these would more properly be the subject of a separate process amending the SDA.
10. Later in the hearing, there was also this exchange with Mrs Janette Dines, Chief Operating Officer of the WGEA:

CHAIR: Say, for example, you've selected improved flexible work offerings for employees and on paper you are definitely progressing—you might be a religious affiliated school, and you report that this is what you're going to pick and you are improving that offering—but then you deprive someone who might have been pregnant out of wedlock of that offering. If someone applies exemptions to their reporting, how would you expect that to be reflected, if at all?

Mrs Dines: I think that is a really good example of a conversation that we had about this previously, in that the WGEA revelatory framework isn't about what happened to an individual; it is about the kind of systemic framework and the ideal policy settings. So we couldn't rule out that your example could come to pass in a workplace and, because we look at the system level, it wouldn't necessarily be detected under the reporting and you might meet a target but still have a representation from an employee that that had occurred.

CHAIR: Of course that could occur with or without the target and with or without an exemption to the Sex Discrimination Act. What I am keen to understand is: there might be an outlier where, yes, an organisation is reporting that they are doing the right thing and progressing in the right direction and, if someone were to take a case to the Human Rights Commission, unless there was just a reasonable misunderstanding or a capacity to negotiate, you would not expect an employer to rely on an exemption. Are we able to distinguish between employers that might rely on an exemption and those that won't? I understand we won't necessarily see outlying cases of discrimination. But, surely, we should be able to see if there are exceptions to when an organisation says yes, they are committed to meeting this target, for example if there are any caveats to that that would fall within the Sex Discrimination Act as intended.

Mrs Dines: I think it would be very difficult because it's not a data point that we collect. There is a reference, as you know, in the Workplace Gender Equality Act to compliance with the Sex Discrimination Act, but we don't affirmatively ask employers for any information around that.

CHAIR: I guess that's therefore a policy question as to identification as a religious organisation and whether you would seek to use those exemptions. It becomes a policy question about whether that information should be collected as part of your mandate or not. Would that be correct?

Mrs Dines: Correct.

11. The Law Council agrees with Mrs Dines that the reporting regime under the *Workplace Gender Equality Act 2012* (Cth) (including as amended by the present Bill) is about employment systems and policy settings, rather than individual cases. There are other legal mechanisms, including internal complaints mechanisms, complaints to the Australian Human Rights Commission (**AHRC**), complaints to state and territory rights commissions and proceedings in the courts and the Fair Work Commission to address incidents of workplace discrimination. The Law Council acknowledges the Chair's concerns about the success rate of discrimination complaints and difficulty of bringing them in the first place for many victim-survivors, but notes that these issues are being addressed by other means.⁵
12. We would defer to the AHRC on the question of whether organisations seek to rely on religious exceptions to the SDA in responding to complaints before it, but we see no legal impediment to doing so, if their circumstances fall within these exceptions.
13. If Government decides that reliance on exceptions to the SDA should be reported to the WGEA so that the organisations concerned are compelled to be more transparent, we would expect a separate specific Bill to be introduced to make this change (after appropriate consultation with all relevant stakeholders). However, a more straightforward means of

⁵ See, for example, the *Australian Human Rights Commission Amendment (Costs Protection) Act 2023* (Cth).

resolving these issues would be to respond to the ALRC's report recommendations to amend the SDA.

14. The Law Council thanks the Chair and the Committee for their consideration of our submissions.

Yours sincerely

Juliana Warner
President