



Law Council
OF AUSTRALIA

Office of the President

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

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

Dear Senator Pratt

Inquiry into the Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Bill 2023 (Cth)

The Law Council of Australia welcomes the opportunity to provide a submission to the Senate Finance and Public Administration Committee (the **Committee**) for the purposes of its inquiry into the Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Bill 2023 (Cth) (the **Bill**).

In the time available, the Law Council has not had an opportunity to consult with all of its constituent bodies on this submission. It has relied on the expert contributions of members of the Law Council's Equal Opportunity Committee and National Human Rights Committee and its constituent body, Law Firms Australia, to inform this submission. As a result, this submission reflects the Law Council's preliminary views.

Executive summary

1. The Law Council welcomes the Australian Government's commitment to implementing several recommendations made by the Department of Prime Minister and Cabinet in its 2021 review (the **Review**)¹ into the *Workplace Gender Equality Act 2012* (Cth) (the **Act**) through the amendments proposed in the Bill.
2. The Law Council emphasises the value of implementing the Review's recommendations to 'accelerate progress on gender equality in workplaces and streamline reporting for employers to the Workplace Gender Equality Agency'.²
3. The Law Council broadly supports the proposed amendments to the Act, although it raises some questions in this submission regarding the manner in which some of the recommendations in the Bill are given effect.

¹ Department of Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (Report, December 2021) < https://www.pmc.gov.au/sites/default/files/resource/download/wgea-review-report_1.pdf > (**Review Report**).

² Ibid 4.

4. It also queries the absence in the Bill of measures to implement recommendations 7.2 and 8 of the Review—which also recommended amendments to the Act. The Law Council encourages the Australian Government to consider implementing these recommendations in full, either within the current proposed Bill or by committing to future implementation.

Background

The Act

5. The objects of the Act are to:
 - (a) promote and improve gender equality (including equal remuneration between women and men) in employment and in the workplace; and
 - (b) support employers to remove barriers to the full and equal participation of women in the workforce, in recognition of the disadvantaged position of women in relation to employment matters; and
 - (c) promote, amongst employers, the elimination of discrimination on the basis of gender in relation to employment matters (including in relation to family and caring responsibilities); and
 - (d) foster workplace consultation between employers and employees on issues concerning gender equality in employment and in the workplace; and
 - (e) improve the productivity and competitiveness of Australian business through the advancement of gender equality in employment and in the workplace.³
6. The Act requires relevant employers to lodge reports each year containing information relating to various gender equality indicators.⁴ A 'relevant employer' is defined as a registered higher education provider or an employer with 100 employees in Australia or more.⁵ Currently, the reports made by relevant employers are available to the public, subject to some exceptions for information that is personal information, information relating to remuneration, and information of a kind specified by the Minister.⁶
7. The Act also establishes the Workplace Gender Equality Agency (**WGEA**),⁷ which advises and assists employers in promoting and improving gender equality in the workplace and undertaking research and programs for the purpose of promoting and improving gender equality in the workplace.⁸

³ *Workplace Gender Equality Act 2012 (Cth) (Act)*, s 2A.

⁴ *Ibid*, s 13.

⁵ *Ibid*, s 4.

⁶ *Ibid*, s 13C - s14A.

⁷ *Ibid*, s 8A.

⁸ *Ibid*, s 10.

The Review

8. In 2021, the Law Council provided a submission to the Review.⁹ The Review report was released in December 2021. It concluded that gender inequality in the workplace is persistent, and that consultation in relation to the Act revealed a need to:
 - ‘accelerate progress on gender equality by increasing transparency of employer-level gender pay gaps and requiring employers to take action to meet targets’; and
 - reduce the ‘regulatory burden’ of WGEA reporting.¹⁰
9. The Review made ten corresponding recommendations to address these issues.
10. According to the Bill’s Explanatory Memorandum (**EM**), in August 2022, the Australian Government agreed in-principle to implement all ten of the Review recommendations, subject to further consultation on the design and implementation of the legislative change.¹¹

Implementation of Review recommendations

11. The Law Council notes that the EM states that the Bill implements, ‘in part or in full, Recommendations 2, 3, 5, and 9 of the Review’.¹² The Law Council’s views on these recommendations, and the amendments made to give effect to them, are discussed below. For the purposes of this inquiry (and given the short period available) the Law Council has only engaged with the recommendations to the extent they require primary legislative amendment.

Recommendation 2—to allow WGEA to publish gender pay gap information at an employer level as an overall figure and by quartile to encourage change within organisations. Individual employee pay information is not to be published

12. Recommendation 2 responded to stakeholder calls for the WGEA to publish information about the gender pay gaps given ‘the current approach of publishing aggregate industry gender pay gaps is not creating the transparency, accountability and insights necessary to closing the gender pay gap fast enough’.¹³
13. The Bill seeks to implement this recommendation under Division 1 of Part 1 of Schedule 1, which introduces provisions requiring the WGEA to publish ‘aggregate information, for each relevant employer for each reporting period, for the purpose of showing the employer’s performance and progress in achieving gender equality in relation to remuneration for the employer’s workforce’.¹⁴

⁹ Law Council of Australia, Submission to the Department of Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act*, (24 November 2021) <<https://www.lawcouncil.asn.au/publicassets/d2d435af-504e-ec11-9444-005056be13b5/4131%20-%20Review%20of%20the%20Workplace%20Gender%20Equality%20Act%202012%20%20Cth.pdf>> (**Law Council submission to the Review**).

¹⁰ Review Report 7.

¹¹ Explanatory Memorandum, Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Bill 2023 (Cth) (**Bill**) 4.

¹² *Ibid.*

¹³ Review Report 33.

¹⁴ Bill subclause 15A(1).

14. The Law Council notes that the recommendation suggested the Act be amended to 'allow' the WGEA to publish the data. However, the proposed amendment provides that the WGEA 'must' publish the information.
15. The Law Council suggests that the Committee satisfy itself that, given an obligation will be imposed on WGEA to publish the information, the WGEA will have reliable access to the information.
16. The Law Council understands that the WGEA will be expected to draw the information it is required to publish from public reports provided by employers.¹⁵ Currently, the content of a public report is determined by a legislative instrument¹⁶ (the Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2023 (Cth) (**Matters in relation to Gender Equality Indicators Instrument**)), which provides for remuneration data to be included in a public report.¹⁷ If the Act creates an obligation on the WGEA to report on employer remuneration data, and the only reliable way the WGEA is likely to obtain that data is through the public reports, from a legislative drafting perspective, it seems preferable that the Act itself oblige employers to provide that remuneration data to the WGEA, rather than a legislative instrument. This will provide certainty that the WGEA will have that information and thus be in a position to meet this obligation.
17. The Law Council received some feedback endorsing the Bill providing the WGEA with a discretion to publish the data, rather than requiring it to publish. This would provide the WGEA with flexibility about publication. If this approach is taken, the Law Council suggests that the draft provision should make clear the expectation that WGEA is to publish the data unless, for reasons beyond its control, it is unable to do so.
18. Additionally, the Law Council notes that the amendment does not appear to expressly permit the data to be published 'as an overall figure and by quartile', as recommended by the Review. The Review articulated the following basis for this recommendation:¹⁸

The consultation process identified that publishing workforce composition across pay quartiles will contribute to accelerate the narrowing of the gender pay gap. It will help track women and men's representation at, and progression through, different levels of the organisation. Reporting across quartiles shows the spread of female and male earners across an organisation. It also shows if one gender is over or under-represented in a particular quartile. This helps employers assess what is happening and take action as needed.
19. Instead, the Bill provides that 'the Agency must publish aggregate information, for each relevant employer for each reporting period'.¹⁹ Accordingly, the Law Council suggests that consideration be given to amending the Bill so that it requires that the data be published 'as an overall figure and by quartile', consistent with the recommendation.

Recommendation 3—Bridge the 'action gap' with new gender equality standards

Recommendation 3 was that the WGEA Act be amended:

- (a) to rename the 'minimum standards' the 'gender equality standards' under the Act (**gender equality standards recommendation**); and

¹⁵ Ibid subclause 15A(3).

¹⁶ Act subsections 13(2) and (3).

¹⁷ Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2023 (Cth) s 8

¹⁸ Review Report 8.

¹⁹ Bill clause 15A.

- (b) to require CEOs of relevant employers to cause two new kinds of reports prepared by the WGEA to be given to all members of their governing body:
- the Executive Summary—a report containing a summary of information in the employer’s public report; and
 - Industry Benchmark Report—a report comparing the information in the employer’s public report with information contained in public reports by similar employers (**reports provision recommendation**).

The gender equality standards recommendation

20. The Law Council considers that the Bill, effectively, implements the gender equality standards recommendation. It supports this amendment, the intention of which is ‘to reflect the increased ambitions of these measures to strengthen gender equality, improving outcomes for both women and men in the workplace’.²⁰

Reports provision recommendation

21. The amendments proposed to be made by the Bill would require:

- the Industry Benchmark Report to be provided as soon as practicable after being received from WGEA;²¹ and
- the Executive Summary Report to be given together with the Industry Benchmark Report, if not already given.²²

22. Notably, a relevant employer is taken to fail to comply with the Act without reasonable excuse if the CEO of the relevant employer fails, without reasonable excuse, to comply with those new requirements.²³ The consequence of this is that the employer may be named as having not complied in a WGEA report.²⁴

23. The Law Council understands the purpose of this recommendation is to address stakeholder concerns that the ‘current legislative framework that only requires reporting data to be enough for WGEA compliance—without any need for employers to take action and show progress on gender equality’.²⁵ This concern is referred to as the ‘action gap’ between policies and strategies directed at gender equality issues, and actual actions.

24. The Review suggested these changes would:

- embed accountability into the reporting process, and foster transparency of gender equality challenges and progress within organisations; and
- ensure boards are aware of the reports given ‘the important strategic role boards play’.²⁶

25. While the Law Council is supportive of measures introduced to illuminate the action gap and enhance accountability, it queries whether the Bill is sufficiently clear about the content to be included in the ‘Industry Benchmark Report’.

²⁰ Review Report 38.

²¹ Bill subclause 16C(2).

²² Ibid subclause 16C(3).

²³ Ibid clause 19CA.

²⁴ Act section 19C.

²⁵ Review Report 37.

²⁶ Ibid 39

26. The Bill states the Industry Benchmark Report is a report that ‘compares the information contained in a public report prepared by the relevant employer in respect of the reporting period with the information contained in public reports prepared by similar relevant employers in respect of the reporting period’.²⁷ The Law Council notes that there is no definition of what ‘similar relevant employers’ means in this context, and questions whether there is enough guidance in the Bill to enable the WGEA to make apt comparisons in each case. It suggests the Committee consider whether to recommend amendments to the Bill so that it makes clearer the features or attributes of an employer that may be the basis of the WGEA categorising that employer as ‘similar’ to another.
27. Furthermore, Law Firms Australia advises that categorisation of employees in the context of the legal profession may be ambiguous given it is not clear whether all law firms categorise their employees in a consistent manner. Additionally, it observes that, given employees of significantly different levels of experience in the legal profession may all be labelled as ‘professionals’, insights gained from this reporting about potential pay gaps for such employees may be limited.

Recommendation 5—support Respect@Work implementation to prevent and address workplace sex-based harassment and discrimination

28. The Bill implements the Review recommendation 5 to amend the Act so that it provides that ‘sexual harassment’, ‘harassment on the ground of sex’, or ‘discrimination’ are gender equality indicators.²⁸ It provides that the former two terms have the same meaning as they have in the *Sex Discrimination Act 1984* (Cth).²⁹
29. Currently, clause 11 of the Matters in relation to Gender Equality Indicators Instrument prescribes ‘sexual harassment’, ‘harassment on the ground of sex’ and ‘discrimination’ as gender equality indicators, under paragraph 3(f) of the Act, which permits the Minister to specify gender equality indicators not otherwise prescribed in the Act.
30. The Law Council supports this amendment to bring these critical gender equality indicators within the Act, rather than leave their continuing use to the discretion of the Minister.

Recommendation 9—set WGEA up for future success to support employers to drive gender equality in Australian workplaces

31. Review recommendation 9.2 was, ‘to avoid confusion with company director roles’, to ‘amend the Workplace Gender Equality Act to change the title of the “Director of WGEA” to Chief Executive Officer (CEO)’. The Bill implements this recommendation under Division 5 of Part 1.
32. The Law Council supports this straightforward, practical change.

Review recommendations not addressed in the Bill

33. The Law Council notes that there are two Review recommendations that call for legislative change that have not been addressed in this Bill.

²⁷ Bill item 16 of Schedule 1.

²⁸ Division 4 of Part 1 of the Bill.

²⁹ Ibid.

Recommendation 7—refine the gender equality indicators

34. This Bill does not address Review recommendation 7.2, which recommended that the Act be amended, in line with the ABS 2020 Standard for Sex, Gender, Variations of Sex Characteristics and Sexual Orientation Variables, to enable the WGEA to collect data on non-binary people.
35. The Law Council’s submission to the 2021 Review offered the preliminary view that there would be benefit in giving consideration to amending the gender equality indicators to provide for ‘more inclusive, informed and best practice data collection with respect to sex and gender information, including for non-binary persons’.³⁰
36. The Law Council suggests the Committee may consider inquiring as to the Australian Government’s progress in addressing this recommendation.

Recommendation 8—strengthen compliance and enforcement

37. This recommendation called for amendment to the Act to ensure that all relevant employers must comply with WGEA’s reporting obligations to be eligible for Commonwealth grants and to participate in Commonwealth procurement.³¹
38. The Bill does not address this recommendation. The Law Council notes that the Review also supported a review of the Workplace Gender Equality Procurement Principles. The Law Council is not aware of such a review taking place.
39. The Law Council suggests the Committee may consider inquiring as to the Australian Government’s progress in addressing this recommendation.

Contact

40. If you would like to discuss this matter further, please contact Ms Claire Paton, Policy Lawyer, on 02 6246 3711 or at claire.paton@lawcouncil.asn.au.

Yours sincerely



Mr Luke Murphy
President

³⁰ Law Council submission to the Review 7, [47].

³¹ Department of Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (Report, December 2021) < https://www.pmc.gov.au/sites/default/files/resource/download/wgea-review-report_1.pdf>, 10.